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State of Washington  
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**NO. 50952-1-II**

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

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**SHYLEE BARTLETT,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The State produced sufficient evidence to support Bartlett's conviction for possession of methamphetamine.
2. The prosecutor did not commit misconduct by inadvertently mentioning a dresser with men's and women's clothing because the remarks were not improper and there was not a substantial likelihood that the remarks affected the jury verdict.
3. Defense counsel was not ineffective in failing to object during the State's closing because Bartlett was not prejudiced by the prosecutor's remarks.

## **II. STATEMENT OF THE CASE**

On March 14, 2017, the Street Crimes Unit of the Longview Police Department was serving a search warrant at 4216 Olympia Place in Longview, Washington. This was the residence of Brandon Coons, who was the named target of the search warrant and who primarily stayed in the garage of the residence. RP 48, 59. After entering the residence, Detectives Sanders and Matua went into the garage and observed two people sitting on the bed – a male and a female that were identified as Brandon Coons and Shylee Bartlett. RP 50–51. The room was very cluttered and there was drug paraphernalia in plain view around the room. This paraphernalia included pipes, foil, a spoon with brown residue, and packaging that drugs are typically packaged in. RP 51–2, RP 61.

Detective Mortensen searched the garage and, upon entering, immediately noticed was appeared to be a methamphetamine pipe sitting

on the floor in plain view. RP 61. A spoon with suspected heroin residue sat on top of the dresser. *Id.* Detective Mortensen searched under the bed that Bartlett and Coons were sitting on when officers arrived and found a briefcase. Inside the briefcase was a digital scale and a plastic container that held a white crystal substance that appeared to be methamphetamine. *Id.* Also inside the briefcase was a hospital bracelet with Shylee Bartlett's name on it and a date of service of March 13 – the day prior to the service of the search warrant. *Id.*

The suspected methamphetamine from the briefcase and some suspected heroin from the room were sent to the Washington State Patrol Crime Laboratory where they were tested and found to contain methamphetamine and heroin, respectively. RP 97, 100.

Bartlett was charged with two counts of possession of a controlled substance – methamphetamine and heroin – and her case ultimately proceeded to trial on September 26, 2017. She was found guilty of possession of methamphetamine and not guilty of possession of heroin on September 27, 2017. RP 159.

### III. ARGUMENT

#### 1. **There is sufficient evidence to convict Bartlett of possession of methamphetamine.**

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the State, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). A claim of insufficient evidence admits the truth of the State’s evidence and all inferences that can be reasonably drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 202, 829 P.2d 1068 (1992). Finally, circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991). In this case, in order for the jury to have reached a verdict of guilty, they had to find that the State proved that Bartlett was in possession of methamphetamine.

Possession can either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person is in actual possession when he has physical custody of the item; constructive possession occurs when the person has dominion and control over the item or the premises wherein the item was found. *Id.* When reviewing whether constructive possession had been established, the court must look at the totality of the

circumstances to determine whether the jury could reasonably infer from the evidence that the defendant had dominion and control over the item. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990).

Here, Bartlett did not have actual possession of the methamphetamine when officers entered and searched the garage. However, there was sufficient evidence that she had constructive possession of it because she had dominion and control over the briefcase in which the methamphetamine was found.

The State agrees that Bartlett was not named in the search warrant, she apparently did not reside in the garage, and none of her belongings were found there – except the briefcase. The case was located directly under the bed where Bartlett was sitting when officers came in, but most importantly, her hospital bracelet from the day prior was inside the case. This case differs from *Callahan* because the evidence showed that Bartlett had dominion and control over the briefcase, if not the garage apartment itself. In *Callahan*, there was no evidence showing dominion and control over the premises or the drugs.

Finally, the jury found Bartlett not guilty of Count II, which charged her with heroin found in the room. This indicates that the State produced insufficient evidence of dominion and control over the heroin for the jury to convict. However, there was sufficient evidence of dominion

and control to support the jury verdict as to the methamphetamine found next to Bartlett's hospital bracelet in the briefcase.

**2. The prosecutor did not commit misconduct by inadvertently mentioning a dresser with men's and women's clothing because the remarks were not improper and there was not a substantial likelihood that the remarks affected the jury verdict.**

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), citing *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718–19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722, citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). However, when the defendant fails to object, a heightened standard of review applies: "failure to object to an improper remark

constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987). The rationale underlying this rule is that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986); see also *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

When improper argument is alleged, “the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Russell*, 125 Wn.2d at 85. If a defendant – who did not object at trial – can establish that misconduct occurred, then he or she must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury

verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened 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; *Russell*, 125 Wn.2d at 85 (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, the absence of an objection at the time of the argument “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).

In previous cases where a prosecutor’s statements were so prejudicial as to warrant a reversal on appeal, the statements typically either violated a defendant’s rights or appealed to the passions of the jury. For example, in *Belgarde*, the prosecutor argued in closing that the defendant was “strong in” a group of deadly madmen and butchers that kill indiscriminately. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The Washington Supreme Court explained that these comments were improper, whether objected-to or not, because a curative instruction “could not have erased the fear and revulsion juror would have felt” in response to the graphic statements. *Id.*

In *Reed*, the prosecutor called the defendant a liar four times, asserted his personal beliefs of the defendant's guilt into his closing argument, stated the defense did not have a case, and implied the defense witnesses should not be believed because they were from out of town and drove expensive cars. *State v. Reed*, 102 Wn. 2d 140, 145, 684 P.2d 699 (1984). The Supreme Court explained that these comments violated the Code of Professional Responsibility as well as the responsibility of a prosecutor in a fair trial. *Id.* at 145–47. Additionally, the evidence that the defendant deliberately intended to kill his wife was not overwhelming. When combined with the flagrant and ill-intentioned statements by the prosecutor, there was a substantial likelihood that the jury's decision was affected. *Id.* at 147–8.

Similarly, a new trial was ordered in *State v. Jungers*. 125 Wn. App. 895, 106 P.3d 827 (2005). In that case, the prosecutor mentioned law enforcement's belief that the defendant was guilty multiple times, even after an objection to the testimony had been sustained. *Id.* at 903. The prosecutor also continued to attempt to elicit credibility testimony, and her closing argument referred to the officer's stricken testimony. *Id.* at 905. In that case, there was improper testimony and argument about the State's belief in the credibility of another witness, as well as references to testimony that was not in the record. The Court of Appeals found that the

cumulative effect of the prosecutor's improper conduct affected the jury. *Id.* at 907.

Here, the defense did not object to the prosecutor's statement at trial. Therefore, she must show that a curative instruction would not have ameliorated any prejudicial effect and that there was a substantial likelihood that the statement affected the jury verdict. That is not shown here. First, while the prosecutor inadvertently mentioned evidence that had been objected to and was not admitted, it is not necessarily incurable on that basis. This error could easily have been ameliorated by a curative instruction, telling the jurors to rely on their memory, or striking the prosecutor's statement. The prosecutor's statement in the case as bar was not so egregious that a curative instruction would have been ineffective. Additionally, the jurors were instructed that what the lawyers say is not evidence and to disregard anything the lawyers say that is not supported by the evidence. Juror are presumed to follow instructions. Therefore, an instruction from the court would have cured any potential prejudice.

Furthermore, Bartlett does not show that there was a substantial likelihood that the prosecutor's statement affected the jury verdict. The jury finding of not guilty of Count II but guilty of Count I indicates that the jury did not find that Bartlett had dominion and control over the bedroom. Whether there were female clothes in the drawer apparently did

not factor into the verdict, as Bartlett was found not guilty of possessing the drugs on the dresser. The prosecutor's brief statement is not likely to have changed the outcome of the trial, given the evidence presented and the jury instructions that were given. The statement made in this case in no way rises to the level of the statements made in *Reed* and *Belgarde*. Therefore, Bartlett does not show that prosecutorial misconduct occurred and the appeal should be denied.

**3. Trial counsel was not ineffective in failing to object during the State's closing because Bartlett was not prejudiced by the prosecutor's statement.**

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*, 466 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 she was denied effective representation, given the entire record, and that she suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that her 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 (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.* Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

To establish ineffective assistance for failure to object, the defendant must show (1) an absence of legitimate strategic or tactical

reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

*a. Counsel's failure to object was a trial tactic.*

Courts have declined to find ineffective assistance of counsel when the actions of counsel go to the theory of the case or to trial tactics. *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut the presumption. *In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In this case, it was a legitimate trial tactic to not object to the prosecutor's statement in closing argument. A trial attorney may choose not to object to something so as not to draw more attention to it, because the information is not particularly harmful to their theory of the case, or

for other, more ephemeral reasons. Here, the statements were brief, and there was no evidence to say that the female clothing in the dresser belonged to Bartlett. Objecting, especially during closing arguments, can have an adverse impact on a jury. Finally, and most importantly, allowing the reference to the clothing was tactical – the defense attorney mentioned the clothing in her closing argument as well to argue that there were other women that lived in the residence. Decisions regarding when or whether to object are presumed to be trial tactics, and that is so in this case. Therefore, counsel was not ineffective.

*b. Even if trial counsel's failure to object was deficient, Bartlett does not show that she was prejudiced.*

Even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice. Prejudice means that the result of the trial would have been different had the deficient performance not occurred. That is not shown here.

Bartlett was found not guilty of the drugs located in or on the dresser. This indicates that the jury did not believe that she had sufficient dominion and control over the premises or the dresser to be in constructive possession of the drugs found there, even after hearing in closing argument that there was men's and women's clothing in the dresser. If trial counsel had objected to the State's comments in closing, the jury

would not have heard that the dresser held men's and women's clothing, and they would still have found that Bartlett had no dominion and control over the dresser. There is no prejudice shown in this case. Therefore, Bartlett's claim of ineffective assistance of counsel fails.

#### IV. CONCLUSION

Bartlett's conviction for possession of methamphetamine should be affirmed as there was sufficient evidence to support the conviction, there was no prejudicial prosecutorial misconduct, and Bartlett's trial counsel was not ineffective.

Respectfully submitted this 27<sup>th</sup> day of April, 2018.

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By:   
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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 April 27<sup>th</sup>, 2018.

Michelle Sasser  
Michelle Sasser

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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