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No. 36010-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

MIKHAIL BARBAROSH,

Appellant

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

NO. 17-1-01220-7

BRIEF OF RESPONDENT

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WASHINGTON STATUTES

RCW 69.50.401318

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. It is not “clear and unmistakable” that the prosecutor was expressing his personal opinion of the defendant’s guilt as opposed to his view of the evidence. In any event, the issue was waived when the defendant failed to object.
- B. The defendant received effective assistance from his attorney.
- C. The failure to identify methamphetamine as the controlled substance in the to-convict instruction does not require the defendant to be resentenced.
- D. The State agrees that the filing fee and DNA fee should be stricken.

II. STATEMENT OF FACTS

A. The Crime

On November 4, 2017, Corrections Officer Cynthia Young of the Benton County Jail saw the defendant, who was then an inmate, approach a sliding door by the kitchen. RP¹ at 41-42. This is not allowed. RP at 42. Officer Young saw the defendant bend down. *Id.* Two other inmates were on the other side of the slider. *Id.* One of those individuals bent down and put something in his shirt pocket. *Id.* That individual was identified as

¹ Unless otherwise indicated, “RP” refers to the verbatim report of proceedings from jury trial on 01/08/2018 to 01/09/2018.

Daniel Kapitula, and in his pocket he had tightly wrapped folder paper which contained a crystal-like substance. RP at 71-72, 75. That substance was found by a forensic scientist with the Washington State Patrol Crime Laboratory, to contain methamphetamine. RP at 94, 102.

B. The trial—the instructions

The Court read WPIC 1.01 to the jury prior to opening statements.

Included in that instruction was this statement:

The defendant is charged by first amended information as follows:

Count I: That the said Mikhail S. Barbarosh in the County of Benton, State of Washington, on or about the 4th day of November, 2017, did unlawfully possess a controlled substance, to wit: methamphetamine, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

RP 01/08/18 at 2-3.

The “to-convict” instruction listed two elements: “1) That on or about November 4th, 2017, the defendant possessed a controlled substance; and 2) That this act occurred in the State of Washington.” CP 28.

The jury found the defendant guilty of the crime of Unlawful Possession of a Controlled Substance as charged in Count I. CP 34.

C. The trial—prosecutor’s rebuttal closing

The prosecutor made the following comment, which the defendant did not object to.

He possessed a controlled substance. He passed that to another inmate. He violated the rules of the trustee to do so, and ultimately Kapitula's found with that substance moments later. *I'm satisfied*. I'm confident that you will be satisfied considering everything that's been presented to you, and I ask you to find the defendant guilty of the crime of Unlawful Possession of a Controlled Substance and answer "yes" to the Special Verdict Form. Thank you.

RP at 160-61. (Emphasis added).

The DNA fee and Filing Fee were assessed against the defendant.

The Judgment and Sentence was entered prior to the legislation making these discretionary and the State agrees they can be stricken.

III. ISSUES

- A. Should the defendant's conviction be reversed where the prosecutor in rebuttal closing makes a two-word comment that he is satisfied with the evidence and where the defendant does not object?
1. What is the Standard on Review?
 2. Did the prosecutor commit misconduct: Is there a distinction between a prosecutor stating he is satisfied with the evidence as opposed to stating that his opinion is that the defendant is guilty?
 3. Even if this comment is considered prosecutorial misconduct, is it so ill-intentioned and flagrant that it could not be cured and was there resulting prejudice?

- B. Did the defendant receive ineffective assistance because his attorney failed to object to the two-word comment?
1. What is the Standard on Review?
 2. Should the defense attorney be deemed to have fallen below reasonable professional standards by making a split-second decision not to object to the comment?
 3. Can the defendant prove the two-word comment had any effect on the verdict?
- C. If the trial court orally informs the jury in a pre-trial instruction that the defendant is charged in Count I with Unlawful Possession of a Controlled Substance, to wit methamphetamine, and if the jury finds the defendant guilty “as charged in Count I”, is that sufficient to conclude that the jury found the defendant guilty of possessing methamphetamine, although the “to-convict” instruction did not state the specific drug the defendant was charged with possessing?
1. What is the standard on review regarding jury instructions?
 2. Should the defendant be allowed to raise this issue for the first time on appeal if the trial court orally instructed the jury that the defendant was charged with possession of methamphetamine, although the “to-convict” instruction does not specifically state the drug involved?

3. Can this case be distinguished from *State v. Gonzalez*, 2 Wn. App. 2d. 96, 408 P.3d 790 (2018), based on the trial court instructing the jury orally that the defendant was charged in Count I with possession of methamphetamine and the jury found the defendant guilty “as charged in Count I”?
 4. Was *Gonzalez* decided correctly?
- D. Should the filing fee and DNA fee be stricken based on legislation passed since the defendant was sentenced?

IV. ARGUMENT

A. Summary

There was no prosecutorial misconduct. The prosecutor’s comment, saying “I’m satisfied” related to a summary of the evidence and not the prosecutor’s personal opinion on the defendant’s guilt. The defendant waived an objection to this by not objecting. If it was in error, the trial court could have easily cautioned the jury that the opinions of the attorneys were irrelevant.

The defense attorney should not be deemed to have fallen below reasonable professional standards for not objecting. The objection may have been overruled, which possibly may have resulted in the jury thinking the defendant had something to hide or that the point was more

important than it really was. When faced with a split-second decision about objecting, a defense attorney should be presumed to have acted appropriately. In this case, the “I’m satisfied” comment had virtually no bearing on the outcome; of course, the jury knew that the prosecutor thought evidence proved the defendant was guilty. The defense attorney made the right call in not objecting, and the defendant was convicted because of the evidence, not a two-word comment in rebuttal closing.

Regarding the “to-convict” instruction, the fact left out of the defendant’s brief is that the trial court did tell the jury that the defendant was charged with possession of methamphetamine as charged in Count I. The jury convicted the defendant, *as charged in Count I*. Cases hold that if the jury instructions do not include an essential element, they can be challenged for the first time on appeal. That does not apply here. The trial court did instruct the jury that the defendant was charged with methamphetamine possession. If that is an essential element, it was not omitted from the court’s instructions. It is at least arguable that the defendant should not be allowed to raise the issue for first time on appeal.

The defendant’s argument would lead to an absurd result. The defendant requests this Court order that he be sentenced for marijuana possession. He was not charged with marijuana possession. The jury was told he was charged with methamphetamine possession. The only

evidence at trial dealt with methamphetamine and nothing about marijuana. The jury instructions dealt with methamphetamine and nothing about marijuana. Marijuana possession has its own issues regarding quantity and quality. The one thing the defendant cannot be guilty of is marijuana possession.

The State agrees that the DNA fee and the Filing Fee should be stricken from the Judgment and Sentence.

B. There was no misconduct because the prosecutor's comment was based on the evidence and, in addition, the defendant waived the issue by not objecting.

1. The Standard on Review

The defendant has the burden of proving there was prosecutorial misconduct and that it had prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

Regarding the alleged misconduct, a prosecutor is not allowed to express his personal opinion of the defendant's guilt. Thus, it is not permissible for a prosecutor to state he "knew" the defendant committed the crime. *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986). It is also not permissible for the prosecutor to state the testimony is "the most ridiculous thing I've ever heard." *State v. Lindsay*, 180 Wn.2d 423, 438, 326 P.3d 125 (2014).

However, it is permissible for a prosecutor to argue that the testimony convinces him or her of that fact. *McKenzie*, 157 Wn.2d at 53-54. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence but is expressing a personal opinion* based on the total argument, the issues in the case, the evidence discussed, and the court's instructions. *Id.* at 53-54.

If the defendant did not object to the prosecutor's allegedly improper argument, he is deemed to have waived any error on appeal, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). If the defendant failed to object, he must show on appeal 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. *Id.* at 761.

2. **Based on the total argument, it is not clear and unmistakable that the prosecutor's comment was his own opinion on the defendant's guilt rather than his opinion of the evidence.**

The context of the prosecutor's comment came at the end of his rebuttal argument:

He possessed a controlled substance. He passed that to another inmate. He violated the rules of the trustee to do so, and ultimately Kapitula's found with that substance moments later. *I'm satisfied*. I'm confident that you will be satisfied considering everything that's been presented to you, and I ask you to find the defendant guilty of the crime of Unlawful Possession of a Controlled Substance and answer "yes" to the Special Verdict Form. Thank you.

RP at 160-61. (Emphasis added).

As stated above, the defendant has the burden to prove it is clear and unmistakable that the prosecutor's two-word sentence was misconduct. What may appear to be a personal opinion about the defendant's guilt, may actually be an allowable statement where the prosecutor is attempting to convince a jury of certain facts drawn from the evidence. *McKenzie*, 157 Wn.2d at 53-54.

The distinction is illustrated by *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985). The prosecutor argued that a witness's testimony was unnecessary to convict Mr. Sargent, saying, "There was already evidence sufficient to convict the defendant of these crimes that were charged, and we went forward with it." *Id.* at 601 n.1. The Court held this was not an expression of personal opinion, but a permissible assertion that the evidence supports a guilty verdict. *Id.* Here, the prosecutor's two-word comment is arguably less objectionable than this. In this case, the prosecutor never veered further into danger, unlike the situation in

Sargent, with the prosecutor stating, “I believe Jerry Lee Brown. I believe him when he tells us I believe him when he said” *Id.* at 343. The Court held these were expressions of personal opinion and were improper.

In this case, the “I’m satisfied” comment was sandwiched between a summary that reviewed the evidence and a statement that the jury should review everything presented. Is the comment a guarantee of the defendant’s guilt by a representative of the State of Washington or the prosecutor’s conclusion based on the evidence? Based on the context and the total argument by the prosecutor, it is more likely that this is his opinion based on the evidence.

At the very least, the defendant has not proved that the prosecutor’s “I’m satisfied” comment was a clear and unmistakable statement of the prosecutor’s belief, independent of the evidence.

3. In any event, the defendant waived the issue by not objecting and there was no prejudice.

Even if the comment is deemed to be misconduct, it was not blatant, flagrant, or so ill-intentioned that it could not have been cured. The prosecutor’s opening argument took seven pages of transcript. The prosecutor’s rebuttal argument took three pages. Compare this alleged misconduct—two words, “I’m satisfied”, with that in *In re Glasmann*, 175 Wn.2d 696, 701-02, 286 P.3d 673 (2012) (booking photos altered with

captions added saying “Do you believe him”, “Why should you believe him”, and “Guilty”).

The court instructed the jury that the law is contained in the instructions, that statements of attorneys are not evidence, and that they must disregard any remark that is not supported by the instructions. CP 16. The defendant could have requested that the Court instruct the jurors that personal opinions of the attorneys should be ignored. In short, there is nothing about the comment that was flagrant or ill-intentioned, and the defendant waived any error by not proposing a curative instruction.

There is also no reason to believe this two-word comment was decisive to the jury. This is not a close case. The defendant was caught by a corrections officer on passing an object to another inmate. That object turned out to be a packet of methamphetamine.

C. The defendant cannot establish that his attorney was ineffective because there was no need to object to the two-word “I’m satisfied” comment, there was a tactical reason not to do so, and it had no effect on the verdict.

1. The Standard on Review

To establish ineffective assistance of counsel the defendant must *establish* that his attorney’s performance was deficient, and the deficiency prejudiced the defendant. Deficient performance is falling below an objective standard of reasonableness based on consideration of all the

circumstances. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. If either element of the test is not satisfied, the inquiry ends. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

There is a *strong* presumption that counsel's performance was reasonable. When counsel's conduct can be characterized as legitimate trial strategy or tactics, the performance is not deficient. *Id.* at 862-63.

2. The defense attorney did not fall below reasonable professional standards.

As stated above, there was no misconduct. A prosecutor is allowed to summarize the evidence and state his opinion of that evidence. Thus, the prosecutor's comment in *Sargent*, that there was sufficient evidence to go forward with the prosecution was not misconduct. If the defense attorney had objected, the objection would probably have been overruled. The jury would have been possibly left with a view that the defense attorney wanted to unfairly muzzle the prosecutor's closing argument and that the prosecutor's closing must have been powerful.

This Court should defer to the experienced trial attorney for the defendant and presume that her conduct was reasonable. She made a split-second decision not to object to the "I'm satisfied" comment. Perhaps she

thought it was not objectionable, which was certainly a reasonable opinion. Perhaps the prosecutor did not emphasize the comment. Perhaps the defense attorney thought an objection may backfire and make her look bad before the jury. There is no reason to overcome the strong presumption that the defendant was effectively represented.

3. The two-word comment had no effect on the verdict.

It is obvious to all jurors in a criminal case that the prosecutor believes the evidence is sufficient to convict. The jury did not convict the defendant because the prosecutor said he was satisfied with the evidence. The jury convicted because the defendant was caught passing drugs to another inmate in the Benton County Jail. The two-word comment *was* only two words.

D. This case is distinguishable from *State v. Gonzalez* because the trial court orally instructed the jury that the defendant was charged in Count I with possession of methamphetamine and the jury found the defendant guilty “as charged in Count I.”

1. The standard on review regarding jury instructions:

Jury instructions are reviewed de novo for errors of law. *State v. O’Donnell*, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007). Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Id.* at 322. A jury is presumed to

Instructions to the jury are sufficient to satisfy the requirement of a fair trial when, taken as a whole, they are readily understood, are not misleading to the ordinary mind, and properly inform the jury of the applicable law. *O'Donnell*, 142 Wn. App. at 324. Whether words used in a jury instruction require further definition is generally a matter of judgment to be exercised by the trial court. *Id.* at 325.

The United States and Washington Constitutions require that the jury be instructed on all essential elements of the crime charged. *Id.* at 322. When a “to-convict” instruction fails to contain all the essential elements to the conviction, the error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *Id.* at 322-23. The defendant is denied a fair trial if the jury must guess at the meaning of an essential element of the crime charge or if it might assume that an essential element need not be proved. *Id.* at 322.

2. **There is not a manifest error affecting a constitutional right concerning the “to-convict” instruction, and this Court should not review the alleged error for the first time on appeal because the trial court specifically informed the jury that the defendant was charged with possessing methamphetamine.**

Generally, the omission of an element from the jury instructions is of sufficient constitutional magnitude to warrant review when raised for

the first time on appeal. *Id.* The defendant also cites *State v. Clark-El*, 196 Wn. App. 614, 619, 384 P.3d 627 (2016) for this proposition. However, in none of those cases is there a transcript showing the trial court in a separate instruction correctly informed the jury of the elements. The trial court did not omit that the State was required to prove the defendant possessed methamphetamine—and only methamphetamine—from its instructions. RP 01/08/18 at 3.

It is presumed that the jury followed this instruction. The jury would not have had to guess at what controlled substance was involved. Likewise, the jury would not have thought that proof of any controlled substance was all that was required. It is at least arguable that there is no manifest error, or that any error affects a constitutional right.

3. The trial court’s oral instruction distinguishes this case from *Gonzalez* on the issue of whether the sentence was authorized.

The trial court’s oral instruction distinguishes this case from *State v. Gonzalez*, 2 Wn. App. 2d. 96, 408 P.3d 790 (2018). Here, the jury was specifically told that the defendant was charged with possession of methamphetamine in Count I. The jury returned a verdict finding him guilty *as charged in Count I* of Unlawful Possession of a Controlled Substance.

There is no requirement that the trial court repeat twice that the defendant is charged with Unlawful Possession of a Controlled Substance, to wit: Methamphetamine. Courts have given the “to-convict” instruction more importance than others, but that is because it should contain all the elements of the crime. However, the trial court’s oral instruction contained all elements of the crime. The jury was fully instructed of the charge and the specific drug, methamphetamine, allegedly possessed.

This is a key fact not present in *Gonzalez*. Because of the oral instruction herein, the jury knew that the substance alleged was methamphetamine. They knew that was the substance in *Count I*. (Emphasis added). Not only was methamphetamine the only drug discussed and proven, it was the specific drug the court told the jury the defendant was charged with possessing. And it is significant that they found the defendant guilty *as charged in Count I*. CP 34.

4. With all due respect, *Gonzalez* was not decided correctly.

This issue was raised in *State v. Sibert*, 168 Wn.2d 306, 230 P.3d 142 (2010). In *Sibert*, the “to-convict” instruction did not mention the specific drug involved in the charges of Delivery of a Controlled Substance and Possession with Intent to Deliver a Controlled Substance. However, the court held that the defendant and the jury were on notice that

the controlled substance was methamphetamine. *Id.* at 312. The charging documents referred to methamphetamine and the “to-convict” instructions referred to the crimes “as charged.”

This reasoning is applicable herein, with the Information alleging possession of methamphetamine and the jury verdict finding the defendant guilty as charged in Count I. In addition, the key additional fact here, not present in *Sibert* or *Gonzalez*, is that the trial court also specifically informed the jury that the defendant was charged with possession of methamphetamine.

Also consistent with *Sibert* is *State v. Williams*, 162 Wn.2d 177, 170 P.3d 30 (2007). In *Williams*, the defendant unsuccessfully argued that the penalty classification of the underlying charge in a bail jump prosecution was an element. *Id.* at 182. The underlying offense was alleged as “possession of a controlled substance, a felony”. *Id.* at 181. The defendant contended that the Information should have alleged a specific classification of offense, an A, B, C felony or a misdemeanor. *Id.* at 182. The “to-convict” instruction, only stated, “That the defendant was charged with Possession of a Controlled Substance.” *Id.* at 187 n.4. The *Williams* court rejected the defendant’s argument and held that the “to-convict” instruction was sufficient, citing the probable cause affidavit and the Information. *Id.* at 188.

Finally, and possibly most important, the defendant's argument would end in an absurd result. The defendant was charged with methamphetamine possession. The trial court informed the jury the defendant was charged with methamphetamine possession. The only drug discussed at trial was methamphetamine. The jury found the defendant guilty as charged. There is no reason to ignore all these facts and sentence the defendant for marijuana possession, a substance he did not possess, much less possess in the quantity needed for a conviction. *See RCW 69.50.4013.*

E. The filing fee and DNA fee should be stricken from the Judgment and Sentence.

This is not a reflection on the trial court. When the sentence was imposed, these fines were mandatory. New legislation has passed since then making the fines discretionary. The State agrees the defendant should have the benefit of this change in the law.

V. CONCLUSION

The conviction should be affirmed. The defendant raises three arguments. First, the two-word comment, "I'm satisfied", in the prosecutor's rebuttal argument may have been questionable. But in context, the prosecutor was referring to the evidence, not giving his guarantee that the defendant was guilty. The defendant did not object to

this comment, which could have easily been cured by an instruction to ignore personal opinions of the attorneys.

Second, the defense attorney failed to object to this comment. It is easy to criticize an attorney after the fact. The defense attorney had to make a split-second decision about whether to object to the comment, which may have made her look bad in front of the jury and may have backfired if the objection was overruled, or to let the comment go. She chose not to object. This was a reasonable choice and did not fall below standard professionalism. Even if the objection was sustained, which is a big if, it would have been obvious to the jury that the prosecutor believed the evidence proved the defendant's guilt.

Finally, concerning the "to-convict" instruction: Unlike other cases, here the court orally informed the jury that the defendant was charged with methamphetamine possession. There was no other drug discussed in the trial or in the instructions. The verdict form referred back to the charged offense—which the trial judge informed the jury was methamphetamine possession. The defendant's argument would result in an absurd result: Although no one ever said the defendant possessed marijuana, although there was no proof he possessed marijuana, although the jury was told he was charged with possession of methamphetamine, the defendant argues he should be sentenced for marijuana possession.

With the exception of the DNA fine and the Filing Fee, the conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED on December 14, 2018.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", written over a horizontal line.

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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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Signed at Kennewick, Washington on December 14, 2018.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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