

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. HAMILTON,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 11-1-01135-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence that Mr. Hamilton constructively possessed methamphetamine.

2. Whether trial counsel was ineffective during trial.

3. Whether the prosecutor committed prosecutorial misconduct during closing argument

B. STATEMENT OF THE CASE.

On July 11, 2011, Trooper Ryan Santhuff of the Washington State Patrol pulled Mr. Hamilton over for traffic infractions. [RP 38]. Mr. Hamilton was driving a full-sized semi-truck pulling a dump bed trailer. [RP 39]. Mr. Hamilton was the only occupant of the truck. [RP 39]. When questioned by Trooper Santhuff, Mr. Hamilton indicated he was on his way home to Hoquiam, Washington. [RP 40]. Mr. Hamilton was driving from Burlington, Washington. [RP 40].

During his initial contact with Mr. Hamilton, Trooper Santhuff noted a sweet, acidic-like odor emanating from the cab of the semi-truck. [RP 41]. The cab was the area that entailed the passenger compartment, similar to the driver and passenger area of a vehicle. [RP 41]. Trooper Santhuff testified that based on his training and experience, the sweet acidic like odor indicated the presence of methamphetamine inside the semi-truck. [RP 42]. When asked by

Trooper Santhuff if there was methamphetamine in the truck, Mr. Hamilton answered "no." [RP 42]. Trooper Santhuff also testified that when he specifically asked about the methamphetamine, Mr. Hamilton looked down towards the area between the driver and front passenger seat. [RP 42]. Mr. Hamilton indicated the smell was that of a new vehicle. [RP 42]. Trooper Santhuff testified that the odor emanating from the semi-truck was not similar to the smell of a new vehicle.

Upon realizing that there might be methamphetamine in the semi-truck, Trooper Santhuff conducted a search of the truck. [RP 44]. During the search, he located a small Ziploc baggie and a coin pouch in a pair of jeans that was found on the floor between the driver and passenger seat. [RP 44]. Trooper Santhuff testified that based on his personal experience, he believed the jeans were size 38 in the waist and 30 in length. [RP66]. He also testified that by comparing Mr. Hamilton's stature to his own stature, he believed the jeans belonged to Mr. Hamilton. [RP 67]. Inside the Ziploc baggie was a white crystalline substance that Trooper Santhuff recognized as methamphetamine. [RP 45]. The white crystalline substance was confirmed by the Washington State Patrol Crime Lab as methamphetamine. [RP 48].

After Trooper Santhuff testified, Mr. Hamilton took the witness stand. According to Mr. Hamilton, he worked for Hannigan Express, a trucking company transporting seafood during the season. [RP 70]. Mr. Hamilton testified that he drove to Burlington on the night of July 14, 2011 and left during the early morning hours of July 15, 2011. [RP 76-77]. Along the way, he stopped for coffee. [RP 77]. At trial, Mr. Hamilton stated that when he hopped into the semi-truck, he placed his personal items down on the floorboard in between the seats. [RP 79]. Mr. Hamilton also testified that “for the most part, we [drivers] try to take our stuff out [of the truck].” [RP 81].

On cross examination, Mr. Hamilton stated that he did not notice the jeans on the floorboard between the driver and passenger seat even though he placed his personal items at the same spot. [RP 96]. Furthermore, Mr. Hamilton testified that he did not see the jeans even though he did check and saw that there was a fire extinguisher located on the floor between the driver and passenger seat. [RP 101]. Finally, Mr. Hamilton testified to the following: (1) that he had the keys to the truck; (2) he had control of the truck; and (3) he was able to exclude other people from the truck if needed. [RP 97-98].

During closing argument, Mr. Hamilton's attorney agreed with the State that Mr. Hamilton had dominion and control of the truck. [RP 126]. However, he argued the affirmative defense of unwitting possession. [RP 133]. After deliberations, the jury returned with a verdict of guilty on the charge of Unlawful Possession of Controlled Substance—Methamphetamine. [CP 6].

C. ARGUMENT

1. The State presented sufficient evidence that Mr. Hamilton constructively possessed methamphetamine.

The applicable standard of review is whether, after viewing evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence are to be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct

evidence are to be considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “credibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-6, 824 P.2d 533 (1992).

The issue in this case is whether Mr. Hamilton possessed the controlled substance—methamphetamine. Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has physical custody of the item. Id. at 29. A person has constructive possession when he or she has dominion and control over the item. Id. This dominion and control need not be exclusive. State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items in the premises. State v. Summers, 107 Wn. App. 373, 389, 28 P.3d 780 (2001), review granted and remanded on other grounds, 145 Wn.2d 1015 (2002); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996); Tadeo-Mares, 86 Wn. App. at 816; see also Callahan, 77 Wn.2d at 30-31. Merely that a defendant is not present when contraband is discovered will not make the evidence insufficient. See State v. Simonson, 91 Wn. App. 874, 877, 881, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999). Nor will the fact that someone else owns the item make the evidence insufficient. State v. Jeffrey, 77 Wn. App. 222, 223, 227, 889 P.2d 956 (1995).

"When the sufficiency of the evidence is challenged on the basis that the State has shown dominion and control only over premises, and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs." Cantabrana, 83 Wn. App. at 208 (distinguishing between claims of insufficient evidence and instructional error).

Mr. Hamilton analogizes the facts of his case to the facts set forth in Callahan. In Callahan, the defendant, Michael Hutchinson, was found sitting at a table on which various pills and syringes were found. Callahan, 77 Wn.2d at 28. Although the defendant had been staying on the houseboat for the preceding 2 or 3 days, he was not a tenant. Id. at 31. The tenant was named Cheryl Callahan. Id. at 28. In concluding that there was insufficient evidence to prove constructive possession, the Washington Supreme Court made the following finding:

“Although there was evidence that the defendant had been staying on the houseboat for a few days, there was no evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that the defendant had dominion or control over the houseboat.”

Id.

The facts in this case are distinguishable between the facts in Callahan. Unlike Callahan where the defendant was found on the houseboat with other people, Mr. Hamilton was the sole occupant of the truck at the time it was stopped by Trooper Santhuff. RP 39. Additionally, and most importantly, unlike

Callahan, Mr. Hamilton's own testimony suggested that he had dominion and control of the truck.¹

Although this case is highly distinguishable from Callahan, the facts are almost identical to the facts in State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969). In Potts, the defendant argued that the evidence was insufficient to prove constructive possession when the State could not prove that he was the owner of the vehicle. Id. at 616. The Court of Appeals Division Two looked to the Supreme Court's analysis in Callahan in determining whether the State established sufficient evidence to prove constructive possession when the defendant was the driver of a motor vehicle. Id. at 617. This Court concluded that there was sufficient evidence of constructive possession when the State proved dominion and control over the "premises." Id. The factors that the Court considered were: (1) the defendant had the keys to the car; (2) the defendant was driving the car; and (3) he was the sole occupant of the vehicle. Id.

In the present case, the State concedes that Mr. Hamilton was not the owner of the semi-trucker; but rather his employer

¹ On cross-examination, Mr. Hamilton admitted the following: (1) that he had the keys to the truck; (2) he had control of the truck; and (3) he was able to exclude other people from the truck if needed. [RP 97-98].

owned the semi-truck. However, Mr. Hamilton was the driver and he had the keys to the truck. [RP 39, 97-98]. Additionally, he was the sole occupant of the vehicle. [RP 39]. Finally, Mr. Hamilton's own admissions suggest that he had dominion and control of the semi-truck.² [RP 97-98]. Therefore, in looking at the totality of the facts in this case and comparing it to Potts, this Court should conclude that the State presented sufficient evidence to show that Mr. Hamilton constructively possessed the methamphetamine that was found in the semi-truck.

2. Mr. Hamilton's trial counsel was not ineffective during trial.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

² Jury instruction 9 states in part: "In deciding whether the defendant had the dominion and control of the substance, you are to consider all of the relevant circumstances...factors...include whether the defendant had the immediate ability to take actual possession of that substance, whether the defendant had the capacity to exclude others from the substance, and whether the defendant had the dominion and control over the premises where the substance was located." [CP 19].

1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the

adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

- a. Trial counsel's misstatement of the law does not constitute ineffective assistance of counsel.

Mr. Hamilton argues that his trial counsel's misstatement of the law constituted ineffective assistance of counsel. To be specific, Mr. Hamilton argues that it was ineffective assistance of counsel when his trial counsel erroneously stated that it was the State's burden to prove that he [Mr. Hamilton] knowingly possessed the methamphetamine. Assuming, *arguendo*, that the Court find counsel's misstatement of the law to be deficient, it is still Mr. Hamilton's burden to prove such deficiency resulted in prejudice. In order to prevail on the "prejudice" prong, Mr. Hamilton must demonstrate that there is a probability that the jury's verdict would have been different but for counsel's errors. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Here, Mr. Hamilton cannot do so. In the present case, the jury was properly instructed on the elements of the charge—in that the State only has to prove that the defendant possessed the drugs. [Instruction 10, CP 20]. Additionally, the prosecutor reminded the jury during rebuttal that it was not the State's burden to prove that Mr. Hamilton knowingly possessed the methamphetamine. [RP 136]. Therefore, Mr. Hamilton has failed to demonstrate that there is a probability the

jury's verdict would have been different but for his trial counsel's error.

- b. Trial counsel's concession that the State proved all of the elements of the crime did not constitute ineffective assistance of counsel.

Mr. Hamilton also argues that it was ineffective assistance of counsel when his trial counsel, during closing argument, conceded all the elements of the crime that the State was required to prove. To be specific, Mr. Hamilton argues it was ineffective assistance of counsel when his trial counsel conceded that the State had proven that he [Mr. Hamilton] exercised dominion and control over the truck; thus establishing constructive possession. [RP 126]. Mr. Hamilton's argument on this issue is two-folds. First, he argues that he is not required to show prejudice since his trial counsel "failed to subject the prosecution's case to meaningful adversarial testing," thus violating his due process.

Under certain limited circumstances, a criminal defendant may not be required to demonstrate prejudice to establish ineffective assistance of counsel. For instance, in United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that no proof of prejudice was required when defense counsel repeatedly conceded that prosecution had proved its case

beyond a reasonable doubt. However, this exception to the Strickland prejudice requirement only applies when “counsel entirely fails to subject the prosecution’s case to adversarial testing.” United States v. Cronic, 466 U.S. 648, 659, 80 L. Ed. 2d 657, 103 S. Ct. 2039, 2047 (1984). Typically, the Strickland standard applies. Cronic only applies when counsel’s deficient performance amounts to an actual or constructive *complete* denial of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984); Gochicoa v. Johnson, 238 F.3d 278, 283 (5th Cir. 2000).

Since its ruling in Cronic, the United States Supreme Court has revisited Cronic in various set of circumstances. In Bell v. Cone, 535 U.S. 685, 697, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002), overruled on other grounds by Bell v. Cone, 543 U.S. 447, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005), the Court emphasized that the Cronic exception applies when the attorney’s failure to oppose the prosecution goes to the proceeding as a whole—not when the failure only occurs during parts of the proceeding. Subsequently, in Florida v. Nixon, 543 U.S. 175, 160 L. Ed. 2d 565, 125 S. Ct. 551, 560, 561 (2004), the Court reached a similar conclusion when it held that the Cronic exception did not apply even in the situation where counsel conceded that the defendant

committed the murder so he can concentrate on the sentencing phase of the case.

The Court's ruling and reasoning in Nixon was resonated in United States v. Thomas, 417 F.3d 1053 (9th Cir. 2005). In Thomas, defense counsel conceded on one charge due to the overwhelming evidence so he can concentrate on the five other charges. Id. at 1058. On appeal, the defendant asked the Ninth Circuit to follow its ruling in Swanson and find that the Cronic exception to the Strickland two-prong test applied. In upholding the convictions, the Ninth Circuit emphasized that in "some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense..." Id.; Swanson, 943 F.2d at 1075-76. It proceeded to find that it is sensible for counsel to not contest a charge when "for all practical purposes, [it is] incontestable, and [counsel] believed that doing so would enhance his credibility on counts where the evidence was somewhat less clear..." Thomas, 417 F.3d at 1058.

In the present case, trial counsel's concession on the elements of the crime did not "fail to subject the prosecution's case to meaningful adversarial testing." Looking at the record as a whole, it is clear that Mr. Hamilton's trial counsel did not completely

abandon his defense of Mr. Hamilton. Mr. Hamilton testified and during closing argument, his counsel argued the affirmative defense of unwitting possession. Trial counsel asked the jury to find Mr. Hamilton not guilty since his possession of the methamphetamine was unwitting. [RP 133]. Under Bell, this concession did not go to the “whole” proceeding, but at most, part of the proceeding. Therefore, because trial counsel concentrated on the affirmative defense, he still subjected the State’s case to an adversarial testing.

Furthermore and most importantly, trial counsel’s concession is a sensible tactical decision. Because Mr. Hamilton raised the affirmative defense and it was his burden to prove the affirmative defense, it was of utmost importance for his trial counsel to have credibility with the jury. Since Mr. Hamilton conceded on cross-examination that he had dominion and control, his constructive possession of the methamphetamine was an incontestable issue. Under Swanson and Thomas, it was not only reasonable, but advantageous to Mr. Hamilton, for his trial counsel to concede on the elements of the crime and enhance his credibility with the jury on the affirmative defense. Based on the above reasons, this Court

should not apply the Cronic exception in its analysis of the issue of ineffective assistance of counsel.

Mr. Hamilton also argues that if the Cronic exception does not apply, then his trial counsel's concession of the elements of the crime still constitutes ineffective assistance of counsel under the Strickland two prong test. In order for Mr. Hamilton to satisfy the Strickland two prong test, he must show that but for his counsel's concession, the jury would have returned a verdict of not guilty. However, he cannot do so. Even if trial counsel argued during closing argument that Mr. Hamilton did not have dominion and control of the truck, there was overwhelming evidence presented that suggested otherwise. Trooper Santhuff testified that Mr. Hamilton not only drove the semi-truck, but was the sole occupant. [RP 39]. Furthermore, the methamphetamine was found in a pair of jeans that was located on the floorboard between the driver and passenger seat. [RP 44]. Additionally, Mr. Hamilton himself testified that he had the keys to the vehicle. [RP 97-98]. Finally, Mr. Hamilton admitted that he had control of the truck and could exclude people from entering the truck. [RP 97-98]. All of these facts, taken as a whole, are indicative that Mr. Hamilton had dominion and control of the semi-truck.

- c. Trial counsel's presentation of the affirmative defense did not constitute ineffective assistance of counsel.

In addition to arguing that trial counsel's misstatement of the law and concession on the elements of the crime constitute ineffective assistance of counsel, Mr. Hamilton argues that counsel's presentation of the affirmative defense of unwitting possession was ineffective as well.

Possession of a controlled substance is unwitting if the person did not know that the substance was in his possession or the nature of the substance. [Instruction 11, CP 21]. For an affirmative defense, the "burden is on the defendant to prove by preponderance of the evidence that the substance was possessed unwittingly." [Instruction 11, CP 21]. "Preponderance of the evidence means that you [the jury] must be persuaded, considering all of the evidence, that it is more probably true than not true." [Instruction 11, CP 21].

Here, trial counsel was not ineffective in his presentation of the affirmative defense. During trial, Mr. Hamilton testified that his company keeps a record of the drivers that uses each truck. [RP 97]. Additionally, he testified that he did not bring the jeans into the

truck. [RP 79-80]. However, Mr. Hamilton never mentioned what size pants he wears.

Mr. Hamilton supports his argument by suggesting that his trial counsel did not present any evidence to corroborate his testimony. To be specific, Mr. Hamilton indicates that his trial counsel should have presented company records and logs to show who else besides Mr. Hamilton drove the truck before he did. Additionally, he suggests that his trial counsel should have brought in the jeans to show that Mr. Hamilton's pants size was different than that of the jeans found in the truck. However, those corroborating evidence is premised on the idea that his testimony was credible. Case law is clear that the determinations of credibility are for the trier of fact and cannot be reviewed upon appeal. Camarillo, 115 Wn.2d at 71. Furthermore, Mr. Hamilton's argument is premised on the idea that those corroborating evidence exists and would be favorable to him. In Pier 67 v. King County, 89 Wn.2d 379, 385, 573 P.2d 2 (1977), the Washington Supreme Court held:

“Where relevant evidence which would properly be part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so...the only inference which the finder of

fact may draw is that such evidence would be unfavorable.”

In this case, Mr. Hamilton’s trial counsel was not ineffective in his presentation of the affirmative defense. The issue should not be analyzed under Cronic since trial counsel did subject the prosecution’s case to an adversarial testing when he raised the affirmative defense of unwitting possession during trial and presented evidence in the form of Mr. Hamilton’s testimony.

Mr. Hamilton’s argument also fails under the Strickland two-prong test. In analyzing the issue of ineffective assistance of counsel, the court must presume that trial counsel was effective in his representation and it is the defendant’s burden to overcome that presumption. Strickland, 466 U.S. at 687. Additionally, a defendant is not guaranteed successful assistance of counsel. Adams, 91 Wn.2d at 90. Here, in order for Mr. Hamilton to succeed, he is presuming that the additional evidence exists and is favorable to him.³ However, under Pier 67, because the evidence was not presented, then the only inference the trier of fact can draw is that such additional evidence would have been unfavorable to

³ Mr. Hamilton, in his brief states that his trial counsel could have “presented company records showing patterns of use of the trucks, logs showing who else besides Mr. Hamilton drove the specific truck before he did and, most significantly, he could have brought in the jeans.” Appellant’s Brief at pg. 31.

Mr. Hamilton. Therefore, because Mr. Hamilton cannot demonstrate that there is anything in the record to suggest that the additional evidence would have been favorable to his case, he cannot meet his burden of showing that his trial counsel was ineffective in his presentation of the affirmative defense.

3. The prosecutor did not commit prosecutorial misconduct during closing argument.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. 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, 293-94, 902 P.2d 673 (1995), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here, the trial court instructed the jury regarding the burden of proof for the affirmative defense and preponderance of the evidence:

"The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true."

[Instruction 11, CP 21].

The trial court also properly instructed the jury that:

"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.”

[Instruction 1, CP 9].

Mr. Hamilton did not object during trial when the prosecutor made the remark that he [Mr. Hamilton] now argues is misconduct. That issue is waived unless he can show that the remark was not only flagrant and ill-intentioned but prejudiced him as a result. Mr. Hamilton does not meet his burden.

In the present case, the prosecutor, in explaining preponderance of the evidence, made the following argument:

“Preponderance of the evidence is basically a burden that is heard of in a civil case, and you know, in civil cases the issue always money, how much money are you wanting to grant one party or one side over the other, and when you go back and you think about Jury Instruction No. 11 and what his burden is, would you say that based on what Mr. Hamilton, himself, said that you’re willing to award him a million dollars to say that he didn’t know that methamphetamine was in the car?”

[RP 144]. Mr. Hamilton does not dispute that preponderance of the evidence is typically the standard in a civil case. However, he argues that the prosecutor’s explanation of preponderance of the evidence was improper. To be specific, Mr. Hamilton argues that the prosecutor’s argument was not relevant to preponderance of

the evidence and that the argument was an “inflammatory remark designed to eliminate Mr. Hamilton’s affirmative defense.”

Mr. Hamilton cannot meet his burden of showing the impropriety of the prosecutor’s remarks. He has not cited to any legal authority to show that the remarks are either flagrant or inflammatory. Instead, case law suggests otherwise. The appellate courts have found numerous different acts to be prosecutorial misconduct. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) is a notorious case where, despite defense objections, the prosecutor committed numerous acts of misconduct including insulting defense counsel and defense experts, pandering to the prejudices of the jury, and calling the defendant a liar. In State v. Stenson, 132 Wn.2d 668, 719-724, 940 P.2d 1239 (1997), and State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000), the prosecutor elicited improper comments from witnesses regarding improper opinion (Stenson) and comment on the defendant’s right to remain silent (Henderson). In State v. Belgarde, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988), the prosecutor stated the American Indian group with which defendant was affiliated was “a deadly group of madmen” and “butchers,” and told them to remember “Wounded Knee, South Dakota.”

In the present case, the prosecutor did not engage in any of these flagrant acts. Her remarks neither heightened nor diminished the standard of preponderance of the evidence. Instead, she simply compared Mr. Hamilton's burden of proof to a possible scenario in a civil case, one in which the jury may have an easier time understanding. Furthermore, in reading the context of the prosecutor's complete rebuttal closing argument, it is clear that she was attempting to argue to the jury that Mr. Hamilton's testimony alone did not overcome his burden of preponderance of the evidence. For example, the prosecutor argued to the jury about other evidence that Mr. Hamilton could have presented to corroborate his testimony but did not.

Assuming, *arguendo*, that the prosecutor's remarks were flagrant and ill-intentioned, Mr. Hamilton has failed to show that the resulting prejudice, if any, could *not* have been neutralized by a curative instruction. Mr. Hamilton compares his case to State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011). In Walker, this Court found that the prosecutor had committed approximately five instances of prosecutorial misconduct. Id. In reaching its decision to reverse, this Court reasoned:

“The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.”

Id. at 737, quoting State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). However, this case is distinguishable from Walker. Unlike Walker, the prosecutor did not, and Mr. Hamilton does not allege, that there were numerous instances of prosecutorial misconduct.

Instead of Walker, this case is more analogous to State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), where the Washington Supreme Court was asked to determine whether it was prosecutorial misconduct when the prosecutor misstated the burden of proof thus undermining the presumption of innocence. In Warren, defense counsel objected and the trial court provided a curative instruction. Id. at 27. On appeal, the Supreme Court concluded that even though the arguments were improper, the defendant failed to show prejudice since the judge was able to provide a curative instruction. Id. Here, Mr. Hamilton’s allegation of improper conduct is similar to the one raised in Warren. According to Mr. Hamilton, the prosecutor’s remarks “changed” his burden of proof under the preponderance of the evidence standard. Under Warren, it is clear that a curative instruction would have

cured any impropriety of the prosecutor's remarks. However, Mr. Hamilton failed to request one at trial. Therefore, pursuant to Binkin, reversal is not required.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm Mr. Hamilton's conviction.

Respectfully submitted this 21 of September, 2012.



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Attorney for Respondent

THURSTON COUNTY PROSECUTOR

September 21, 2012 - 1:48 PM

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