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Court of Appeals
Division II
State of Washington
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NO. 52855-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICHOLAS PETER ROSELLO,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Rosello's attorney provided effective assistance because he had a legitimate trial strategy. Additionally, Rosello fails to show that the outcome of the trial would have differed in the absence of his attorney's conduct.
2. The prosecutor did not commit misconduct by inadvertently mentioning "over \$500 in cash" in closing argument because the remark was not improper and there was not a substantial likelihood that the remark affected the jury verdict.
3. There was no cumulative error.

II. STATEMENT OF THE CASE

Detectives with the Longview Police Department Street Crimes Unit and the Cowlitz-Wahkiakum Narcotics Task Force served a search warrant at Nicholas Rosello's residence at 207 Southwest 4th Avenue in Kelso, Washington. RP 45, 74, 94. The warrant allowed the search of Rosello and his residence for drugs and related items. RP 45, 74. Rosello told detectives which room was his, and detectives found methamphetamine in numerous locations throughout that room. There was a small baggie that had "10K" written on it containing a shard of methamphetamine, a mirror with suspected methamphetamine residue, a scale with suspected methamphetamine residue, a glass bowl containing methamphetamine, and a large shard of methamphetamine on an envelope. RP 75-76, 87. Detectives also found packaging material in the form of a

plastic bag. RP 87, 106. Rosello had cash in his wallet and, when asked if it was from selling drugs, he paused and looked at the ground before eventually denying selling drugs. RP 51. Finally, Rosello himself told Detective Sanders that, while he did not sell drugs, he had given methamphetamine to people on occasion. RP 51.

The total amount of methamphetamine found in Rosello's residence that was tested at the crime laboratory was 7.6 grams. RP 140. Additional suspected methamphetamine was found in pipes and on the digital scale. RP 75–76, 87. The State charged Rosello with one count of possession of methamphetamine with intent to deliver. CP 1–2.

At trial, the defense strategy was to argue that the officers went in to the search assuming Rosello was a drug dealer and therefore were going to charge him with intent to deliver regardless of the evidence. RP 170–73. He suggested in closing argument that officers ignored evidence – in the form of potential fingerprint and DNA analysis – that would show that the drugs were not all Rosello's. *Id.* To lay the foundation for that theory, the trial attorney elicited testimony that a confidential informant had observed a drug deal inside the house. RP 52. The State then properly argued that the previous sale was circumstantial evidence of Rosello's present intent to deliver. He was found guilty of possession with intent to deliver and now timely appeals. CP 23.

III. ARGUMENT

A. Trial counsel was not ineffective, Rosello has not shown prejudice, and the outcome of the trial would not have differed if the complained-of evidence had not come in.

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. Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). 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 that “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 also must show that the deficiency caused prejudice.

1. *Counsel’s actions were tactical and strategic.*

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). This court presumes that an attorney’s actions were 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 ask the detectives about their information regarding Rosello's drug use or sales. The trial attorney's strategy was to argue that the detectives were going to attribute any drug evidence they found to Rosello, since they had prior information that he was involved in a drug sale. In effect, the defense's theory of the case was that the officers fell prey to confirmation bias – they expected to find proof of drug selling and, when they did find some evidence of that, they assumed it was Rosello as opposed to any one of the five other people in the residence at the time. This is clear from the defense attorney's closing argument, where he argued that the detectives did not collect fingerprint or DNA evidence, the drugs were out in the open where multiple people had access to them, and there were multiple separate packages of drugs. RP 171–72. In order to support his argument, trial counsel decided to let the jury hear that the detectives had information that Rosello had engaged in a drug deal on a prior occasion. Therefore, trial counsel was not ineffective.

This case is factually similar to *Hendrickson*, where the Washington Supreme Court found that trial counsel was deficient because he failed to object to the admission of two prior judgements and sentences

for drug-related offenses. 129 Wn.2d at 77. The Court stated that such convictions are very damaging and prejudicial in a case where the defendant is charged with a similar crime. *Id.* at 78. The case at bar differs from *Hendrickson*, however, in that there was no evidence of a conviction introduced in this case. In fact, there was no further information elicited regarding whether Rosello was arrested or charged in connection with the alleged sale of drugs. There was merely a reference to an unidentified confidential informant observing a drug sale inside the house. RP 52. The jury already knew that Rosello had given drugs to people in the past because his statement to that effect was introduced in the State's direct examination of Detective Sanders. RP 50–51. The information elicited here does not rise to the level of that elicited in *Hendrickson*, and it was a reasonable strategy to bring it out. Therefore, trial counsel was not ineffective.

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

Even if a defendant can show that counsel was deficient, he must also show that the deficiency caused prejudice. Rosello has not shown that the result of the trial would have been different had the complained-of evidence not come in.

The prejudicial effect of the jury's knowledge that the CI had previously observed Rosello involved in a drug deal is to be viewed against the backdrop of all the evidence in the record. *State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998); *Hendrickson*, 129 Wn.2d at 80. The evidence in this case supports Rosello's guilt on the possession with intent to deliver charge. In Rosello's room, detectives found methamphetamine spread throughout the room. There was a small baggie containing a shard of methamphetamine, a mirror with suspected methamphetamine residue, a scale with suspected methamphetamine residue, a glass bowl containing methamphetamine, and a large shard of methamphetamine on an envelope. RP 75–76, 87. Detectives also found packaging material in the form of a plastic bag. RP 87, 106. Rosello had cash in his wallet and, when asked if it was from selling drugs, he paused and looked at the ground before eventually denying selling drugs. RP 51. Finally, Rosello himself told Detective Sanders that he had given methamphetamine to people on occasion. RP 51.

The total amount of methamphetamine found in Rosello's residence that was tested at the crime laboratory was 7.6 grams. He now argues that that is not a large enough amount to infer the intent to deliver, thus heightening the prejudicial value of the evidence elicited by the trial attorney. Not all of the suspected methamphetamine found in Rosello's

room was tested at the lab, but circumstantial evidence can be sufficient to establish the identity of a drug in a criminal case. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A reasonable juror could find from the testimony of the experienced officers that all of the white crystal substance found in Rosello's room was methamphetamine. There was in fact more than 7.6 grams of methamphetamine in Rosello's possession.

Additionally, Detective Sanders testified that the typical methamphetamine user in Cowlitz County purchases about .2 grams at a time, and that people typically buy just the amount of a drug that they would use right away. RP 43. Therefore, a person who has even 7.6 grams can stand to make a profit by selling .2 grams at a time to other individuals. RP 57.

The evidence of guilt in this case was strong, given the amount of methamphetamine present, the scale with methamphetamine residue, packaging materials, cash, and Rosello's own statement that he had given drugs to people in the past. The prejudicial effect of the jury hearing that a CI observed Rosello give drugs to someone in the past was negligible. The outcome of this trial would not have been different but for the introduction of this evidence. Therefore, Rosello has not established ineffective assistance of counsel and his conviction should be affirmed.

B. The prosecutor did not commit misconduct by inadvertently mentioning “over \$500 in cash” because the remark was not improper and there was not a substantial likelihood that the remark 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*, 132 Wn.2d 668, 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.

In instances where the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the prosecutor’s statement or question 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 a 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 a 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, Rosello 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. First, while the prosecutor inadvertently mentioned information that had not come in through testimony, 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. Jurors are presumed to follow instructions. Therefore, an instruction from the court would have cured any potential prejudice.

Second, Rosello fails to show that the prosecutor's statement (that there was "over \$500 in cash" in Rosello's wallet) affected the jury's verdict. As discussed above, there was other evidence to support a conviction for possession with intent, including Rosello's evasive behavior when asked whether the money was from drug selling and his own statement that he previously gave meth to people. Additionally, there was evidence that the defendant had a job and had renters who paid him rent

every month. The amount of money found would not have affected the verdict since, based on the evidence, the money itself could have come from legal or illegal activity.

The statement made in this case in no way rises to the level of the statements made in *Reed* and *Belgarde*. Therefore, Rosello does not show that prosecutorial misconduct occurred and his conviction should be affirmed.

C. There was no cumulative error.

The cumulative error doctrine is limited to instances when there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The doctrine does not apply if “the errors are few and have little or no effect on the outcome of the trial.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Based upon the above-stated arguments, there was no cumulative error in this case.

First, Rosello fails to prove ineffective assistance of counsel, since his attorney had a legitimate trial strategy in allowing the testimony that officers had information Rosello had participated in a drug deal prior to the date of the search warrant. Rosello also fails to show prejudice from his attorney’s actions because the jury had already heard that he gave

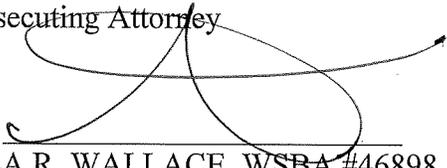
drugs to people in the past. Second, the prosecutor did not commit misconduct in closing argument as there was not was a substantial likelihood that the passing statement affected the jury verdict. Therefore, Rosello received a fair trial and his conviction should be affirmed.

IV. CONCLUSION

Rosello's conviction for possession of methamphetamine with intent to deliver should be affirmed as his trial counsel was effective, the prosecutor did not commit misconduct, and there was no cumulative error.

Respectfully submitted this 7th day of May, 2019.

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CERTIFICATE OF SERVICE

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

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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 May 7th 2019.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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