FILED
Court of Appeals
Division II
State of Washington
12/13/2019 3:29 PM

NO. 53026-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TESSITA WOODARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF FACTS 3

1. Charge & Plea 3

2. First Jury Trial 4

3. Second Jury Trial 8

4. Sentence & Appeal 12

C. ARGUMENT 12

1. WOODARD'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HER TRIAL COUNSEL FAILED TO CONFRONT OFFICER VANCUREN-DOLAN ON CRITICAL AND INCONSISTENT TESTIMONY GIVEN IN A PRIOR MISTRIAL. 12

2. THE JURY INSTRUCTIONS WERE MISLEADING, INTERNALLY INCONSISTENT, AND FAILED TO ADEQUATELY SET FORTH THE CORRECT LEGAL STANDARD ON THE CORE DISPUTED ISSUE AT TRIAL. ..22

i. Instruction No. 5 is confusing, misleading, reduces the State's burden of proof with respect to an essential element, and conflicts with Instruction No. 2. 24

ii. The instructional error requires reversal. 28

3. COUNSEL'S FAILURE TO OBJECT TO THE INSTRUCTIONS WAS INEFFECTIVE ASSISTANCE OF COUNSEL. 31

TABLE OF CONTENTS CONT'D

Page

4. THE CUMULATIVE ERROR DOCTRINE REQUIRES REVERSAL. 31

D. CONCLUSION 32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint Fleming
142 Wn.2d 853, 16 P.3d 610 (2001) 12, 22

In re Pers. Restraint Lui
188 Wn.2d 525, 397 P.3d 90 (2017) 13

State v. Allen
182 Wn.2d 364, 341 P.3d 268 (2015) 23, 24, 26

State v. Caldwell
94 Wn.2d 614, 618 P.2d 508 (1980) 29

State v. Coe
101 Wn.2d 772, 684 P.2d 668 (1984) 31

State v. Drewery
8 Wn. App. 2d 1018, 2019 WL 1490620 (2019) 26

State v. Irons
101 Wn. App. 544, 4 P.3d 174 (2000) 28-30

State v. LeFaber
128 Wn.2d 896, 913 P.2d 369 (1996) 22, 22 n.1, 23, 28

State v. McFarland
127 Wn.2d 322, 899 P.2d 1251 (1995) 12-13, 21

State v. McSorley
128 Wn. App. 598, 116 P.3d 431 (Div. II.2005) 14, 5, 17, 19

State v. O'Hara
167 Wn.2d 91, 217 P.3d 756 (2009)
as corrected (Jan. 21, 2010) 22, 22 n.1, 23, 28-30

State v. Shipp
93 Wn.2d 510, 610 P.2d 1322 (1980) 24, 26

TABLE OF AUTHORITIES CONT'D

Page

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 12, 13, 22

State v. Walden
131 Wn.2d 469, 932 P.2d 1237 (1997) 23, 29

State v. Wanrow
88 Wn.2d 221, 559 P.2d 548 (1977) 23, 29

RULES, STUTUTES & OTHER AUTHORITIES

GR 14.1 ..... 26 n.2

RAP 2.5(a)(3) 22 n.1

U.S. CONST., AMEND. VI 12, 22

U.S. CONST., AMEND. XIV 22

WASH. CONST., ART. 1, § 3 22

WASH. CONST., ART. 1, § 22 ..... 12, 22

A. ASSIGNMENTS OF ERROR

1. The Appellant Tessita Woodard's constitutional right to effective assistance of counsel was violated when defense counsel failed to confront a testifying officer with prior and significant exculpatory testimony made under oath.

2. The "knowledge" instructions were misleading and relieved the State of its proper burden to prove the essential element of "knowing[]" for the crime of possession of oxycodone in a correctional facility.

3. Woodard's right to effective assistance of counsel was further violated when defense counsel failed to object to the improper "knowledge" instruction.

4. The cumulative error doctrine applies and requires reversal where the errors descried above all bore on the essential element of "knowing" possession, and when combined, denied Woodard the right to a fair trial.

Issues Pertaining to Assignments of Error

1. The core disputed issue at trial was whether Woodard intended to sneak oxycodone pills into a correctional facility during a voluntary jail commitment, or whether she taped an emergency stash of pills to her body on a regular basis and simply forgot they were there until

she removed her bra during a strip search. During Woodard's first trial, Officer VanCuren-Dolan testified Woodard was not "squirrely," did not attempt to consume the pills, and unlike other inmates discovered with contraband, did not "fight" with officers; rather Woodard promptly complied with officer instructions to hand them the pills. The first trial resulted in a hung jury.

During a second jury trial, VanCuren-Dolan mentioned none of these details, and testified she was unsure if Woodard "just handed" over the pills. Furthermore, in motions *in limine* prior to the second trial, defense counsel agreed with State that both parties could refer to testimony from the prior proceeding, so long as they did not mention a "trial." Did defense counsel's failure to confront Officer VanCuren-Dolan with her prior testimony violate Woodard's right to effective assistance of counsel? Does the error require reversal?

2. The trial court provided Instruction No. 5 to the jury, equating "knowledge" with "intent" and permitting the jury to "find" Woodard "knew" the pills were taped to her in the jail, so long as it found Woodard intentionally taped to pills to herself earlier that day. In the context of the trial, were the instructions misleading? Does Instruction No. 5 reduce the State's burden to prove each element beyond a reasonable doubt, and thus create an internal conflict with Instruction No.

2? Must the error be presumed prejudicial? Regardless, did the error prejudice Woodard's trial and nonetheless require reversal?

3. Where defense counsel failed to object to the inadequate instructions, was Woodard's right to effective assistance of counsel further violated? Does the error require reversal?

4. In the alternative, if the errors above do not independently require reversal, does the cumulative error doctrine apply to require reversal?

B. STATEMENT OF FACTS

1. Charge & Plea

The Cowlitz County prosecutor's office charged Woodard with one count of violation of the uniform controlled substances act, alleging she knowingly possessed oxycodone in a county jail. CP 10. The State further alleged she had taped approximately 9-10 pills to her breasts in order to conceal them from jail officials and smuggle them into the jail facility when she checked in for a voluntary commitment. RP 152; CP 1-2. The State alleged some of the pills contained hydrocodone and oxycodone. CP 1-2.

Woodard pleaded not guilty and the case proceeded to jury trial. RP 153. In opening statements, defense counsel explained that Woodard's defense was that she had prescriptions for a variety of medical conditions.

RP 153. Because her purse had previously been stolen, she kept extra medication taped to her body, as her grandmother had advised her. RP 154. After a very stressful day, she was unexpectedly ordered to check herself into the jail, and she simply forgot the pills were there. RP 154.

2. First Jury Trial

During the first trial, officers testified that Woodard checked herself in for a voluntary jail commitment. RP 156. Two female officers strip searched Woodard and discovered pills taped to her breasts with medical tape. RP 163 (VanCuren-Dolan), 176 (Long).

Officer VanCuren-Dolan testified that although some people get "squirrely" and try to consume whatever it was they had brought into the jail, Woodard did not behave this way, and she did not "fight" them, but simply handed over the pills to the officers when asked. RP 163. When asked if Woodard had any loose items with her at booking, VanCuren-Dolan testified, "I don't think so. Every once in a while someone will have a piercing or something that they've forgotten to take off, but I don't recall specifically." RP 171.

Officer Murray testified to the following conversation he had with Woodard at the jail. RP 192-94. Murray asked Woodard why she had taped the pills to her breasts. RP 192. Woodard told him that she had a prescription for the pills. RP 193. Woodard explained that taping things

to her breasts to keep them safe was something her grandmother had taught her. RP 192-93. Woodard taped the pills to her breasts every morning to store them, rather than keeping them in her purse because her purse had previously been stolen. RP 192-94. Woodard told Murray she had taped the pills to her breasts that morning at around 8:00 A.M. and had forgotten they were there when she turned herself in to the jail. RP 194. Murray verified Woodard had an empty prescription bottle in her purse for oxycodone pills. RP 193.

A forensic scientist who tested one of the pills she received from Murray opined the pill contained Oxycodone. RP 200.

The State also presented a video depicting Woodard in a courtroom. RP 229-30. The custodian of records verified Woodard had testified in court around 2:15 P.M. prior to her jail commitment on the same day. RP 229. The video showed that while she Woodard on the witness stand, she reached into her purse to retrieve medication and explained she was "on a schedule." RP 231; see also RP 130-30 (parties describing video).

Woodard testified to the following. Ten years prior, she had been diagnosed with a variety of medical ailments including lupus and other chronic conditions. RP 237-38. On the date she booked herself into jail, she had been was under the care of both a physician and a surgeon due to a

recent surgery to replace her knee. RP 238. As a result of her conditions and the recent surgery, she took a variety of medications on a regular basis, including oxycodone, which had been prescribed to her to manage breakthrough pain. RP 239-40. She was always very careful with her pills, kept them in a safe at home, and even had Narcane, a medication for use if someone else, such as a baby, ever got access to her pills and overdosed. RP 240.

Woodard testified that she worked as a millwright, which required her to climb 330-foot windmill towers, and the job sometimes required her to stay up on the tower for hours at a time, even though the job was "not supposed to" require her to do that. RP 239-41. Woodard explained she did not want to be caught without her medications, and so had begun taping an emergency stash of pills to her breasts every morning. Her grandmother had rolled valuables in a sock and pinned them to her bra. RP 241. Woodard had tried this method, but because her chest was significantly bigger than her grandmother's, it was too "noticeable" for her. RP 241. After trying various tapes, she found one that worked without pulling her skin off, and she got into the habit of taping her pills to herself every morning. RP 241. It became part of her "morning ritual." RP 241. Both her doctor and surgeon had given her permission to use this method to carry her emergency medications. RP 242.

The day she was ordered to go to jail had been very stressful, and "traumatic"; she "was floored" at being ordered to turn herself into the jail. RP 244. Per her normal routine, she had taped the oxycodone pills to herself that morning. RP 247. But due to the stress of the day, she had completely forgotten about them until the moment she removed her bra during the strip search. RP 247. She apologized and promptly handed the pills to the jail staff once she realized they were there. RP 247.

In closing the State argued it had proven beyond a reasonable doubt that Woodard knew she had the oxycodone pills taped to herself. RP 278. The prosecutor argued Woodard had "ample opportunity" to "remember that she had all those pills there" given that she had gone home after court, returned to the jail, sat in the waiting area for three hours, and been patted down by officers prior to the strip search. 3RP 275-76. He further argued Woodard's testimony that the doctors had given her permission to tape the pills to herself rather than keep them in a pill bottle was not credible. RP 277.

Defense counsel argued the case was based on a "misunderstanding" and Woodard "simply … forgot" the pills were there. RP 279. Woodard was under the care of a physician and also had to turn herself into jail that day and did so. RP 279. She waited in the lobby for hours, was taken back, put her purse in the bucket as instructed, was being

strip searched, started to take off her bra, remembered the pills, and promptly handed them over to the officers. RP 280. Woodard did not remember the pills until that moment. RP 283. She was not trying to sneak pills into the jail. RP 283. She had simply forgotten. RP 283. The State had failed to prove this was intentional possession. RP 283.

The first trial resulted in a hung jury and the court declared a mistrial. RP 295-96.

3. Second Jury Trial

Testimony in the second jury trial was similar to the first trial, with the following notable differences. In the second trial, Woodard testified that just prior to the strip search, jail staff told Woodard she was not allowed to bring her oxycodone into the jail. RP 525-26. In cross-examination, the prosecutor elicited additional details about Woodard's testimony that she had obtained permission from the court to go home and that she also stopped by her parents' house before turning herself into the jail, and confronted her with her prior testimony under oath in the first trial. RP 527, 532-33. Woodard testified she said she did not recall that testimony. RP 532-33. The prosecutor also cross-examined her more intensely about her claim that she taped her pills to herself even while on job sites that required her to climb 330-foot wind towers and remain there for hours at a time. RP 530-31.

In the second trial, Officer VanCuren-Dolan's testimony about Woodard's behavior during the strip search was significantly different. VanCuren-Dolan made no mention that Woodard was not "squirrely," made no attempt to "consume" the pills or to "fight" as other inmates sometimes did when contraband was discovered. Compare RP 163 with RP 449-56. Instead, VanCuren-Dolan testified simply that she and Officer Long conducted a strip search of Woodard, and "[o]nce the bra was removed, there was something that was taped to her chest that we had her take off." RP 449, 451. VanCuren-Dolan emphasized that the area where the pills were taped was an area that was not touched by officers during the cursory pat-down conducted prior to the strip search. RP 452. Defense counsel then asked if Woodard handed the tape to Officer VanCuren-Dolan. RP 456. VanCuren-Dolan answered, "Um, I don't know that she just handed it to us." RP 456 (emphasis added). Counsel made no attempt to confront VanCuren-Dolan with her prior testimony under oath to elicit similar testimony on the relevant details she testified to in the first trial, or to confront her with the inconsistencies in her testimony. See RP 456-58.

The trial court provided the jury with Instruction No. 11, setting forth three elements: (1) that on the relevant date, Woodard "was confined to a county or local correctional institution," (2) that she "[k]knowingly

possessed a controlled substance; and (3) the acts occurred in Cowlitz County. CP 49. The instruction further subdivided element (2) into alternative means a), b), and c) and instructed jurors the element was met if Woodard was "in the institution," "[u]nder the custody or supervision" of the institution's staff, or "on any premises subject to the control of the institution." CP 49. Instruction No. 7 defined oxycodone as a controlled substance. CP 45.

The court also provided Instruction No. 5, defining "knowingly" as follows:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. <u>It is not necessary that he [sic] person know that the fact, circumstance, or result</u> is defined by law as being unlawful or an element of a crime.
>
> If a person had information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowing [sic] as to a particular fact is required to establish an element of a crime, <u>the element is also established if a person acts intentionally</u> as to that fact.

CP 43 (emphasis added).

The Court also provided Instruction No. 2, stating, "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP 40.

In closing, the State and defense both argued the case hinged on the knowledge element and Woodard's credibility regarding her claim that she simply forgot the pills. RP 558 (State), 596 (State), 559 (defense). The State argued Woodard knew she had the pills "from the moment she stepped foot in that jail." RP 558. The prosecutor pitted Woodard's testimony and credibility against that of the officers and argued the officer testimony "ma[de] more sense." RP 554-56. Defense counsel conceded Woodard had taped the pills to herself that morning, but argued she had forgotten they were there by the time she checked herself into the jail. RP 564. Defense counsel also argued Woodard did hand the pills to the officers, showing she was cooperative and not trying to sneak the pills in. RP 560-61. However, in this second trial given VanCuren-Dolan's revised testimony, the defense had to rely solely on Woodard's testimony to argument this point.

The second jury submitted the following question to the court: "Do we need to have a unanimous decision on all 3 parts?" CP 53. The trial court responded by writing, "Please refer to your jury instructions and continue to deliberate." CP 53. Ultimately, this second jury returned a conviction. CP 55.

4. Sentence & Appeal

The trial court sentenced Woodard to ten days of incarceration. CP 59. Woodard timely appealed. CP 67.

C. ARGUMENT

1. WOODARD'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HER TRIAL COUNSEL FAILED TO CONFRONT OFFICER VANCUREN-DOLAN ON CRITICAL AND INCONSISTENT TESTIMONY GIVEN IN A PRIOR MISTRIAL.

Woodard's right to effective assistance of counsel was violated when her trial attorney failed to confront a key law enforcement witness on prior relevant and inconsistent testimony, given under oath during a previous mistrial.

The federal and State Constitutions guarantee all persons accused of a crime the right to effective assistance of counsel. U.S. CONST. AMEND. VI; WASH. CONST. ART. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) counsel's representation was deficient, and (2) the representation prejudiced the defendant. In re Pers. Restraint Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Prejudice is shown where there is a "reasonable probability" that but for counsel's error, the "result of proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). Where a claim is established, reversal of the conviction and remand for a retrial is the appropriate remedy. Thomas, 109 Wn.2d at 232.

There is a "strong presumption" trial counsel's performance was effective. McFarland, 127 Wn.2d at 335. The decision to cross-examine a witness, or the manner of such cross-examination, is often found to be within a defense attorney's allowable range of reasonable trial strategies or tactical decisions. For example, in In re Pers. Restraint Lui, the Washington Supreme Court held that trial counsel's failure to impeach a testifying officer with his extensive disciplinary record was a valid trial strategy. 188 Wn.2d 525, 549, 397 P.3d 90 (2017). This was particularly true given that trial counsel conceded the disciplinary records and the cases they involved "had no nexus to Lui's case," and the Court found counsel's assessment was reasonable. Id. Moreover, the Court further described the disciplinary records as mere "allegations" that had resulted in numerous "internal investigations." Id. The fact the allegations and investigations existed was not disputed. Id. However, there is no indication in the appellate record that the truth of the underlying allegations had been or would be conceded by the State or the officer. C.f. id. (not mentioning any concession regarding underlying facts).

In contrast, the presumption of effective performance is overcome, and prejudice is established, where the record shows evidence of undisputed authenticity was available at the time of trial, this evidence could have been used to confront and cross-examine a witness on a critical trial issue, yet trial counsel failed to obtain the evidence for trial and failed to conduct cross-examination on the matter. State v. McSorley, 128 Wn. App. 598, 600-10, 116 P.3d 431 (Div. II.2005). A showing of prejudice is further strengthened where the context of the trial was a credibility contest and counsel's error permitted the prosecutor to pit the defendant's testimony and credibility against that of a law enforcement witness. Id. at 609-10.

In McSorley, the defendant was convicted of child luring. 128 Wn. App. at 600. The trial evidence was largely a credibility contest between McSorley and the alleged victim. Id. at 610. A key issue at trial was whether McSorley had been running errands prior to a mid-morning medical appointment as McSorrel testified, or whether he was driving around looking for a child to molest. Id. at 609. A detective testified he called the doctor's office and was told McSorley's appointment had been in the afternoon. Id. at 606. Counsel failed to object to this hearsay. Id. Weeks after the conviction, defense counsel moved for a new trial and presented a fax from the doctor's office showing McSorley's appointment

had been at 10:30 A.M. Id. at 608. The State asserted it did not dispute the authenticity of the evidence, but did dispute whether it qualified as "newly discovered evidence." Id. The trial court denied the motion for a new trial. Id.

The appellate court concluded trial counsel had been ineffective for failing to object to the hearsay, failing to obtain the fax by the time of the trial, and failing to use the fax to cross examine the detective during the trial. Id. at 609. Because the case was a credibility contest between McSorley and the alleged victim, and because cross-examination of the detective regarding the fax would have born on a critical issue at trial, the appellate court found prejudice and reversed for a new trial. Id. at 609-10. Also critical to the analysis was the appellate court's acknowledgement that the failure to confront the detective with this evidence allowed the prosecutor "to pit McSorley's credibility against that of an experienced police detective, to assert that McSorley was knowingly being untruthful about when his appointment was, and to claim that McSorley's testimony failed to explain a six-hour time gap." Id. at 610.

The context of McSorley is very similar in several respects to what occurred in Woodard's second trial. First, the underlying evidence was undisputed and would have been accessible for trial counsel to obtain and utilize during cross-examination. It was undisputed Officer VanCuren-

Dolan had testified in the previous trial under oath. RP 163. Her exact testimony was also undisputed. RP 163. The record shows conclusively the recording and transcript of the first trial would have been available to the trial attorneys at the time of the second trial. See RP 404-05 (discussing prior testimony), 512-13 (court reporter testifying that court proceedings are recorded in ordinary course of business). Thus, just as in McSorrel, the underlying evidence was of undisputed authenticity and was available for trial counsel to utilize in cross-examination. Id. at 608.

Moreover, during motions *in limine*, both parties openly discussed the possibility they may rely on testimony from the prior trial in order to conduct cross-examination. RP 404-45. The parties even discussed the proper method for doing so, in order to avoid referencing the fact of a prior criminal trial or hung jury. RP 404-05. Specifically, the State moved to conduct any cross-examination by referring the prior statements as testimony under oath, and not refer to a prior "trial." RP 404. Defense counsel indicated that if that method were used, she was not concerned with any resulting prejudice to Woodard. RP 405 ("I don't have a problem with that."). This shows the failure to utilize the transcripts during cross-examination was not due to any defense trial strategy to avoid prejudice to Woodard by referring to a prior trial; counsel felt that concern had been adequately addressed. Rather, the record shows there

would be no such prejudice given the safeguards outlined by the court and agreed to by both parties, and that counsel had no remaining concerns regarding that issue.

Second, just as in McSorley, the evidence counsel failed to address on cross-examination was central to the core disputed issue in the case. In McSorley, the defendant's conduct around the time of the alleged offense was critically relevant to the defense theory of general denial, i.e. that he was running errands before a medical appointment, not driving around looking for a victim. Id. at 609. Similarly, Woodard's conduct around the time of the strip search, and particularly her behavior and demeanor immediately after officers observed the pills, was critically important.

The central issue at trial was her mental state: whether she had truly forgotten the pills or had lied after being caught trying to sneak the pills into the facility. Compare RP 558 (State's final sentence in closing was "She knew. Find her guilty.") and RP 596 (repeating in rebuttal closing final sentence), with RP 566 (defense final sentence in closing argument that Woodard did not know, find her not guilty). Whenever the question in a case involves a mental state, there is no direct evidence. There is only a defendant's testimony and circumstantial evidence of their statements and behavior related to the allegations. Thus, the officer's testimony—that Woodard was not "squirrely," that she did not behave like

others who attempted to consume contraband before it could be confiscated by officers, and that Woodard instead was cooperative and promptly handed the pills to officers—this testimony was of critical importance. RP 163.

Yet despite this critical importance, Woodard's trial attorney failed to elicit similar testimony from VanCuren-Dolan in the second trial, and failed to cross-examine VanCuren-Dolan with her prior testimony under oath. As a result, her testimony in the second trial was different in key respects. During the first trial, VanCuren-Dolan testified Woodard was not "squirrely." RP 163. Woodard did not try to consume the pills. RP 163. Woodard did not "fight." RP 163. When officers saw the pills and asked for them, Woodard complied and turned them over. RP 163. The implication of the testimony was that Woodard did so promptly and without delay or hesitation. See RP 163.

VanCuren-Dolan failed to mention any of these details in the second trial. See RP 449-51. Instead, during the second trial, Officer VanCuren-Dolan testified simply that she and Officer Long conducted a strip search of Woodard, and "[o]nce the bra was removed, there was something that was taped to her chest that we had her take off." RP 449, 451. Defense counsel asked if Woodard handed the tape to Officer VanCuren-Dolan. RP 456. In testimony that was completely contrary to

her testimony in the first trial, VanCuren-Dolan responded, "Um, I don't know that she just handed it to us." RP 456 (emphasis added).

At this point, counsel could have simply asked the following questions: "Isn't it true you previously testified under oath that Woodard was not 'squirrely'? That she did not 'fight'? That she did not attempt to 'consume' the pills like many other inmates do under similar circumstances? And that she did promptly 'hand them over' when instructed by officers to do so?" Instead, counsel failed to confront VanCuren-Dolan at all regarding the prior testimony. RP 456-57. She simply allowed VanCuren-Dolan to testify she "did not recall" which officer received the pills, the topic moved on, and counsel stated she had no further questions. RP 456-58.

Third, just as in McSorley, the failure to cross-examine on this critical issue pitted Woodard's testimony and credibility against that of an experienced law enforcement officer, and allowed the prosecutor to argue Woodard's testimony did not fully account for various details. Id. at 610. The prosecutor heavily emphasized in closing argument that Woodard's testimony did not make sense and should not be found credible. RP 550, 555. The prosecutor also relied on officer testimony to argue Woodard's behavior and demeanor during the strip search showed she knew she had the pills. RP 552 (prosecutor arguing, "Why was she nervous and hesitant

when taking off her bra? Because she knew she was about to be caught."); see also RP 554-56 (prosecutor additionally pitting Woodard's testimony against officer testimony, and arguing officer testimony "make[s] more sense" than Woodard's testimony).

Given the context addressed above, the defense attorney's failure to confront Officer VanCuren-Dolan with her prior testimony on the critical issue of Woodard's behavior during the strip search was deficient performance. In addition, because this failure allowed the prosecutor to pit Woodard's credibility against that of law enforcement, in the context of a trial that hinged entirely on Woodard's credibility regarding her mental state, the failure was prejudicial. It is relevant that the first trial included more favorable testimony and resulted in a hung jury; whereas the second trial with less favorable testimony resulted in conviction. Compare RP 295-96, with CP 55. Although there were additional variables, meaning the disparate outcomes is not conclusive alone, still this strengthens the case for prejudice.

In addition, the juror question submitted in the second trial shows the jury was grappling with whether to convict, and at some point, there was not unanimous agreement on all elements. See CP 53 (asking if jurors had to be unanimous as to "all 3 parts"). As, the State pointed out in closing, Woodard's own testimony established she possessed oxycodone

after turning herself into a detention facility. RP 525, 535 (testimony), 552, 568 (closing). Thus, the record supports the obvious conclusion: the jury was grappling with whether Woodard's possession was "[k]nowingly." CP 49 (Instruction No. 11: to conviction).

While it might be argued the jury's reference to "three parts" related to parts a), b) and c) of element (2), whether Woodard was "in the institution," under "custody of supervision" of the institution's staff, or "on any premises" controlled by the institution. CP 49. However, none of these alternative elements were in dispute. Woodard's own testimony established that all three alternatives applied to her: she had possessed oxycodone pills after walking into the facility, turning herself in for a jail commitment, and being strip searched by staff. RP 525, 535. Furthermore, the crime's elements were labeled (1), (2), and (3), with element (2) corresponding to the knowledge element. CP 49. The alternative means elements were labeled a), b), and c). CP 49. Thus it is far more likely jurors' reference to "3 parts" showed they were grappling with the sole disputed element of "[k]knowingly," rather than the undisputed alternative means. Given the above, there is more than a "reasonable probability" counsel's error affected the outcome of proceedings. McFarland, 127 Wn.2d at 335.

Thus, both steps of the ineffective assistance of counsel test are met, and a new trial is required. Fleming, 142 Wn.2d at 865; Thomas, 109 Wn.2d at 232.

2. THE JURY INSTRUCTIONS WERE MISLEADING, INTERNALLY INCONSISTENT, AND FAILED TO ADEQUATELY SET FORTH THE CORRECT LEGAL STANDARD ON THE CORE DISPUTED ISSUE AT TRIAL.

The trial court's Instruction No. 5 relieved the State of its burden to prove "knowingly," an essential element of the crime, beyond a reasonable doubt. The instructions were inadequate. Woodard's conviction must be reversed.

Unclear jury instructions, particularly those relevant to a defense, implicate a defendant's constitutional rights to due process and to present a defense. See State v. LeFaber, 128 Wn.2d 896, 898, 913 P.2d 369 (1996) (abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 104, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010))[1] ("the jury instruction failed to make manifestly clear the law of self-defense and thereby prevented Defendant from obtaining a fair trial"); U.S. CONST., Amends. VI, XIV; WASH. CONST., ART. I, §§3, 22.

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[1] The part of LeFaber abrogated by O'Hara was the reasoning addressing the standard of review for instructional errors raised for the first time on appeal under RAP 2.5(a)(3). O'Hara, 167 Wn.2d at 104.

In general, jury instructions when read as a whole must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present her theory of the case. O'Hara, 167 Wn.2d at 105. In the context of jury instructions that are central to a criminal defendant's theory of the case or other defense, the instructions must do more than adequately convey the law. State v. Walden, 131 Wn.2d 469, 473, 478, 932 P.2d 1237 (1997) (context of self-defense) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). They must "make the relevant legal standard manifestly apparent to the average juror." Id. When such instructions are ambiguous, confusing, or misleading, reversal is required. O'Hara, 167 Wn.2d at 108 (discussing LeFaber, 128 Wn.2d 896); Walden, 131 Wn.2d at 477-79. Here, the knowledge instruction was central to the core disputed element of the case, and to the defense's central argument. Thus, this heightened standard applies to the definition of "knowingly" in the instructions.

Jurisprudence confirms that the legal standard for knowledge can be confusing. The Washington Supreme Court has ruled that in other contexts requiring actual knowledge, the permissive inference (i.e. finding a person in fact did know because she should have known) must not be conflated with allowing a conviction based on a "should have known" standard. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015)

(finding of actual knowledge required for accomplice liability conviction). The Supreme Court has noted that this actual knowledge standard, and related permissive inference, can be "understandably misinterpret[ed] ... to allow a finding of knowledge ... if the defendant 'should have known'" but in fact, subjectively did not know. Id. at 374 (quoting State v. Shipp, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980)).

Thus, the knowledge requirement must be carefully explained and thoughtfully instructed to avoid any such confusion. Here, however, the knowledge requirement was not adequately explained.

i. Instruction No. 5 is confusing, misleading, reduces the State's burden of proof with respect to an essential element, and conflicts with Instruction No. 2.

Each of the three paragraphs in instruction No. 5 was both confusing and misleading. Moreover the instruction conflicts with other instructions. As a result, the instructions, read as a whole, were inadequate.

The first paragraph of Instruction No. 5 states,

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that he [sic] person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

CP 43 (emphasis added).

This paragraph permitted the jury to conclude that because Woodard knowingly taped the pills to herself that morning, it was not "necessary" for the State to prove Woodard knew the result would be unlawful—i.e. that she would later possess them in the jail and that would be a crime. CP 43. This is a misstatement of the law. Rather, the act the State was required to prove is that Woodard knew she was possessing the pills while in a correctional facility. However, the instruction does not clarify this point and so is confusing.

The second paragraph of Instruction No. 5 states,

> If a person had information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 43 (emphasis added).

This paragraph relieves the State of its burden to prove each element beyond a reasonable doubt. This is because it instructs the jurors that they are "permitted … to find" Woodard "acted with knowledge" simply because some other "reasonable person in the same situation" would have known. CP 43. This is akin to an instruction that because Woodard "should have known," the jury was permitted to find her guilty. This reduced the State's burden of proof—it was much easier to prove Woodard should have known, than that she actually knew.

As noted above, the Washington Supreme Court has repeatedly recognized the "'should have known'" standard should not be conflated with "'knowledge,'" and must be carefully distinguished from a permissive inference. Allen, 182 Wn.2d at 374 (quoting Shipp, 93 Wn.2d at 514); see also State v. Drewery, 8 Wn. App. 2d 1018, 2019 WL 1490620 (2019) (unpublished) (discussing the confusion that results from conflating "actual knowledge" with "should have known" and permissive inference).[2] The problem arises because this paragraph of the instruction did not clarify to the jury that in order to make this permissive finding, it had to conclude Woodard did in fact possess actual knowledge. Where, as here, the instruction failed to clarify this requirement, it was both confusing and misleading, and misstated the relevant legal standard.

The third paragraph states,

> When acting knowing [sic] as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 43 (emphasis added).

The errors in paragraphs one and two were further compounded by the misleading nature of paragraph three in the context of Woodard's case. It was undisputed Woodard intentionally taped the pills to herself. The dispute centered on whether she remembers and thus knew, of her

[2] This case is unpublished and not binding. Pursuant to GR 14.1, it is here cited only for whatever persuasive value this Court deems appropriate.

possession at any time after entering the facility but before the moment she removed her bra and handed the pills to the officers. Although the third paragraph may be sufficient for other cases, it was confusing in the context of this case. It left open the possibility of a conviction based on Woodard's intentional acts done that morning alone. For example, the jury could have concluded that because Woodard intentionally taped the pills to herself that morning, she knew the pills were taped to herself (at that point), and that was sufficient. Again, the jury is permitted to infer from a finding that she knew earlier to conclude that she did know later. But the jury is not permitted to replace a finding of later knowledge with a finding of earlier knowledge. Yet that is precisely what the instructions allow.

Furthermore, the instructions created an internal conflict. Instruction No. 2 states: "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP 40. Because Instruction No. 5 reduced the State's burden of proof with respect to the knowledge element (i.e. permitting a 'should have known' finding, rather than an 'actual knowledge' finding), it conflicted with Instruction No. 2. Compare CP 40 (Instruction No. 2) with CP 43 (Instruction No. 5).

For the reasons discussed above, the instructions were confusing, misleading, internally inconsistent and failed make the relevant legal

standard apparent to the average juror. This Court should find the instructions were insufficient.

ii. The instructional error requires reversal.

Instructional errors come in many varieties, and are subject to a variety of standards of appellate review. However, Washington courts have articulated at least three independent circumstances in which an error is constitutional and is presumed prejudicial to the defendant: preserved self-defense instructional errors; errors reducing the State's burden to disprove an essential element, and errors involving inconsistent jury instructions arising out of a misstatement of law. LeFaber, 128 Wn.2d at 902 (abrogated on other grounds by O'Hara, 167 Wn.2d at 101-03); O'Hara, 167 Wn.2d at 108; State v. Irons, 101 Wn. App. 544, 559, 4 P.3d 174 (2000). The latter two reasons apply here.

First, the error reduced the State's burden of proof. In O'Hara, the Washington Supreme Court recognized where a self-defense instructional error reduces the State's burden to disprove self-defense, the error is constitutional and presumed prejudicial. O'Hara, 167 Wn.2d at 105. This rule applies to the State's burden to disprove self-defense, because a colorable self-defense claim creates an additional element. Id. The "knowing" element in Woodard's case is a similarly essential element that was critical to the defense theory of the case. As discussed above,

Instruction No. 5 was confusing and misleading primarily because it relieved the State of its burden to find beyond a reasonable doubt that Woodard had actual knowledge she possessed the pills while in a correctional facility. See CP 43. Thus, the error was constitutional and must be presumed prejudicial. Id.

Second, the error is also constitutional and presumed prejudicial because it created inconsistencies in the instructions based on a misstatement of the law.

> Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law. Where the inconsistency is the result of a misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant … .

Irons, 101 Wn. App. at 559 (citing Walden, 131 Wn.2d at 478, 932 P.2d 1237 (citing Wanrow, 88 Wn.2d at 239; State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980))).

Here, as discussed above, Jury Instruction No. 5 misstated the law by relieving the State of its burden to prove the knowledge element beyond a reasonable doubt. This misstatement of law created inconsistencies between Instruction Nos. 5 and 2. Instruction No. 2 required the State to prove each element beyond a reasonable doubt. CP 40. But Instruction No. 5 permitted the jury to "find" the knowledge element was met if it concluded some other

reasonable person would have known … even if the jury was not certain whether Woodard in fact did know. CP 43. This inconsistency between Instruction Nos. 2 and 5 arose out of the misstatement of law contained in Instruction No. 5, and so "must be presumed to have misled the jury in a manner prejudicial to the defendant." Irons, 101 Wn. App at 559.

For each of these two independent reasons, articulated in O'Hara and Irons, the instructional error was constitutional and must be presumed prejudicial to Woodard.

Even under a harmless error analysis, which Woodard does not concede applies, the record establishes the instructional error caused prejudice in Woodard's second trial. As discussed in the ineffective assistance of counsel section above, "knowledge" was the sole disputed issue in the trial. Thus, an error regarding this essential element cannot be said to be harmless under any circumstances. This is particularly true here, where the State's case did not present overwhelming evidence of guilt, and the trial was essentially a credibility contest between Woodard and other witnesses providing circumstantial evidence. In addition, the case was a close call, as shown by the prior hung jury and jury question regarding unanimity submitted in the second trial. Under such circumstances, there is more than a reasonable likelihood the instructional error impacted the outcome of trial. Reversal is required.

3. COUNSEL'S FAILURE TO OBJECT TO THE INSTRUCTIONS WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In addition, defense counsel's failure to object to the faulty instructions was deficient performance, and independently requires reversal. In the context of a trial that hinged entirely on the knowledge element, counsel's failure to object to a standard that allowed, or even merely suggested, the jury could convict based on a lower "should have known" standard, was not a reasonable tactical decision. As discussed above, it is more than reasonably likely the error impacted the trial outcome. Reversal for ineffective assistance of counsel is required on this basis as well.

4. THE CUMULATIVE ERROR DOCTRINE REQUIRES REVERSAL.

Under the cumulative error doctrine, even where the errors standing alone do not independently require reversal, reversal is required where the accumulation of several errors combined resulted in an unfair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Here, as discussed above, defense counsel's performance was deficient for failure to obtain the transcript of the prior trial, failing to confront Officer VanCuren-Dolan with omitted and inconsistent testimony, and failing to object to erroneous instructions. The trial court independently erred in providing the misleading and legally inaccurate jury instructions. Particularly where all these errors bore on the same issue—knowledge—and

where this element was the sole disputed issue at trial, this Court should apply the cumulative error doctrine to reverse the conviction and remand for a new trial.

D. CONCLUSION

For the reasons discussed above, Woodard respectfully requests that this Court reverse her conviction and remand for a new trial.

DATED this 13th day of December, 2019.

Respectfully submitted,

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December 13, 2019 - 3:29 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53026-1
Appellate Court Case Title:	State of Washington, Respondent v. Tessita L. Woodard, Appellant
Superior Court Case Number:	18-1-00520-2

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