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NO. 52697-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBBIE LEE FITCH,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Trial counsel was not ineffective by refusing to stipulate that Fitch was charged with a Class B felony, thereby requiring the State to prove every element of each crime charged.
2. Trial counsel was not ineffective by failing to move to sever the bail jumping charges from the underlying drug charges because such a motion would not have been granted, and Fitch fails to show prejudice.
3. Trial counsel was not ineffective for failing to object to Sergeant Langlois' testimony because an objection would not have been sustained and Fitch fails to show prejudice.

II. STATEMENT OF THE CASE

On February 17, 2017, Longview Police officers served a signed and valid search warrant at 2008 46th Avenue, Apartment A, in Longview, Washington. RP 195, 230. The warrant allowed officers to search Robbie Fitch and his residence for illegal drugs and related items. Immediately prior to the execution of the warrant, Detective Seth Libbey observed Fitch contact a woman outside his residence. RP 197. Fitch and the woman completed a hand to hand transaction while the woman was sitting in her car and Fitch was standing in the driveway. The woman then drove away.

Officers then drove up to Fitch's residence while announcing "Police stop" and similar announcements. RP 198, 233. Fitch ignored commands, ran into the residence, and was able to shut and lock the door

before officers could reach him. He eventually did open the door and was detained. Officers read him his *Miranda* warnings at which time he blurted out, “Is all this happening because I just sold dope to that girl?” RP 235. He believed the officers were there because he had just completed a drug deal, not because they had previously acquired a search warrant. RP 221.

When officers searched Fitch’s garage, they found a plastic bag with a white crystal substance, another smaller bag with black tar residue, cash, and a digital scale with suspected meth and heroin residue. RP 236. The amount of methamphetamine in the bag appeared to be more than what is typically seen in simple possession cases. RP 237.

Fitch was initially charged with three counts of possession of a controlled substance with intent to deliver, one each for methamphetamine, heroin, and clonazepam. The charges were later amended at least twice; at trial, the charges consisted of one count of possession with intent (methamphetamine), one count of possession (heroin), and two counts of bail jumping. CP 143.

At trial, the officers all testified about their training and experience with controlled substances, including the difference between typical user and dealer amounts. RP 186–89, 227. When asked if the amount of methamphetamine in Fitch’s garage was consistent with a typical user

amount, Sergeant Langlois said that it was far in excess of a typical user amount. RP 237. A forensic scientist from the Washington State Patrol Crime Laboratory testified that the methamphetamine weighed 11.9 grams. RP 314.

To prove the bail jumping charges, the State put forward testimony from a deputy court clerk and a number of certified documents. RP 270; Ex. 7. One of those exhibits was the original charging information, showing that Fitch was charged with a Class B felony at the time he failed to appear in court. Ex. 7.

The jury found Fitch guilty of all four charges. He now timely appeals.

III. ARGUMENT

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 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 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for 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 also must show that the deficiency caused prejudice.

A. Fitch fails to show that his trial counsel was ineffective by choosing not to stipulate that Fitch was charged with a Class B felony, or that he was prejudiced by that action.

1. Trial counsel was not ineffective by not requesting an Old Chief stipulation.

In *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997), the United States Supreme Court held that a trial court must accept a defendant's stipulation to a prior conviction upon the defendant's request. This decision was based on a recognition of the prejudicial effect that a defendant's prior conviction may have on a trial. *See State v. Streepy*, 199 Wn. App. 487, 502, 400 P.3d 339 (2017). However, not requesting an *Old Chief* stipulation is not necessarily deficient performance.

In *Streepy*, the trial attorney made the strategic decision to make the State prove all elements of the crime of unlawful possession of a firearm in the second degree. The State used the judgment and sentence to prove that the defendant had a qualifying conviction for UPF 2, but the judgment was silent as to the date of the offense. *Streepy*, 199 Wn. App. at 503. The defense objected to the admission of the incomplete judgment, meaning the State was required to obtain an additional document during a recess in the trial. Had the State not done this, it would

have failed to prove every element of the charged crimes. *Id.* There was a strategic reason for defense counsel in *Streepy* to not stipulate to the prior offense, namely that the defense believed the State would be unable to prove every element of the crime, leading to acquittal.

There are other reasons a trial attorney might refused to stipulate, even in circumstances not as obvious as that present in *Streepy*. For example, the trial attorney may believe that agreeing to anything at all simply makes the State's job easier, to the detriment of the defendant. Or the defendant himself may demand that the State be held strictly to its burden of proving each element beyond a reasonable doubt. In other words, there are legitimate tactical and strategic reasons to require the State to meet its burden to prove each element of a charged crime that mitigate against stipulating to prior convictions. In this case, the trial attorney made the tactical decision to make the State prove that Fitch was charged with a Class B felony at the time of his alleged bail jumping. Doing so was not deficient performance.

It is also important to note that *Old Chief* is focused on the prejudicial nature of prior convictions. It is reasonable to assume that evidence that a person has previously been convicted of a crime may lead a jury to convict for improper reasons. However, *Old Chief* and its progeny do not discuss the implication of current charges, as opposed to

prior convictions. The prejudicial nature of a charged offense is simply less than a prior conviction, since jurors understand the idea of the presumption of innocence and are instructed that a charging document is merely an accusation. Therefore, the comparison of this case to *Old Chief* is inapposite.

2. *Even if Fitch has shown that his trial counsel's performance was deficient, he fails to show that he was prejudiced by the attorney's actions.*

Even if this Court finds that trial counsel's performance was deficient, Fitch has failed to show that the result of the proceeding would have been different had the defense attorney requested a stipulation that Fitch had been charged with a Class B felony. Fitch argues that he was prejudiced for two reasons – first, he argues that he was prejudiced because the trial court would have accepted an offer to stipulate to the fact that Fitch was charged with Class B felonies. While the trial court likely would have accepted the stipulation, that alone does not show prejudice.

Second, he argues that the jury would have concluded that Fitch possessed the drugs for his personal use if not for their knowledge that he was originally charged with possession with intent of heroin and clonazepam. This argument is speculative at best. First, jurors are instructed multiple times throughout any trial that a charge is simply an allegation and a defendant is presumed innocent unless and until the jury

finds guilt beyond a reasonable doubt. Jurors are presumed to follow instructions. Therefore, even if the jury did see the original information in this case, there is no indication that they would not be able to follow instructions and only find guilt on those counts that had been proven beyond a reasonable doubt.

Second, the original information was used only to show that Fitch was charged with a Class B felony at the time he failed to appear in court. At trial, he was still charged with one of the counts of possession with intent that he had been charged with. The State merely streamlined its case in the time between charging and trial. Fitch does not explain how the jury having knowledge that he was originally charged with possessing three different substances with the intent to deliver them is any more prejudicial than being charged with possessing one substance with the intent to deliver it.

Finally, the outcome of the trial would not have differed because evidence of guilt on the four separate charges was overwhelming in this case. That evidence includes: Detective Libbey observed what he believed to be a drug deal between Fitch and a woman; Fitch asked if the officers were there because he had just sold dope to the woman; 11.9 grams of methamphetamine; 1.2 grams of heroin; a scale with meth and heroin residue on it; and \$111 in cash that Fitch admitted was proceeds of

drug sales. RP 197, 200, 221, 235, 236. Additionally, officers testified that a typical user amount is anywhere from 0.2 grams to 0.5 grams and multiple grams is an indication of drug selling. RP 186–89; 227. There is no indication that the juror’s knowledge of the original charges had any effect on the outcome of the trial. Therefore, Fitch has not shown ineffective assistance of counsel in not requesting an *Old Chief* stipulation.

B. Fitch has failed to show that his trial counsel was ineffective by not moving to sever the bail jumping charges, or that he was prejudiced as a result.

Severance of criminal charges is important when a jury might use evidence of one crime to infer guilt on another crime, or to infer a general criminal disposition. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). However, separate trials are disfavored in Washington law. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). In determining whether to sever charges to avoid prejudicing a defendant, a court is to consider “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *Sutherby*, 165 Wn.2d at 884–85. In this case, a motion to sever would not have been granted so trial counsel was not ineffective in failing to make the motion.

Division I of the Washington Court of Appeals discussed the issue of joining bail jump charges to an underlying offense for purposes of trial in *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). The Court in that case held that, as a matter of law, when a defendant's custody and release on bond stems directly from an underlying substantive charge, a charge of bail jumping is properly joined for trial with the underlying charge in the absence of a strong showing of prejudice. *Bryant*, 89 Wn. App. at 860. In that case, the Court analyzed this question under the joinder rule rather than severance, which is argued here. However, the concepts are sufficiently related in law and fact to lead to the same conclusion under either analysis. In fact, Division II of the Washington Court of Appeals followed *Bryant* in a case almost identical to the one currently at bar – *State v. Cranor*, 193 Wn. App. 1050 (2016).¹

In *Cranor*, the defendant was initially charged with burglary in the second degree and possession of stolen property in the first degree. He failed to appear at court two separate times and the State added two counts of bail jumping. *Id.* at 2. At trial, some potential jurors expressed that a defendant's bail jumping might impact their consideration of the case;

¹ *Cranor* is an unpublished case. GR 14.1 allows for the citation to unpublished opinions of the Court of Appeals. Any unpublished opinion filed on or after March 1, 2013, may be cited as nonbinding authority, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

specifically, some jurors admitted that bail jumping was an indication of guilt. These jurors were excused. *Id.* at 3. In its ruling, the Court of Appeals cited to *Bryant* in holding, “In Washington, a bail jumping charge is sufficiently connected to the underlying charge if the two offenses related in time and the bail jumping charge stems directly from the underlying charge. The trial court properly tries bail jumping and other charges together as a matter of law if these requirements are met and the defendant is not prejudiced.” *Id.* at 8, *citing Bryant*, 89 Wn. App. at 866–67. The *Cranor* Court held that a motion to sever would not have been granted based on the four *Sutherby* factors.

Similarly here, a motion to sever would not have been granted. First, the State’s evidence on each count was strong. As to Count I, possession with intent to deliver, Detective Libbey observed what he believed to be a drug deal between Fitch and a woman; Fitch asked if the officers were there because he had just sold dope to the woman; officers found 11.9 grams of methamphetamine, a scale with meth and heroin residue on it, and \$111 in cash; and officers testified that a typical user amount is anywhere from 0.2 grams to 0.5 grams and multiple grams is an indication of drug selling. RP 197, 200, 221, 235, 236, 186–89, 227. As to Count II, possession, officers also found heroin residue in Fitch’s residence with the other items of drug paraphernalia listed above. Finally,

as to the bail jumping charges, the State presented evidence, through court documents and testimony from a deputy clerk, that Fitch was ordered to appear at a later court date and failed to do so. RP 270. Based on this evidence, it is not clear that the result would have been different had the trial court severed the counts.

Additionally, the State's case was not strengthened by the addition of the bail jumping charges. Any jurors that expressed that the bail jumping charges caused them to believe Fitch was guilty of all charges were excused for cause. The remaining jurors were instructed that each charge was to be considered separately; jurors are presumed to follow instructions. There is no indication that the remaining jurors were unable to follow the instructions and consider each count separately.

Second, Fitch provides no basis for his argument that the jury would have been confused by the defenses put forth at trial. Fitch denied the drug charges and asserted an affirmative defense to the bail jumping. These are separate and distinct, and there is no indication that the jury would not be able to consider the defenses separately, just as they considered each count separately. Third, the trial court instructed the jury to consider each count separately.

Fourth, while evidence of bail jumping would not be admissible to prove the drug possession counts, evidence that Fitch was charged with an

offense and released is admissible to prove bail jumping. Specifically, the charging document, release conditions, and clerk's notes and minutes from the hearings in the drug case would be admissible at a separate trial for bail jumping. Severance is not automatically required where evidence for one charge is not admissible for another. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). All four factors indicate that a motion for severance would not have been granted. Therefore, trial counsel was not ineffective in failing to move to sever the charges.

Finally, Fitch has not shown any prejudice from his counsel's failure to move for severance. He argues that the jury must have found him guilty on the drug charges solely because he was also charged with bail jumping, but offers no evidence for this assertion. He has not shown prejudice from his attorney's actions and his convictions should be affirmed.

C. Fitch's trial counsel was not ineffective in failing to object to Sgt. Langlois' testimony, and Fitch has failed to show that he was prejudiced.

To establish ineffective assistance of counsel based on a 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).

1. *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). "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 Sergeant Langlois' statement. 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 statement was brief, was based on Langlois' testimony about his training and experience, and was corroborated both by testimony from other detectives and by Fitch's statements to the officers that he had sold drugs. Objecting can have an adverse impact on a jury and may serve only to draw attention to an undesirable piece of

information. 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.

2. *An objection to Langlois' statement would not have been sustained.*

Fitch argues that Langlois' statement, that the amount of methamphetamine located was "far in excess of" a typical user amount, was a comment on his guilt. This is incorrect. Experts are permitted to testify on information and subjects that are not within the understanding of the average person. *State v. Montgomery*, 163 Wn.2d 577, 519, 183 P.3d 267 (2008); ER 702. The fact that an expert opinion might cover an issue that will ultimately be decided by the jury does not require automatic exclusion. *Id.* Specifically, law enforcement officers are permitted to testify about specialized knowledge gained through training and experience. This knowledge includes specialized information about drugs and the drug trade, since the typical juror likely is not familiar with these topics.

In *Montgomery*, the detective testified that he felt "very strongly" that the defendants were intending to manufacture methamphetamine. *Id.* at 588. A second detective testified that he believed the items were purchased for manufacturing. *Id.* A forensic chemist testified after

reviewing the purchases that “these are all what lead me toward this pseudoephedrine is possessed with intent.” *Id.* The Washington Supreme Court found it very troubling that the testimony at issue was direct and involved explicit expressions of personal belief, as well as the chemist’s use of the specific legal standard involved. *Id.* at 594.

Here, on the other hand, Langlois’ statement was not directly connected to Fitch and did not involve statements of his own personal belief. Detective Libbey and Sergeant Langlois both testified at length regarding their training and experience with illegal drugs, drug users, and the drug trade. They discussed what they typically found in simple possession cases, as well as the amounts that typical users will use at one time. RP 186–189, RP 227–229. Specifically, Libbey testified that anywhere from around .1 grams to around 1.5 grams of methamphetamine is a user amount. RP 187. Langlois testified that a typical dealer amount is “anything over a couple of grams. Three grams or more.” RP 227. The officers also testified about other things they frequently see in possession with intent cases, such as scales with drug residue and cash. RP 190, 228. Then, Sergeant Langlois was asked, “Based on your visual observations, was that a typical user amount of methamphetamine that you located?” He responded, “Far in excess of.”

Langlois' statement was based on his training and experience in the drug world and was a reasonable inference from his – and Libbey's – prior testimony. If a user amount is anything under three grams, then 11.9 grams is far in excess of that. Additionally, he did not say that he believed Fitch to be selling drugs or that he felt strongly that the 11.9 grams of methamphetamine was being possessed with the intent to deliver. In other words, his statement was not a comment on Fitch's guilt. It was a permissible expression of his training and experience, and a reasonable inference to be drawn from the previous testimony. Therefore, an objection would not have been sustained and trial counsel was not deficient.

3. *Even if trial counsel's failure to object was deficient, Fitch does not show that he was prejudiced.*

Even if a defendant can show that counsel was deficient, he 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.

If trial counsel had objected to Sergeant Langlois' statement, the jury would still have heard about the differences between user and dealer amounts, the items that frequently go along with drugs in possession with intent cases, and Fitch's statements to the officers that the cash they found

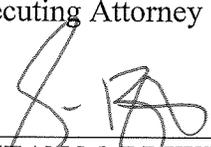
was proceeds of drug dealing and that he had just sold drugs to the woman that was there. The jury would likely have made the inference that 11.9 grams is a larger amount than is typically seen with drug users, and when combined with the scale, cash, and Fitch's statements, showed that he was guilty of possession with intent. There is no prejudice shown in this case. Therefore, Fitch's claim of ineffective assistance of counsel fails.

CONCLUSION

Fitch's convictions should be affirmed as his trial counsel was not ineffective.

Respectfully submitted this 26 day of June, 2019.

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CERTIFICATE OF SERVICE

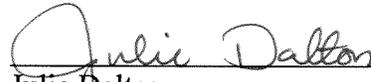
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 26, 2019.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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