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Court of Appeals  
Division III  
State of Washington

NO. 315053-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

WILLIAM JOSEPH CANTRELL, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 12-1-00970-1

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BRIEF OF RESPONDENT

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## I. ANSWERS TO ASSIGNMENTS OF ERROR

1. **Defense counsel provided effective assistance of counsel when he made a tactical decision not to request a jury instruction on “Unwitting Possession.”**
2. **Any error present in the original Judgment and Sentence has been rendered moot upon the entry of a new Judgment and Sentence following the defendant’s failure to comply with the provisions of his Residential DOSA sentence.**

## II. STATEMENT OF FACTS

On August 10, 2012, the defendant was arrested at a Kennewick Home Depot store following an investigation by the Richland and Kennewick Police Departments into a shoplifting report that was associated with his red Dodge Durango. (RP<sup>1</sup> 12, 121). At the time of arrest, the defendant’s Dodge Durango was located in the store parking lot. (RP 12, 121). The back storage area of the Durango was packed with numerous household kitchen items, power tools, and appliances, which were all brand new and in boxes. (RP 18, 32-36, 69). The defendant was initially charged with one count of Second Degree Trafficking in Stolen Property. (CP 1-2). A later search of the defendant’s vehicle yielded both

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<sup>1</sup> Unless otherwise dated, “RP” refers to the Transcript of Verbatim Report of Proceedings for the jury trial held on December 13, 2012, and reported by Renee L. Munoz.

heroin and methamphetamine, and the defendant was charged on October 15, 2012, with one count of Unlawful Possession of a Controlled Substance (Heroin) and one count of Unlawful Possession of a Controlled Substance (Methamphetamine). (CP 22-23).

Officer Michael Rosane of the Kennewick Police Department was among the first officers on the scene during the day in question and assisted in the arrest of the defendant. (RP 13, 121). Three other individuals were also arrested at that time in association with the stolen property. (RP 12). Ms. Cindy McCready, her daughter Kristy McCready, and Shawn Charpentier were either in the vehicle or in the vicinity when law enforcement arrived. (RP 15, 121-22). The officers initially secured the vehicle and the McCreadys, and then Officer Rosane detained Mr. Charpentier as he exited the Home Depot. (RP 121-22). The defendant was subsequently detained inside Home Depot and placed into custody.

While trying to establish who the driver of the Dodge Durango was, the defendant initially denied he was the driver, but eventually admitted that he was driving. (RP 13-14). The keys to the Dodge Durango were found in the defendant's pockets. (RP 14).

As the defendant was being transported and interviewed, Detective Damon Jansen of the Richland Police Department seized the Dodge Durango, sealed it, and transported it to the Richland Police Department

for execution of a search warrant. (RP 28-29). The warrant was executed on August 16, 2012. (RP 32). During his search and inventory of the vehicle, Detective Jansen located two shaving kits in the rear storage compartment of the vehicle. (RP 33-36). One shaving kit was on top of the boxes of appliances and power tools, and the second one was located in between some of the boxes. (RP 33-36). The first shaving kit was solid black and contained four gift cards, a social services card with the name William J. Cantrell, and a prescription pill bottle and prescription explanation sheet that both contained the name William J. Cantrell. (RP 37, 39-41, 91-92).

The second shaving kit was gray and black, and appeared to be a kit full of items associated with drug use. (RP 41). Among other things, the kit contained a syringe loaded with a brown liquid that later tested positive as heroin, a digital scale, used cotton swabs, metal measuring spoons, and small white crystals which tested positive for methamphetamine. (RP 41-54, 104-05).

During the trial, the State admitted portions of two jail phone calls between Kristy McCready and the defendant while he was in jail. (RP 71-74). The two individuals were involved in a romantic relationship at that time. (RP 75, 130). The calls were made on August 20, 2012, and August 28, 2012. (Ex. 34-Transcript at 98-99, 134; RP 76-77). In the first call,

the defendant among other things stated to Ms. McCready, "Say that stuff is yours."<sup>2</sup> (RP 76). Ms. McCready then asked the defendant if "you want me to take the charges - - and say that the shit was mine." (Ex. 34-Transcript at 99). In the August 28th call, the defendant told Ms. McCready, "There was some dope in the vehicle, too. . . . But it was in the back. . . . [j]ust like a couple - - a gram or something. But it was within Shawn's reach. So that could be anybody--." (Ex. 34-Transcript at 134). The defendant was aware that these statements were subject to recording at the time he made them. (RP 74).

At trial, the defense theory was that the defendant did not have any knowledge of the particular drugs contained in the gray and black shaving kit. (RP 133, 146). The defendant argued that the first conversation referred to the stolen property in the vehicle, and the second conversation referred to two grams he "may" have hid in the back of the Dodge Durango. (RP 134-35). The defendant later stated in reference to his jail phone call where he admitted knowledge of drugs, "I wasn't sure what drugs they were talkin' about. I'm thinkin' I might have hid two grams in it. You know, I got two different vehicles. You know, maybe I hid two grams in my other vehicle." (RP 156).

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<sup>2</sup> The transcript of Exhibit 34 shows the word "say that" as inaudible, however, the words can be heard when listening to the conversation. (Ex. 34-Transcript at 98).

The defendant admitted that the Dodge Durango was his and that the drugs were found in his vehicle. (RP 158-60). The defendant further admitted that drugs were found in the back of his vehicle comingled with the property that he had a written list of, and the bag that contained his social services card and prescriptions. (RP 160). In addition to acknowledging that he was a drug user and had used drugs earlier on the day in question with Cindy and Kristy McCready, the defendant admitted that he may have supplied drugs to the McCreadys before going to Home Depot on the day of the arrest. (RP 147, 150). However, he was unsure about that since he believed it was four or five months ago. (RP 147).

On cross-examination, in addition to admitting to multiple crimes of dishonesty, the defendant admitted that he lied to the police about who was driving the Dodge Durango on the day in question. (RP 158). The defendant admitted that he would have Kristy McCready lie for him regarding possessing the items located in the vehicle, and that in his jail phone call he wanted to place the blame of the possession of the narcotics located in the vehicle on Shawn Charpentier. (RP 154-55, 158-59). The defendant maintained that he had no knowledge of any drugs in a gray and black case, and other than the drugs he thought were in the car, he did not know of any others. (RP 132-33, 135, 145-46, 182-90). Counsel discussed the possibility of requesting an unwitting possession jury

instruction, but reserved that decision for later to see “which way we go.” (RP 118-19). Defense counsel subsequently did not request the unwitting instruction at the end of the trial.

The defendant was found guilty on all charges, and sentencing was delayed pending defense counsel’s request for an inquiry into a possible residential Drug Offender Sentencing Alternative (DOSA). (CP 71-72; RP 213-14). The defendant argued for and was granted a special DOSA sentence over the State’s objection. (CP 86-97; RP 02/08/13, at 59; RP 03/06/13, at 67). On October 11, 2013, the defendant’s residential DOSA sentence was revoked for failure to comply with the terms set forth therein. (CP 110-11). After revocation, the defendant was sentenced to 24 months in prison with 12 months of community custody, and a new Felony Judgment and Sentence was entered. (CP 112-20).

The only two issues on appeal are: (1) trial counsel’s representation was ineffective due to his decision to not ask for an unwitting possession instruction, and (2) the original Judgment and Sentence contained a scrivener’s error with regard to 12 months of community custody listed under the prison based DOSA section

### III. ARGUMENT

#### 1. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant alleges that his trial counsel was ineffective because he did not request a jury instruction on “unwitting possession.” (App. Brief at 6). The decision to request such an instruction was purely a tactical and strategic decision, and thus, not ineffective.

When evaluating an ineffective assistance claim, Appellate Courts engage in a strong presumption that representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail, the defendant bears the entire burden of showing:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*McFarland*, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A trial counsel's performance is not deficient if his actions go to trial tactics and strategy. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). A reasonable probability is not what conceivably might have happened, but is instead “probability sufficient to undermine confidence in

the outcome.” *Id.* at 34 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *Review denied*, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Furthermore, “[b]ecause the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336. As a result, to prevail in his claim, the defendant here must show that defense counsel’s decision to not request a jury instruction on unwitting possession falls outside of a “conceivable” tactic or strategy. *Id.*; *Grier*, 171 Wn.2d at 33. The defendant in the instant matter is unable to meet that burden.

**A. Trial counsel’s performance was not deficient since an unwitting instruction would not have been appropriate given the facts of the case; however, even if one were appropriate, the decision to not request an instruction was a reasonable trial tactic or strategy.**

Possession is unwitting if the person did not know the substance was in his possession or he did not know the nature of the substance. *See* WPIC 52.01. Once the instruction is given, the defendant takes on the burden of proving by a preponderance of the evidence that the possession

was indeed unwitting. *Id.* Even if defense counsel requested an unwitting instruction, it would not have been appropriate since the defendant here acknowledged he had drugs in the back of his vehicle. (Ex. 34-Transcript at 134). See *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008).

In the instant case, trial counsel's decision to not request the unwitting possession instruction is explained by a thorough understanding of what the consequences of requesting such an instruction would be. "The unwitting possession defense is analogous to the affirmative defense of entrapment in terms of their respective burdens of proof. That is, entrapment, like unwitting possession, is a defense that admits that the defendant committed the crime and seeks to excuse the unlawful conduct." *State v. Buford*, 93 Wn. App. 149, 152, 967 P.2d 548 (1998).

In cases where the State alleges constructive possession as opposed to actual possession, as in the instant case, the unwitting possession defense may be far less attractive. In actual possession cases, the item is on the person of the individual charged. No further proof is necessary. There is no need to show 'dominion and control.' *State v. Chavez*, 138 Wn. App. 29, 35, 156 P.3d 246 (2007). It is a simple factual question. 'Constructive' possession is a very different legal construct. "Constructive possession exists where a person not in actual possession

still has dominion and control over the object or place where the object was found. . . . To determine whether a defendant was in constructive possession of an object, we look to the totality of the circumstances.” *Id.* at 34-35. (Citations omitted). As a result, constructive possession is an issue open to argument. It doesn’t ask the jury to answer a single factual question, but rather to engage in a complicated, multipronged analysis.

One of the factors that a jury or a court may consider when determining if a defendant exercised dominion and control over an object is to assess whether the defendant had knowledge of the item. *State v. Jeffery*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995). Therefore, the defendant may argue that his lack of knowledge prevented him from exercising dominion and control. In a constructive possession case, a defendant can argue that a lack of knowledge makes him not guilty, while holding on to the ‘beyond a reasonable doubt’ standard. A reasonable strategy is for an attorney to not request the unwitting possession, and then argue a lack of knowledge along with other features, simultaneously holding onto the ‘beyond a reasonable doubt’ standard, and argue that his client’s lack of knowledge prevents him from being guilty. Here, defense counsel made a tactical decision, electing to hold the State to its burden of proving that the defendant was in possession of the drugs beyond a reasonable doubt. He based his closing argument around that. (RP 183).

Defense counsel argues that the defendant was not in exclusive control of the drugs, and that he couldn't take immediate possession of the drugs. (RP 185-86). Trial counsel was not ineffective in choosing to not request the instruction.

The defendant relies on *State v. George*, 146 Wn. App. 906, 914-16, 920, 193 P.3d 693 (2008) for the proposition that unwitting possession applies in constructive possession cases. (App. Brief at 10). While this may be true where sufficient evidence supports an instruction, the defendant's reliance here on *George* is misplaced. The *George* Court examined a situation where a defendant was a passenger in a car owned and driven by another individual. *Id.* at 912. After the vehicle was stopped for speeding, law enforcement discovered a marijuana pipe in the back seat. *Id.* at 912-13.

Unlike the instant case, the defendant in *George* unequivocally denied having any knowledge of marijuana or a marijuana pipe being present in the vehicle. *Id.* at 915. At trial, defense counsel twice asked for an unwitting instruction and it was denied by the trial court, because the defendant did not testify. *Id.* at 914. The trial court held that in order to avail himself of the unwitting instruction, the defendant would have to testify. *Id.* The Appellate Court reversed the conviction, stating that a

sufficient evidentiary basis existed for the instruction absent the defendant's testimony. *Id.* at 916. That is simply not the case here.

In contrast to the defendant in *George*, the defendant here was the driver and the owner of the vehicle where the drugs were discovered. Furthermore, property in the back of the vehicle belonged to the defendant, as did the shaving kit containing the defendant's identifying information. (RP 37, 39-41, 91-92). Moreover, the instant case is not one where the defendant denies all knowledge of drugs in the vehicle like in *George*. In the second jail phone call played for the jury, the defendant unequivocally admits, "There was some dope in the vehicle, too. But it was- - . . . . in the back. . . . . But it was within Shawn's reach. So that could be anybody--" (Ex. 34-Transcript at 134). Despite that admission, the defendant later recanted, and instead argued that perhaps he misremembered which car he hid the drugs in, and maybe he was wrong about the drugs being in the Dodge Durango. (RP 134-35, 155-56).

The defendant consistently attempted to rephrase his admission of knowledge by replacing the dispositive phrase, "There was some dope in the vehicle, . . . ." with "I said, 'I may have hid. . . .'" (EX 34-Transcript at 134; RP 155; *See also* RP 134-35). This reversal still does not help the defendant, nor does it reconcile the defendant's admission that the drugs in the back of the vehicle were within Mr. Charpentier's reach. (*See* RP 133,

156). The defendant argued that if he did hide his drugs, he would never have left them out on the boxes, but would have instead placed them in a locked compartment underneath all of the boxes that was only accessible by key. (RP 133).

Even if one assumes for a moment that the defendant in fact hid his drugs in this compartment (or “thought” he did), they would now be under lock and key. If under lock and key, they would not be in Mr. Charpentier’s reach and the defendant would not have been able to blame Mr. Charpentier for the drugs as he planned to as stated in the jail phone call. (*See*, Ex. 34-Transcript at 98-99, 134; RP 133, 156). Furthermore, the defendant did not deny suggesting that he and the McCreadys place the blame entirely on Shawn Charpentier. (RP 159). Consequently, an unwitting instruction was not appropriate.

Even if the trial court would have granted an unwitting instruction, defense counsel’s performance was not deficient since the decision was a tactical one. *E.g.*, *Grier*, 171 Wn.2d at 43. The issue here is not whether an unwitting instruction is useful in a drug case, but more specifically, was defense counsel’s decision conceivably tactical? *Id.* at 42. In *Grier*, a defendant appealed his conviction arguing ineffective assistance of counsel because his attorney chose to withdraw a jury instruction on a lesser included offense, and instead, pursued an all or nothing strategy. *Id.*

at 20. The Court held that despite the risk, this decision was not unreasonable and was “at least conceivably a legitimate strategy” or tactic. *See Id.* at 42. The Court later reaffirmed this position in *State v. Breitung*, 173 Wn.2d 393, 400-01, 267 P.3d 1012 (2011), when it held that a trial counsel’s decision to withhold a similar instruction was a reasonable strategy.

In support of his argument, the defendant gives a general accusation that trial counsel misunderstood the law, and thus, did not effectively represent the defendant. (App. Brief at 10). The defendant goes on to say that since the defendant testified here, there is no tactical reason not to include the instruction. (*See* App. Brief at 11). These blanket assumptions ignore any number of possible tactics and trial strategies that the State believes defense counsel could have been pursuing.

One such tactic is that defense counsel simply did not think it was appropriate to request an instruction given the context of the testimony already presented. Another possible strategy and tactic may have stemmed from the burden of proof that comes with an unwitting instruction. In the face of the defendant’s conflicting statements, defense counsel may not have wanted to saddle the defendant with the burden of proving unwitting possession. The decision may also have been a result of

the numerous impeachments of the defendant's credibility. (RP 156-59). The defendant attempts to sidestep his burden of showing that this was not a tactical decision, by claiming that defense counsel misunderstood the case law based on a statement at the close of the State's case-in-chief. (App. Brief at 10; RP 118-19). However, the only thing that is clear from that statement is that defense counsel considered the instruction, but reserved his decision for later. (RP 119). Consequently, defense counsel did not request the instruction, likely for the reasons the State has identified. (RP 118-19).

As the *Grier* Court noted, the fact a particular tactic or strategy failed is "immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn. 2d at 43. Incidentally, the defendant here is using hindsight to attack his conviction, but offers nothing more than the fact that he was convicted as evidence. By only looking at how the instruction "might have been useful," the defendant fails to consider the variety of tactical reasons it may have been detrimental to his case, or simply not applicable. Since the decision was "conceivably" tactical, defense counsel's performance was not deficient.

**B. Trial counsel's performance did not prejudice the defendant, as there is no reasonable probability that the outcome would have differed with an unwitting possession instruction.**

Even if an unwitting instruction would have been relevant in this case, its omission is harmless, because the defendant was not prejudiced. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *State v. Lewis*, 156 Wn. App. 230, 242, 233 P.3d 891 (2010). An error by counsel, even if professionally unreasonable or deficient, will only warrant setting aside the judgment if the alleged error affected the judgment. *Strickland* 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *See also, State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006).

Thus, to set aside the judgment, the defendant must affirmatively prove prejudice by showing the error had an actual, not just a conceivable, effect on the outcome. *Id.* The State has shown that even if defense counsel could have asked for an instruction, the result would likely have been the same. Even if defense counsel was confused as to the state of the law surrounding unwitting possession, it did not have an effect on the outcome. *Cf. Grier*, 171 Wn.2d at 43; *Breitung*, 173 Wn.2d at 400-01. Properly informed trial counsel likely would have made the same tactical decision when viewed against the backdrop of the case as a whole. *Id.*

Furthermore, even if trial counsel had elected to request the unwitting possession instruction, there is no reasonable probability that the jury would have found him not guilty. The defendant was heard on tape referring to the drugs in the back of the Dodge Durango, and he admitted to the jury that he was heard referring to them on the tape. (RP 155). The defendant never explained how he knew the drugs were within Mr. Charpentier's reach. (Ex. 34-Transcript at 134; RP 157). Furthermore, the defendant admitted that he may have provided the exact kind of drugs found in the kit to the McCreadys prior to picking up Mr. Charpentier. (RP 147). The defendant admitted to knowing where the drugs were found in the automobile, and identified who he believed that he could blame the possession on. (RP 156). In addition, the defendant admitted he encouraged Ms. McCready to perjure herself and take responsibility for his crimes. (RP 158). Finally, the defendant fully admitted to the jury that he had no credibility. (RP 158-59). As a result, there is no reasonable probability that the jury would have found him not guilty.

The only evidence the jury heard about the defendant not knowing about the drugs were the defendant's conflicting statements. Given these facts, the presentation of an unwitting possession instruction would not have altered the outcome of the trial. The defendant has failed to show prejudice.

**2. WHILE THE ORIGINAL RESIDENTIAL DOSA JUDGMENT AND SENTENCE CONTAINED A SCRIVENER'S ERROR, ENTRY OF A NEW PRISON BASED JUDGMENT AND SENTENCE AFTER THE DEFENDANT WAS REVOKED FROM HIS RESIDENTIAL DOSA SENTENCE HAS RENDERED THE ERROR MOOT.**

The initial Residential DOSA Judgment and Sentence entered on March 6, 2013, erroneously listed 12 months of community custody under the prison based DOSA section. (CP 92). However, that scrivener's error now is moot. On October 11, 2013, the defendant's Residential DOSA sentence was revoked after the defendant failed to comply with the conditions of said sentence. (CP 110-11). On October 11, 2013, a new prison Judgment and Sentence was entered wherein the defendant was sentenced to 24 months in prison, and imposed 12 months of community custody. (CP 112-22). Thus, the scrivener's error on the first Judgment and Sentence has been rendered moot, and remanding the defendant for correction would serve no purpose.

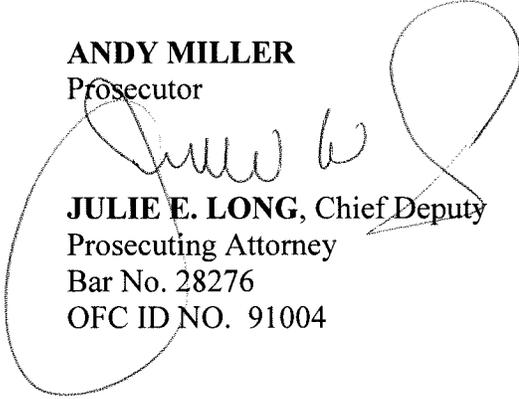
#### **IV. CONCLUSION**

Based upon the aforementioned rationale, the defendant's appeal should be denied and the conviction affirmed. Furthermore, the need to remand the matter back for correction of the Residential DOSA Judgment and Sentence was alleviated when the defendant was revoked from his

Residential DOSA sentence and an error-free prison based Judgment and Sentence was entered on October 11, 2013.

**RESPECTFULLY SUBMITTED** this 28th day of January 2014.

**ANDY MILLER**  
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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

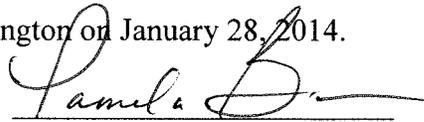
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