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No. 50116-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ROBERT VANDERVORT, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 16-1-00351-6

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because it was within the sole province of the jury to weigh the credibility of Vandervort's testimony that he unwittingly possessed the controlled substances at issue in this case, the jury did not err by rejecting the defense of unwitting possession
2. Reversible error based on prosecutorial misconduct is not present in this case.
 - a) The State did not misstate the law of unwitting possession.
 - b) The State did not impugn defense counsel.
 - c) Although the State compared the credibility of the State's witnesses to the credibility of Vandervort, the State did not argue that in order to find Vandervort not guilty the jury would have to find that the State's witnesses were lying, and no prejudice occurred due to the State's argument; thus, reversible error did not occur.
3. Vandervort has failed to meet the burden of showing ineffective assistance of counsel on appeal.
 - a) Vandervort has not shown any prejudice based on his attorney's failure to object at trial to what Vandervort now asserts for the first time on appeal to have been an improper argument.
 - b) The record is insufficient to support Vandervort's contention that his attorney failed to investigate and botched the presentation of his affirmative defense, and in any event he has failed to show prejudice from the error that he alleges.

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B. FACTS AND STATEMENT OF THE CASE

On July 30, 2016, the Olympia Police Department asked the Mason County Sheriff's Office for assistance with an investigation of two males in a black car that were going to garage sales in Olympia and buying things with fake money. RP 233-34, 266, 336. A check of the license number of the black car linked the registration to an address in Mason County. RP 234, 267, 366, 342. So, Mason County Deputy Sheriff Nathan Anderson went to the address on the registration, and when he arrived he saw two males, one of whom was Vandervort, standing next to the black car. RP 234, 267.

When the Deputy Anderson arrived, Vandervort began walking away. RP 234. When the deputy told Vandervort to stop, Vandervort began running and fled into the house. RP 234-45. Deputy Anderson called for assistance from other officers. RP 235. The officers spoke with the homeowner, who gave them Vandervort's name. RP 236. The officers ran Vandervort's name and discovered that he had felony warrants. RP 236.

The homeowner gave the officers permission to search the residence for Vandervort. RP 236, 336-37. Officers entered and found

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Vandervort hiding under a bed. RP 238, 320, 337-38, 368. The officers arrested Vandervort. RP 238. In a search incident to arrest, Deputy Anderson discovered an electronic scale in Vandervort's pocket. RP 239-39, 325, 378. Deputy Anderson opened the lid to the scale and discovered a small amount of methamphetamine on the scale. RP 241, 357.

The Sheriff's Office sent the scale to the laboratory for testing. RP 242. The testing revealed that there was a small amount of methamphetamine and also a small amount of heroin on the scale. RP 301, 305. In a two-count information, the State charged Vandervort with possession of heroin and with possession of methamphetamine. CP 92-93. At trial, Vandervort asserted that his possession of the controlled substances was unwitting because he had picked up the scale from a car that he was driving for a friend and had not looked in the scale and did not know that it contained controlled substances. RP 362-63. The jury returned guilty verdicts on both counts. RP 424.

C. ARGUMENT

1. Because it was within the sole province of the jury to weigh the credibility of Vandervort's testimony that he unwittingly possessed the controlled substances at issue in this case, the jury did not err by rejecting the defense of unwitting possession.

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Under RCW 69.50.4013, possession of any amount of a controlled substance, even residue, without a valid prescription or as otherwise authorized by law, is a criminal offense. *State v. Schmeling*, 191 Wn. App. 795, 797 n.2, 365 P.3d 202 (2015). Proof of unlawful possession of a controlled substance does not require proof that defendant's possession was knowing, intentional, willful or voluntary. *State v. Bradshaw*, 152 Wn.2d 528, 539, 98 P.3d 1190 (2004). However, our Supreme Court has adopted an "unwitting possession defense" in order "to 'ameliorate [] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance.'" *City of Kennewick v. Day*, 142 Wn.2d 1, 10-11, 11 P.3d 304, 309-10 (2000) (quoting *State v. Cleppe*, 96 Wash.2d 373, 381, 635 P.2d 435 (1981)). To successfully assert the unwitting possession defense, the defendant bears the burden of proving by a preponderance of the evidence either that he (in the instant case) did not know that he possessed the controlled substance or that he did not know the true character of the substance that he possessed. *Kennewick* at 10-11 (citations omitted).

Vandervort cites *City of Spokane v. Beck*, 130 Wn. App. 481, 486, 123 P.3d 854 (2005), to support his contention that there is insufficient evidence to support his convictions in the instant case because, he

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contends, a rational jury could not have found that he failed to prove the affirmative defense of unwitting by a preponderance of evidence. Br. of Appellant at 8. However, *Beck* is distinguishable from the instant case because in *Beck* the defendant who was on trial for physical control asserted the statutory defense of being safely off the roadway, and there was physical evidence proving that she was, in fact, safely off the roadway. *Beck* at 488.

In the instant case, however, the only evidence (as opposed to argument) presented in support of the affirmative defense of unwitting possession was Vandervort's own testimony. Assessments of the credibility and persuasiveness of testifying witnesses and the weight to assign to such evidence is the sole province of the jury. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999); *State v. McCreven*, 170 Wn. App. 444, 476-77, 284 P.3d 793 (2012). Reviewing courts do not reweigh the evidence or substitute the reviewing court's judgment for that of the jury. *McCreven* at 477 (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

Thus, despite Vandervort's contrary assertions on appeal, at trial he did not meet his burden of persuading the jury that his possession of

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controlled substances in this case was unwitting, and as such, the jury's verdicts should be sustained.

2. Reversible error based on prosecutorial misconduct is not present in this case.

a) The State did not misstate the law of unwitting possession.

Vandervort avers that during closing argument the prosecutor misstated the law when the prosecutor made the following argument to the jury:

[T]here are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.

Br. of Appellant at 12, citing RP 404. Vandervort contends that although the issue was not preserved with an objection at trial, he should be allowed to raise the issue for the first time on appeal because, he contends, "[t]he misstatement of law is flagrant and ill-intentioned because it is a serious irregularity and likely misled the jury." Br. of Appellant at 13. Citing *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), Vandervort states that "[a]n argument is flagrant and ill-intentioned when those same arguments have been held improper in a published opinion." Br. of Appellant at 10. However, Vandervort does not cite

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to any opinion that has held the argument at issue in this case, nor any argument similar to this argument, to be improper.

The prosecutor's statement at issue here contains only one statement of law, as follows: "[T]here are only two ways that you get to an unwitting possession defense.... Didn't know I had it, or didn't know what it was." RP 404. But in his argument accusing the prosecutor of misconduct, Vandervort properly concedes that this statement is a correct statement of law, where Vandervort writes as follows: "Vandervort is not guilty of possession of a controlled substance if he establishes by a preponderance of the evidence that he 'did not know the substance was an his possession or did not know the nature of the substance.'" Br. of Appellant at 12, quoting *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994), and CP 45 (Jury Instruction No. 15).

The remaining portion of the quoted material to which Vandervort now claims error, rather than constituting a statement of law as contended by Vandervort, was mere argument based on the evidence presented at trial. The prosecutor presented this argument in his initial closing argument. RP 404. Thus, Vandervort had opportunity to rebut the prosecutor's argument in his own closing argument, which came after the prosecutor's statement. RP 405-16.

On appeal Vandervort argues that "the question for the jury was not whether or not Vandervort knew he had a scale, but whether or not he knew there was methamphetamine and heroin on the scale." Br. of Appellant at 12. The point is well taken that mere knowledge of possession of the scale does not prove

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knowledge that there was a controlled substance on the scale. But it's still argument, as opposed to a statement of law, and it is argument drawn from inferences from the evidence presented at trial. "In closing arguments, attorneys have "latitude to argue the facts in evidence and reasonable inferences."'" *State v. Wilkins*, ___ Wn. App. ___, 403 P.3d 890, 903 (2017) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (quoting *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985))).

b) The State did not improperly impugn defense counsel.

The State's initial and rebuttal closing arguments together occupy 10 or 11 pages of the verbatim reports. RP 397-405, 417-19. Within these 10 or 11 pages of transcript, there is a single paragraph that contains words that Vandervort alleges to have improperly impugn defense counsel.

Br. of Appellant at 13-14. This single paragraph reads as follows:

Really the entire defense in this particular case, and getting up and admitting to something else, it's really kind of a distraction technique. It's somewhat reminiscent of sitting around the dinner table, your kids and dad comes in and says, Michael, I see that you got an F in algebra. Well that may be true, dad, but Mark is smoking pot. It doesn't mean that Michael didn't get an F in algebra. It's just admitting to something else as a distraction and confusion technique. Especially when there's no other charge. There's nothing dealing with stolen property. That's just really foundation as to how they came into contact with Mr. Vandervort.

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RP 417-18. Vandervort did not object to the prosecutor's argument. *Id.*

During trial, Vandervort repeatedly probed the State's witnesses about the case that coincidentally led the police to the residence where they coincidentally encountered Vandervort. RP 265-68, 279-80, 326, 340-44. The prosecutor's argument did not say anything at all about defense counsel, his role, or his integrity; instead, the prosecutor's argument only addressed the irrelevance of defense counsel's interest in the property crimes that led the police to contact Vandervort, from which police coincidentally discovered drugs in Vandervort's possession.

But even if the prosecutor's remarks were inappropriate because they might be interpreted as disparaging of defense counsel, Vandervort has nevertheless not shown that there was a substantial likelihood that the prosecutor's comment affected the jury's verdict. To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper in the context of the entire record and the circumstances at trial and must also show that there is a substantial likelihood that the conduct affected the verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Because Vandervort has not, and cannot, make this showing, his contention on this point should fail.

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Finally, even if the prosecutor's comment was improper in the context of the record and circumstances of the case, and even if some prejudice were present as a result, which it isn't, a curative instruction would have further eliminated any possibility of prejudice. But Vandervort did not object to the prosecutor's comments to which he now asserts error, nor did he request a curative instruction. The failure to object constitutes a waiver of the error unless the prosecutor's comments were so flagrant and ill intentioned that a curative instruction would not have avoided any resulting prejudice. *Id.*

- c) Although the State compared the credibility of the State's witnesses to the credibility of Vandervort, the State did not argue that in order to find Vandervort not guilty the jury would have to find that the State's witnesses were lying, and no prejudice occurred due to the State's argument; thus, reversible error did not occur.

Vandervort contends that the State argued to the jury that in order to find him not guilty, they would have to find that his testimony was more credible than the officers' testimony. Br. of Appellant at 15. Vandervort does not provide any citation to the record to support his contention. *Id.* However, there is some support in the record for Vandervort's contention, where during closing argument, the prosecutor argued as follows:

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But even though a statement wasn't taken of Mr. Vandervort in this case, that's no reason for you to find — to not find him guilty in this particular case because the evidence and the weight of it is so stacked against him, you would have to find Mr. Vandervort's testimony more credible than that of the officers. And you'd also have to ignore the admissions that Mr. Vandervort made on the stand.

RP 404-05.

To some extent it would appear that the only meaningful, relevant issue that was in dispute in this case was whether Vandervort knew that the scale that he possessed contained one or more controlled substances. Vandervort admitted that he possessed the scale, and there was ample evidence that the scale contained heroin and methamphetamine, but Vandervort denied knowing that the scale contained these substances. RP 305, 362-63. The officers did not testify one way or the other about whether Vandervort knew or did not know that the scale contained contraband. So any comparison between the officers' credibilities and the credibility of Vandervort is pointless in these circumstances.

In *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991), the court found error where the prosecutor argued in closing that “in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officers' testimony” and that the jury would “have to believe that the officers are

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lying.” *Id.* at 874-75. But that is not exactly what happened in the instant case, because here the prosecutor did not argue that the jury would have to believe the officers were lying.

Instead, the prosecutor’s comment here was more of the type that were found not to be improper in *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012), because “the challenged comments here did not expressly contrast an acquittal or finding of not guilty with a jury determination that the State’s witnesses were lying.” *Id.* at 837.

Also, because Vandervort did not object to the prosecutor’s comments at trial, to prevail on appeal not only must he show that the comment was improper, he must also show that the comment was prejudicial. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice exists only if there is a substantial likelihood that the misconduct, if any, affected the jury’s verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). The reviewing court considers “misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.” *Rafay* at 824 (citing *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). Additionally, where the defendant, as in the instant case, fails to object to the prosecutor’s comment, the reviewing court will not consider the error

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for the first time on appeal unless the prosecutor's comment was so flagrant and ill-intentioned that a curative instruction could not have negated any resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Here, the prosecutor merely addressed the quibbling that occurred during trial about who arrested Vandervort, who searched him, and other such matters. Vandervort cannot show prejudice here because the issue has no bearing on whether he knew or did not know that the scale he possessed contained a controlled substance. And even if some prejudice were possible, which it wasn't, the prejudice could have been negated if Vandervort would have objected and asked for a curative instruction.

3. Vandervort has failed to meet the burden of showing ineffective assistance of counsel on appeal.

a) Vandervort has not shown any prejudice based on his attorney's failure to object at trial to what Vandervort now asserts for the first time on appeal to have been an improper argument.

Here, Vandervort contends his trial counsel committed reversible error based on ineffective assistance of counsel because by not objecting to the prosecutor's closing argument. But as argued above, where Vandervort alleges reversible error based on prosecutorial misconduct,

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Vandervort has not and cannot show any resulting prejudice based on the prosecutor's argument.

To prevail on a claim of ineffective assistance of counsel, Vandervort must show not only that his trial counsel's performance was ineffective, but must also show that the error was so serious as to deprive him of a fair trial for which the result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). Because Vandervort cannot make that showing in this case, his claim on this point should fail.

- b) The record is insufficient to support Vandervort's contention that his attorney failed to investigate and botched the presentation of his affirmative defense, and in any event he has failed to show prejudice from the error that he alleges.

Vandervort claims that he received ineffective assistance of counsel because, he contends, his trial counsel did not properly investigate and present a defense based on a chain of factual assertions and arguments related to an unrelated crime that led officers to arrest him on his felony warrant, which led to the discovery of controlled substances on a scale in his pocket. Br. of Appellant at 17-20. To support his contentions,

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Vandervort avers that his defense counsel botched the aborted defense, and he contends that the nature of the defense was “clear.” *Id.* at 17.

But there is nothing in our record to indicate that any of the evidence that Vandervort alleges to support his defense actually exists in an exculpatory form or that it would support his assertions. By the time of trial, it very well may have become apparent that the evidence would not support his assertions, or that it would contradict his defense of unwitting possession, or that it would not be helpful to him. We simply don’t know from the record we have. “When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record.” *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260, 1266 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel’s performance was deficient and, if so, whether counsel’s errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would

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have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

Vandervort has not shown that his attorney's decisions, acts, and omissions, if any, were not motivated by legitimate trial tactics, and he has not shown any resulting prejudice. Accordingly his claim of ineffective assistance of counsel should fail.

D. CONCLUSION

For the reasons argued above, the State asks this court to deny Vandervort's appeal and to sustain the jury's verdicts of guilt.

DATED: November 17, 2017.

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