

NO. 49666-6-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KERRY GROHS,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. RESPONSE TO ASSIGNMENTS OF ERROR

Trial counsel was not ineffective; the decision not to request the unwitting possession jury instruction was tactical and the defendant suffered no prejudice.

II. STATEMENT OF THE CASE

Kerry Grohs was charged with one count of possession of methamphetamine after he was contacted by police on September 1, 2016. CP 3; RP 60. Deputy Spaulding stopped Grohs because he was riding a bicycle without a headlight during the hours of darkness. RP 61. Upon running Grohs' name, Deputy Spaulding learned he had a warrant for his arrest. RP 62. They then walked approximately 30 yards to a covered portion of a business to wait for confirmation of the warrant. RP 74. As they were doing that, Grohs retrieved a pie out of the top section of his backpack and began eating it. RP 73. A short time later, Grohs asked if he could retrieve some other food out of his backpack. RP 63. Before allowing him to do so, Deputy Spaulding asked him if there were any weapons, drugs, or contraband in the backpack. He asked this as a precaution – to ensure officer safety. *Id.* Grohs responded that there was some meth in his backpack. Deputy Spaulding asked him to hand him the methamphetamine, and Grohs handed Deputy Spaulding a folded-up piece

of paper that contained a crystal substance which appeared to be and later tested positive for methamphetamine. RP 64, 84.

Grohs testified that he told the deputy that there *might* be some methamphetamine in the pack. RP 96. He stated, “I said there might be because there was that package in there and it looked to be methamphetamine to me, but I didn’t know for sure whether it was or not.” *Id.* He also testified that he did not hand the methamphetamine to Deputy Spaulding; rather, Deputy DeRosier searched the backpack and handed the methamphetamine to Deputy Spaulding. RP 96–7. Grohs then testified on cross-examination that the substance looked like methamphetamine that he had seen before, adding that bath salts look similar as well. RP 99. Finally, he testified that he had looked inside the folded-up paper, had seen the crystalline substance, and knew that it was in his backpack. *Id.*

The jury was given the standard “to convict” instruction, WPIC 50.02. It states:

- To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
- (1) That one or about September 1, 2016, the defendant possessed a controlled substance; and
 - (2) That the acts occurred in the State of Washington, County of Cowlitz.

CP 21. They were also instructed that methamphetamine is a controlled substance. CP 19.

In closing argument, the defense focused their attack on the chain of custody. RP 119. Defense counsel argued that Ms. Finney did not know whether the substance she tested was actually the substance obtained from Grohs' backpack, highlighting the difference in testimony between Deputy Spaulding and Grohs. For example, Grohs testified that he did not hand Deputy Spaulding anything, Deputy DeRosier searched the backpack, and Deputy Spaulding never went into the backpack. RP 119. Defense counsel discussed the discrepancy at length, including the fact that the State did not call Deputy DeRosier to testify. RP 120. He also argued that the substance that was tested could have been "something else that was around the station that got put in there." RP 120.

The jury found Grohs guilty of possession of methamphetamine. RP 125; CP 24.

III. ARGUMENT

1. Trial counsel was not ineffective.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 446 U.S.

668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: “After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer “failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar

circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173. Therefore, even if a defendant can show that counsel was deficient, he also must show that the deficiency caused prejudice.

a. Grohs cannot show that his counsel’s conduct was not legitimate trial strategy.

“If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* Additionally, in order to find that Grohs received ineffective assistance of counsel based on trial counsel’s failure to request a jury instruction, this court must find that Grohs was entitled to the instruction. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

Looking at the entire record in this case, trial counsel gave effective representation and his actions were legitimate trial strategy.

Grohs does not show that he was entitled to the unwitting possession instruction. The evidence presented in this case was that Grohs was asked if there were any weapons or drugs in his backpack, to which he responded that there was some meth in there. He then handed the methamphetamine to the deputy. RP 63–4. Grohs’ testimony was slightly different, though he ultimately admitted that he knew there was a substance in his backpack that looked like other methamphetamine he had previously seen. RP 99–100. Defense counsel’s closing argument focused on chain of custody, arguing that the State had not proved that the substance tested at the crime lab was indeed the substance that was in Grohs’ backpack, based on Grohs’ testimony that another deputy searched the backpack and handed the folded-up paper to Deputy Spaulding.

First, Grohs was not entitled to the unwitting possession instruction. A party is entitled to a jury instruction when it is supported by the evidence presented. The evidence in this case showed that Grohs knew there was an illicit substance in his backpack, and that he at least suspected it was methamphetamine. Stating that he did not know for sure whether it was methamphetamine or bath salts is not a basis for an unwitting possession instruction. Second, it was a strategic decision by trial counsel to focus his argument on the chain of custody rather than request an unwitting possession instruction, because the defendant’s

testimony was that he did know there was a substance in his backpack that he had seen and that looked like methamphetamine. It was reasonable, given the testimony, to not want to highlight that by arguing unwitting possession and allowing the State to rebut the argument. For these reasons, trial counsel's decision not to request an unwitting possession instruction was a legitimate trial tactic. His performance was not deficient.

b. Grohs cannot show that trial counsel's failure to request the unwitting possession jury instruction prejudiced him.

In addition to overcoming the strong presumption of effective assistance, the defendant must also show that he was prejudiced. Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. A reasonable probability is one that is "sufficient to undermine confidence in the outcome of the trial." *Strickland*, 466 U.S. at 694.

Here, Grohs has not made such a showing. As discussed above, the evidence did not support instructing the jury on unwitting possession, and trial counsel chose instead to attack the chain of custody. The attack on the chain of custody was supported by Grohs' testimony that he did not

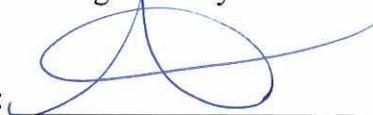
ever hand anything to Deputy Spaulding. Additionally, Grohs does not show that the result of the trial would have been different if an unwitting possession instruction had been given. The defendant testified that he knew the package was in his backpack, but that the substance could have been methamphetamine or bath salts. Even if the unwitting possession instruction were given, the jury could have found that that the possession was not unwitting because Grohs knew that the package contained a controlled substance. There was simply not a reasonable probability that the outcome of the trial would have been different if the unwitting possession instruction had been given.

IV. CONCLUSION

The defendant's conviction for possession of methamphetamine should be affirmed as trial counsel was not ineffective.

Respectfully submitted this 20th day of June, 2017.

Ryan Jurvakainen
Prosecuting Attorney

By: 

AILA R. WALLACE, WSBA #46898
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

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

Mr. Eric J. Nielsen/David Koch
Attorney at Law
Nielsen Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122-2842
nielsene@nwattorney.net
sloanej@nwattorney.net

kochd@nwattorney.net

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 June 20th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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