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Court of Appeals
Division II
NO. 4973-3-II
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TINA MARIE HUGHES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 16-1-00709-9

BRIEF OF RESPONDENT

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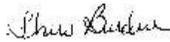
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether defense counsel was ineffective for not suppressing the fact of arrest and for not objecting to a police witness's remark about not fingerprinting an item of evidence that was taken for the arrestee's personal possessions?

2. Whether the forfeiture provision of the Judgment and Sentence was erroneous (CONCESSION OF ERROR)?

3. Whether the trial court erred in not considering the defendant's ability to pay when imposing mandatory legal financial obligations?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tina Marie Hughes was charged by information filed in Kitsap County Superior Court with possession of a controlled substance, methamphetamine. CP 1.

The defense proposed an unwitting possession instruction. CP 41. The trial court so instructed the jury. CP 57 (instruction 8).

Hughes was found guilty. CP 63. She was sentenced to a suspended sentence, serving two days with 178 suspended.¹ CP 65. Only

¹ Obviously, no cross-appeal was filed on this sentence.

mandatory legal financial obligations were imposed. CP 70.

The present appeal was timely filed. CP 75.

Pretrial, the state pointed out to the court that Hughes had been stopped because the car she was driving was listed as stolen but she was not charged with possession of a stolen vehicle. RP, 11/14, 14. The state was concerned that the reason for the stop and arrest be in the record so that the jury did not speculate that Hughes was stopped for no reason. RP, 11/14, 15. Defense counsel agreed, saying “because that is an important part of my witness’ and also my client’s case as to why they originally— why she was originally pulled over.” RP, 11/14/ 15. The trial court also agreed, ruling that the jury needs “to have some framework to understand...why she was stopped, and why there was a search at some point.” RP, 11/14, 16. Further, the trial court expressed its concern that the jury may believe that Hughes was unlawfully searched. RP. 11/14, 17.

The parties and the trial court then discussed the scope of the deputy’s testimony on the issue and whether or not the jury should be advised that there was no stolen vehicle charge because the investigating officer had been unable to locate the alleged victim. RP, 11/14, 17-19. It was agreed that the officer could testify to the fact that the vehicle was listed as stolen but not discuss that the case was not charged because of failure to contact the alleged victim. RP, 11/14, 19.

B. FACTS

Kitsap County Sheriff's Office Deputy Bass was on patrol in the south-end of the county late at night. RP, 11/16, 61. The Deputy routinely runs license plates while on patrol. Id. He ran one that came back as a stolen vehicle. RP, 11/16, 62. He stopped the vehicle before it reached the county line and awaited backup because a stolen car stop is regarded as high-risk for police. RP, 11/16, 62. The vehicle stopped appropriately, using its turn signal. RP, 11/16, 63. Backup was soon present and the occupants of the truck were instructed to exit the truck. RP, 11/16, 64.

The occupants were detained in handcuffs and questioned. RP, 11/16, 64. The male passenger with Hughes was released because he was not driving the stolen truck. RP, 11/16, 64-65. In attempting to identify Hughes, the officer requested of her that he run her driver's license; she acquiesced, allowing the Deputy to retrieve her license from her purse. RP, 11/16, 65. The purse was in the truck beneath the seat in which Hughes had been sitting. Id. There were no other purses in the truck. RP, 11/16, 65-66. The driver's license was returned to the wallet it came out of and the Deputy asked Hughes about the disposition of the purse. RP, 11/16, 66. She requested that the purse accompany her to the jail. Id. Deputy Bass then took the purse and secured it in his patrol car. Id.

The passenger was still cuffed and sitting in the patrol car while the Deputy dealt with identifying Hughes. RP, 11/16, 66. There was no one else at the scene. RP, 11/16, 66-67.

At the jail, Deputy Bass gave Hughes over to corrections officers for booking. RP, 11/16, 68. Booking staff searches arrestees to make sure the police did not miss anything. *Id.* Meanwhile, the arresting Deputy fills out booking paperwork. *Id.* The Deputy had completed the paperwork and Hughes was in a holding cell when a corrections officer indicated that contraband had been found in Hughes's purse. RP, 11/16, 69. The corrections officer handed the item, a little baggie containing a crystal-like substance, to Deputy Bass who secured it and left the jail to type reports. RP, 11/16, 70.

Corrections Officer (CO) Fitzwater testified as to the process of dealing with an arrestee's possessions. RP, 11/16, 92. Anything that the arresting officer brings in that belongs to the arrestee is placed in a bin. *Id.* The person is patted down before the cuffs are removed. *Id.* Extra clothing and shoes are placed in the bin. *Id.* A sealed property bag is used to store small items like cellphones or jewelry. *Id.* After dealing with clothing and the like, the arrestee is placed into a holding cell. *Id.* Then, the CO turns her attention to things like bags and purses, which are thoroughly searched. *Id.*

CO Fitzwater engaged this protocol with Hughes. RP, 11/16, 94.

Hughes's purse had been brought to booking with her. RP, 11/16, 95. The CO found a makeup container in the purse, the bottom of the container flipped up where the applicator was and there the CO found a little Ziploc bag. Id. The CO immediately handed the baggie to Deputy Bass. RP, 11/16, 96.

The material in the Ziploc was tested at the Washington State Patrol Crime Lab. RP, 11/16, 110 *et seq.* The testing resulted in a finding that the material contained methamphetamine. RP, 11/16, 115.

Hughes claimed that she had been at a friend's house for several hours before the arrest incident and that her purse had been left unattended in the truck for as long as five hours. RP, 11/16, 129-30. She drove when she left because her passenger did not have a license. RP, 11/16, 130. It was not her truck so she tried to find the vehicle paperwork until she was commanded to keep her hands on the steering wheel. RP, 11/16, 130-31. She hesitated in following commands to exit the truck because she did not know what to do with her purse. Id. Then she was told to drop the purse. Id. When Hughes was told why she was detained, she thought that the person who had sold them the truck had sold them a stolen truck. RP, 11/16, 132.

Hughes testified that the officer was very nice and their conversation seemed to dispel some of the officer's concerns. RP, 11/16, 133. When asked for identification, Hughes told the officer that it was in a

green wallet in her purse. Id. The officer first retrieve the wrong green wallet and then returned to the purse and retrieved the right green wallet. RP, 11/16, 133-34. Hughes spoke with the officer about taking her purse to jail with her or leaving it; the officer said that all of her personal items needed to be out of the truck and the passenger was already burden with things. RP, 11/16, 134. At the jail, Hughes joked with the officer about him carrying her purse. RP, 11/16, 136.

Hughes waited for some time in the booking cell. RP, 11/16, 137. Then, the officer came to the window of the cell, held up an item, and asked “What is this?” RP, 11/16, 137. She claims it looked like a “glasses holder” and claimed that it was not her item. RP, 11/16, 138. She became upset thinking that the stolen vehicle situation would be resolved but “now I have a drug charge in my purse.” RP, 11/16, 139. She testified that she does not have a makeup holder like the one described by the custody officer. RP, 11/16, 141-42.

III. ARGUMENT

A. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO RES GESTAE EVIDENCE ON TACTICAL GROUNDS AND FOR NOT OBJECTING TO POLICE TESTIMONY THAT THE PURSE SEARCHED BELONGED TO THE DEFENDANT.

Hughes argues that her counsel was deficient for not arguing

against the admissibility of the fact that Hughes was arrested because the vehicle she was driving was listed as stolen and because counsel did not object to supposed opinion that her purse belonged to her. This claim is without merit because the story of this incident would make no sense absent the fact that the car Hughes was driving was listed as stolen and because an objection to the officer's testimony would not have been sustained because ownership of the purse was a fact not an opinion.

Ineffective assistance claims are reviewed de novo. *State v. Linville*, 199 Wn. App. 461, 465, 400 P.3d 333 (2017), *citing*, *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (questions of mixed law and fact reviewed de novo).

This Court recently provided the standards by which such claims are decided:

To establish ineffective assistance of counsel, a defendant must demonstrate that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness under the circumstances and (2) he was prejudiced as a result of his counsel's performance. A legitimate trial strategy or tactic cannot serve as the basis for a claim of ineffective assistance of counsel. A defendant is prejudiced by counsel's deficient performance if, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. We presume that defense counsel's representation was effective, and the defendant must demonstrate that there was no legitimate or strategic reason for defense counsel's conduct.

State v. Boyer, 200 Wn. App. 7, 14, 401 P.3d 396. One expansion on

these fundamental principles is that “the presumption of adequate representation is not overcome if there is any ‘conceivable legitimate tactic’ that can explain counsel's performance.” *State v. Streepy*, 199 Wn. App. 487, 501, 400 P.3d 339 (2017).

Further, on the issue of prejudice, “[i]t is not enough to show that the errors had some conceivable effect on the outcome of the proceeding.” *Matter Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). Rather, “[c]ounsel’s errors must be so serious as to deprive the defendant of a fair trial, a trial whose results are reliable.” 188 Wn.2d at 539.

1. Fact of Arrest

This case involves a search of an arrested person at the Kitsap County Jail. According to Hughes, the story of the case should begin and end with the finding of the drugs by the custody officer.

Admissibility of the fact of arrest in the matter was first breached by the prosecution. The state raised the issue in observing that Hughes was not charged with possession of a stolen vehicle. RP, 11/14, 14. The state argued that the arrest out of the stolen truck was *res gestae*. RP, 11/14, 15. The state argued that “[t]here’s no way for the jury really to understand how this case came about if they don’t get to hear...the vehicle was listed in his system as stolen.” RP, 11/14, 15. The defense agreed indicating that the fact of arrest was an “important part” of Hughes’s case.

Id.

The trial court also agreed, saying that “I think it is important for the jury to have some framework to understand how she—you know how she was stopped, why she was stopped, and why there was a search at some point.” RP, 11/14, 16. The trial court also shared the state’s concern in saying “I also don’t want to lend any misimpression to the jury that whatever search was done...was not done lawfully.” RP, 11/14, 17. Thus the parties and the trial court were in complete agreement with the notion that the fact of arrest was an important part of the case. Next, the trial court asked about instructing the jury that she was not charged with the stolen vehicle. RP, 11/14, 16. The state responded that matters that go to charging decisions should not be admitted. Id. The defense acquiesced correctly noting that the jury would not be charged with regard to a stolen vehicle. RP, 11/14, 18. It was ultimately decided that the Deputy could testify that the car was listed as stolen and that he initiated a stop. RP, 11/14, 18-19.

Hughes testified that at the time of the stop her passenger was nervous and that she calmed him by noting that “everything is legal.” RP, 11/16, 130. She then recounted her recollection of the entire incident at the road side. RP, 11/16, 131 et seq. She told the jury that she was thinking that the arrest was a mistake. RP, 11/16, 132. She told the jury

that she thought the seller of the truck had stolen it and sold her a stolen truck. *Id.* She was able to establish her lack of knowledge that the truck had been reported stolen. RP, 11/16, 132-33. She recounted her request that her purse go to the jail with her. RP, 11/16, 134. In sum, the fact of the stop and arrest for the stolen truck was the primary focus of Hughes's testimony.

True to her pretrial statement to the trial court that the fact of the stop was important to her client's case, defense counsel argued that Hughes was "very cooperative with the officer when she was pulled over." RP, 11/16, 172. More, she was "very, very cooperative." *Id.* Then, the defense theory is launched: she had the opportunity to leave the purse behind when she knew she was being arrested. *Id.* If she knew that there were drugs in her purse, why would she want it brought along to the jail. RP, 11/16, 173. Hughes's cooperation with Deputy Bass during the stolen truck arrest was used to bottom an inference that she is a nice, noncriminal who would not have dope in her purse; "[s]he was cooperative the entire time." RP, 11/16, 175. And, that point provided a perfect segue to argue unwitting possession. This is reasonable trial strategy.

This well prepared defense attorney knew pretrial that she was going to argue Hughes's cooperation with Deputy Bass. Then she did so argue. The fact of the stop was in fact important to the defense because it

allowed for the cooperative arrestee argument. Not objecting to the fact of the stop was in fact strategic. Otherwise, the record would contain only the drugs found in her purse and her denial that she knew it was there. At least, her cooperation provided a foundation upon which to build up her credibility on the unwitting possession defense. The defense was better with the cooperation part than it would have been without it. There was no deficient performance in the case.

Moreover, even if Hughes's cooperation were not such an integral part of the defense, the fact of the stop was admissible in any event. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Jefferson*, 199 Wn. App. 772, 800, 401 P.3d 805 (2017), citing, *State v. Darden*, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002). A reviewing court may affirm the trial court on any ground that is supported by the record and the law. *State v. Haviland*, 186 Wn. App. 214, ¶26,² 345 P.3d 831 (2015) (citation omitted).

Evidence of *res gestae* is intended to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place” and to “depict a complete picture for the jury.” *State v. Grier*, 168 Wn. App. 635, 647, 278 P.3d 225 (2012) (internal quotation omitted) on remand from 171 Wn.2d 17 (2011) cert. denied 135 S.Ct. 153 (2014).

² No pagination in the Westlaw version of the case. Thus the cite to the paragraph

Whether viewed as an exception to ER 404(b) evidence of prior bad acts or viewed as an issue of relevance as the *Grier* Court analyzed the issue, this is the reason that the trial court in the present case allowed the evidence. The trial court was concerned that the jury would be left to speculate as to how the search of Hughes's purse came about. The trial court did not want that speculation to ripen into a situation where the jury might question the legality of the search. Thus the evidence was relevant both to complete the story of the incident and to avoid jury speculation. These are reasonable considerations for the exercise of the trial court's discretion.

Even had the defense objected here, that objection would have been overruled. *See State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007) (showing of deficient performance for failure to object must establish that the objection would likely be successful). But since the defense knew it could and did put that evidence to good use, there was no reason to object. The tactical use of the evidence and the fact that it was admissible in any event forecloses a finding of deficient performance.

2. Supposed opinion about Hughes's ownership of her purse.

Here, there was simply no issue as to the ownership of the purse. The only witness in the case that did not testify about the purse was the

number.

state's crime lab expert. Deputy Bass referred to the purse numerous times: retrieving Hughes's driver's license from her purse, asking her if she wanted to take her purse to jail with her, securing her purse in his patrol car, carrying her purse into the jail, giving her purse to the corrections officer. The corrections officer testified that she received Hughes's purse from the Deputy and searched it preparatory to storing it with the rest of Hughes's belongings. Hughes herself clearly identified that all these things were happening to her purse. At bottom, the defense could not reasonably deny that the purse belonged to Hughes or that the drugs were found in that purse.

The prosecutor asked Deputy Bass if he attempted to fingerprint the item containing the drugs. RP, 11/16, 72. Deputy Bass's testimony was that he does not fingerprint items that are taken from the personal possession of an arrestee. RP, 11/16, 72-73. He was stating no opinion but saying why he did not do an act.

An opinion is defined, in part, as "a view, judgment, or appraisal formed in the mind about a particular matter." Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary/opinion>. Herein, the fact that the purse belonged to Hughes was simply not an issue of view, judgment, or appraisal. It was simply a fact—a fact confirmed by Hughes in her own testimony. Any opinion in that bit of testimony might

be found in the assertion that finger printing in these circumstances is not “common practice” but again that testimony provided no evidence, opinion or otherwise, that the purse belonged to Hughes. Since the remark was not an opinion about the ownership of Hughes’s purse, an objection asserting that it was an improper opinion would have been overruled.

But even if the notion that Deputy Bass’s remark was an opinion, it was not an improper one. “The general rule is that no witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *rev denied*, 123 Wn.2d 1011 (1994) (internal quotation omitted). “However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” 70 Wn. App. at 578); *State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009). ER 704 allows opinions about the ultimate issue in a case; “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” The “otherwise admissible” clause requires that the opinion is subject to the other rules of evidence. 70 Wn. App. at 579.

And, the rules of evidence do allow opinion testimony. ER 701

allows a lay opinion that is

(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of ER 702.

Here, Deputy Bass, if considered to be a lay witness on this point, gave a rational answer to a question about his procedures in processing evidence.

In a case where the possession of the item is at issue, the jurors may well have wanted to know about the possibility of fingerprinting the item and so letting them know that there are circumstances in which fingerprinting is not done was helpful. Since the testimony was both reasonable and helpful to the jury, the fact that it may have embraced an ultimate issue does not make the testimony inadmissible.

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) is on point with regard to helpfulness to the jury. There, a detective testified about the protocol used in interviewing a child relating to that child's ability to tell the truth. *Id.* at 930. The Court found that this was not a comment on whether or not the detective believed the child; instead, it provided context to the jury so it was able to evaluate the reasonableness of the child's responses. *Id.* at 931. Here, similarly, Deputy Bass's testimony was not more than contextual. The remarks similarly served to explain police investigative procedures, or lack thereof, but here, as opposed to in

Kirkland, the remark came nowhere nearly as close to the issue of witness credibility.

In this case, Deputy Bass repeatedly testified to the unobjectionable fact that the purse belonged to Hughes. Counsel was not deficient and the remark caused no prejudice in light of the other evidence adduced regarding the purse. This claim fails.

**B. THE FORFEITURE PROVISION IS
ERRONEOUS BUT SHOULD NOT
OCCASION A NEW SENTENCING HEARING
(CONCESSION OF ERROR).**

Hughes next claims that the trial court erred by entering a Judgement and Sentence that included a forfeiture provision that does not comport with current law. CP 70. This claim is has merit under existing case law.

In conceding the point, the state will note that Hughes makes no assertion that any of her property was improperly forfeited. Only by exalting form over substance is Hughes an “aggrieved party.” RAP 3.1. An aggrieved party is “one whose personal right or pecuniary interests have been affected.” *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). But it has been held that a person need not be aggrieved in order to prevail on this issue. *See State v. Rivera*, 198 Wn. App. 128, 392 P.3d 1146 (2017).

The state concedes that present authority requires deletion of the present forfeiture provision. This should be done in the manner of a remand to correct a scrivener's error. "Where only corrective changes are made to a judgment and sentence by a trial court on remand, there is nothing to review on appeal." *In re Sorenson*, __Wn. App. __, 403 P.3d 109 (2017). This being a ministerial action that allows for no discretion on the part of the trial court, a new sentencing hearing is not required. *Id.*

C. HUGHES WAS ASSESSED ONLY MANDATORY LEGAL FINANCIAL OBLIGATIONS TO WHICH THE ABILITY TO PAY INQUIRY UNDER RCW 10.61.160(3) DOES NOT APPLY.

Hughes next claims that the trial court erred in imposing legal financial obligations without considering Hughes's ability to pay. This claim is without merit because the trial court did not impose any discretionary legal financial obligations.

A trial court's decision on whether or not to impose LFOs is reviewed for abuse of discretion. *State v. Clark*, 191 Wn.App. 369, 372, 362 P.3d 309 (2015) *review granted* 187 Wn.2d 1009, 388 P.3d 487 (2017) (remanded to trial court for consideration of ability to pay "discretionary" LFOs). But alleged due process violations are reviewed *de novo*. *State v. Seward*, 196 Wn. App. 579, 584, 384 P.3d 620 (2016).

Here the trial court imposed a \$500 crime victim penalty assessment (CVPA) pursuant to RCW 7.68.035, a \$200 filing fee pursuant

to RCW 36.18.020(2)(h), and a \$100 DNA collection fee under RCW 43.43.7541. The DNA fee statute provides that that fee “must” be included. RCW 43.43.7541. The CVPA statute commands that the same “shall” be imposed. RCW 7.68.035(1) (a). As this court has observed “Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees” *State v. Mathers*, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016). Finally, RCW 36.18.020(2)(h) provides that a defendant who either does not appeal or whose appeal results in affirmance “shall be liable for a fee of two hundred dollars.”

Hughes claims that these amounts were ordered in violation of RCW 10.61.160(3) because the trial court did not consider ability to pay. But, these assessments and fees are “mandatory obligations not subject to RCW 10.61.160(3).” *Clark*, 191 Wn. App. at 374. Further, “[t]he statutory inquiry is required only for *discretionary* LFOs.” 191 Wn. App. at 373, *citing*, *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

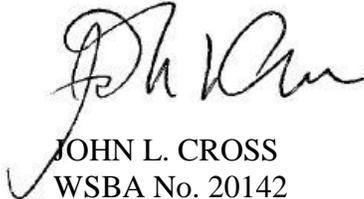
In *State v. Seward*, *supra*, this court rebuffed a due process challenge to these three mandatory LFOs. Hughes brings nothing new to the due process table. The trial court properly followed the statutory commands and the cases of this Court. Hughes claim fails.

IV. CONCLUSION

For the foregoing reasons, Hughes's conviction and sentence should be affirmed.

DATED November 2, 2017.

Respectfully submitted,
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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J".

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