

NO. 44515-8-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH CHENEY,

Appellant.

RESPONDENT'S BRIEF

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. Defense counsel properly did not object to the prosecutor's statements in closing argument because the prosecutor did not impermissibly shift the burden of proof to Mr. Cheney.
2. Mr. Cheney was not denied his Sixth and Fourteenth Amendment right to effective assistance of counsel.
3. The trial court did not err in entering a judgment against Mr. Cheney for possession of methamphetamine.

B. STATEMENT OF THE CASE

1) Procedural History

On October 23, 2012, the Cowlitz County Prosecuting Attorney filed an information charging Kenneth Cheney with Violation of the Uniform Controlled Substances Act – Possession for possessing methamphetamine on or about October 18. CP 1-2.¹ The case proceeded to a jury trial before The Honorable Marilyn Haan, which commenced on January 15, 2013 and concluded on January 16, 2013. RP 1A 63-158; RP 1B 159-305.

The jury found Mr. Cheney guilty as charged. RP 298-302; CP 3. The court imposed a standard range sentence of 7 days jail. RP 310-12; CP 4-15. Mr. Cheney filed a timely notice of appeal. CP 16.

¹ RCW 69.50.4013(1).

2) Statement of Facts

The State adopts the Appellant's recitation of the facts in the context of the arguments currently before the court with the following additions: Cowlitz County Sheriff's Deputy Marc Johnson testified that when he had Mr. Cheney back at his patrol car he asked Mr. Cheney if the pipe retrieved was used to smoke "meth" and Mr. Cheney confirmed that it was. RP 1A 104-06, 108-09, 140. Furthermore, Deputy Johnson testified that shortly thereafter, and in the same conversation, Mr. Cheney took responsibility for the meth pipe. RP 1A 106-110, 114, 139-40. During this conversation, according to Deputy Johnson, Mr. Downing was not present. RP 1A 102-03, 106-08, 148. Additional facts concerning the closing argument will be introduced in the argument section.

C. ARGUMENT

DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN HE PROPERLY DID NOT OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENTS BECAUSE THE PROSECUTOR DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO MR. CHENEY.

1) Shifting the Burden of Proof and Unwitting Possession

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing arguments “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.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Thus, the State commits misconduct if its arguments

improperly shift the burden of proof to the defendant. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006); *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of two standards of review: “[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Emery*, 174 Wn.2d at 760 (citations omitted). Under the latter standard, “[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762; *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) (prosecutor's misstatements about the burden of proof undermined the presumption of innocence but were not incurable).

In unlawful possession of controlled substances cases the State has the burden of proving beyond a reasonable doubt “the nature of the

substance and the fact of possession” *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). “Defendants then can prove the affirmative defense of unwitting possession.” *Id.* In order to establish said defense, a defendant must prove by a preponderance of the evidence that his or her possession of the controlled substance is unwitting in that he or she either did not know that they were in possession of the controlled substance or did not know the nature of the substance that they possessed. *State v. Buford*, 93 Wn.App. 149, 151-52, 967 P.2d 548 (1998) (citing *State v. Balzer*, 91 Wn.App. 44, 67, 954 P.2d 931, 942 (1998)); *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

Requiring the defendant to make such a showing “does not improperly shift the burden of proof.” *Bradshaw*, 152 Wn.2d at 538. “In Washington . . . defendants are required to prove affirmative defenses by a preponderance of the evidence ‘because generally, affirmative defenses are uniquely within the defendant’s knowledge and ability to establish.’” *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996), (quoting *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994)).

Here, the State did not improperly shift the burden of proof to Mr. Cheney. Instead, the State spent the bulk of its closing argument

discussing possession and attempting to show that it had proven that Mr. Cheney was in possession of the methamphetamine on the day in question. RP 1B 246-51. After laying out the evidence that prosecutor believed established Mr. Cheney's possession of the methamphetamine the prosecutor said:

So, that is, in a nutshell, what the State's evidence is, to establish possession. . . . But in terms did he have possession itself. That's all it is, possession, it's what is left. Did he have constructive possession? Most definitely. Did it happen in Cowlitz County, State of Washington, on October 18th 2012? Most definitely. And was the substance a controlled substance, being methamphetamine? Yes. So at this point, I leave you off with burden for the State has been met. He is in possession of a controlled substance.

RP 1B 250-51. The prosecutor then properly explained that once possession was established that it was Mr. Cheney's burden to prove unwitting possession:

Now it is their turn to show that they should not be held responsible, and this is where this case is unique for this one purpose. The burden shifts. And up to this point, I would surmise that Mr. Morgan will agree with everything I've said, that possession has been established. Now it is their job to prove unwitting possession. And only – only once they've proven that, can he not be held responsible for being in possession.

RP 1B 251.

During Mr. Cheney's closing argument, however, his attorney did not concede possession and instead argued that the State did not prove possession beyond a reasonable doubt. RP 1B 258-60. In fact, as part of his argument about possession, Mr. Cheney's attorney read the reasonable doubt portion of the instructions to the jury. RP 1B 259; Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub. Nom. 17), Instruction 3. Mr. Cheney's attorney then discussed the unwitting possession defense and acknowledged that it was Mr. Cheney's burden to prove such a defense by a preponderance of the evidence if the jury found beyond a reasonable doubt that he possessed the methamphetamine. RP 1B 260-62, 267-68.²

In rebuttal, the State remarked that Mr. Cheney's closing argument:

"doesn't focus on a first step, which is possession, because the law is constructive possession is when dominion and control – dominion and control is whether the Defendant had immediate ability to access, physical possession. He didn't – he didn't break those things down. What did he do? He just glossed over it, because there was possession.

² "You find something beyond a reasonable doubt someone did something, that's the ball game. But in this case, even if you find that he possessed this, then there's a second step. And Mr. Nguyen [(the prosecutor)] is correct, this is rather unusual because normally the burden is exclusively on the State . . .". RP 1B 260.

RP 1B. The State only then turned to the unwitting possession defense and read the instruction to the jury but immediately after doing so noted: “[o]ne of the things we talk about in voir dire is one of the hallmarks of our society is you are presumed innocent. The burden is on the State for the most part.” RP 1B 270; Supp. DCP, Court’s Instructions to the Jury, Instruction 8. Finally, the State near the close of its rebuttal once again referred to its burden by talking about the “two-step process” and stating that “[t]he first step is was he in possession? He most definitely was in possession.” RP 1B 282.

Viewing the statements by the State in closing argument and rebuttal within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions³, the State did not improperly shift the burden of proof. Moreover, even if some of the statements were improper, Mr. Cheney has failed to show that the misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.⁴

³ The jury was correctly instructed on the burden of proof. Supp. DCP, Court’s Instructions to the Jury (sub. Nom. 17), Instruction 3.

⁴ Admittedly, Mr. Cheney does not seek relief through a straight prosecutorial misconduct analysis.

2) Ineffective Assistance of Counsel

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first prong (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second prong (resulting prejudice), the defendant must show by a reasonable probability

that, “but for” counsel’s errors, the outcome of the case would have been different. *Id.* at 694.

Here, Mr. Cheney has failed to show to that his trial counsel provided ineffective representation because, as argued above, the prosecutor’s statements in closing argument did not impermissibly shift the burden of proof to Mr. Cheney. As a result, Mr. Cheney’s trial counsel properly did not object to said statements. Furthermore, even if the prosecutor’s statements in closing argument were improper, Mr. Cheney has failed to show by a reasonable probability that, but for his counsel’s errors, the outcome of the case would have been different.

D. CONCLUSION

For the reasons argued above, Mr. Cheney’s conviction should be affirmed.

Respectfully submitted this 7th day of October, 2013.

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APPENDIX A

RCW 69.50.4013

Possession of controlled substance — Penalty — Possession of useable marijuana or marijuana-infused products.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3) The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

[2013 c 3 § 20 (Initiative Measure No. 502, approved November 6, 2012); 2003 c 53 § 334.]

Notes:

Intent -- 2013 c 3 (Initiative Measure No. 502): See note following RCW 69.50.101.

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on October 9th, 2013.

A handwritten signature in cursive script that reads "Michelle Sasser". The signature is written in black ink and is positioned above a horizontal line.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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