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Division III
State of Washington

NO. 37148-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

JASMINE SABOURIN

Appellant.

Superior Court No. 19-1-00084-20

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

A properly instructed jury found the defendant guilty of the crimes of unlawful possession of a firearm and unlawful possession of a controlled substance. The defendant claims on appeal that the jury reached its decision based upon insufficient evidence to support either charge, that the prosecutor committed prejudicial misconduct during closing argument, and that ineffective assistance of counsel require reversal of these convictions. The defendant's claims are without merit and the defendant's convictions should be affirmed.

B. STATEMENT OF FACTS

On July 14, 2019, Klickitat County Sheriff Dwayne Matulovich was patrolling an isolated and remote section of Klickitat County checking for homeless encampments or illegal campers. RP 66. During the patrol he came upon a campsite consisting of two tents situated approximately 10-15 feet apart. RP 77. After approaching these tents on foot he observed a significant amount of vomit outside of one of the tents and attempted to check the welfare of the tent's occupants to see if they were unwell. RP 71. Deputy Matulovich then encountered one of the occupants, Cody Brock, who identified himself and claimed he was the only occupant. RP 72. Deputy Matulovich recognized Brock as a known associate of the defendant, Jasmine Sabourin, and was under the

belief that both Brock and the defendant had outstanding warrants. RP 72. Deputy Matulovich returned to his vehicle after his contact with Brock and was able to verify that both Brock and the defendant did, in fact, have outstanding warrants. RP 75. After awaiting a back-up officer to arrive, Deputy Matulovich returned to the campsite and placed Brock into custody. RP 77. Deputy Matulovich then observed a female feigning sleep on the bedroll within the tent and identified her as Jasmine Sabourin, the defendant. RP 76. The defendant was taken into custody on her outstanding warrant. RP 76. During the arrests Deputy Matulovich observed a pair of pants with an empty holster located at the end of the bedroll. RP 76. The defendant was permitted to put on clothes during the arrest and dressed in a pair of pants, but not the pants that had the holster on the belt. RP 77. The defendant also inquired about her cash that was in a small storage bag attached to the tent. RP 77. Deputy Matulovich agreed to remove the cash from the bag. RP 77. While removing the cash he also observed a firearm cartridge in the bag that appeared to be a .9 mm cartridge. RP 77.

After placing both the defendant and Brock in custody Deputy Matulovich applied for, and was granted, a search warrant to search both tents for the presence of a firearm. RP 77. Deputy Matulovich was aware that both Brock and the defendant were convicted felons and believed they may be in possession of a firearm based on the empty

holster and the bullet. RP 77. Once he began his search of the first tent Deputy Matulovich observed the presence of drug paraphernalia, so he secured the scene, exited the tent, and applied for, and was granted, a second warrant to search for the presence of controlled substances and drug paraphernalia. RP 78. With both warrants in hand, Deputy Matulovich and a back-up officer began searching the tents. RP 78. A search of the tent that the defendant was sleeping in revealed the presence of drug paraphernalia, firearm ammunition, and, located under the bedroll between where Brock and the defendant were sleeping, an unloaded .41 caliber revolver and five .41 caliber cartridges lying close to the firearm. RP 80-82, 97. A search of the second tent revealed various items of dominion and control that identified the defendant, a backpack and a woman's jacket that contained a number of blue pills. RP 80-82. In the backpack, Deputy Matulovich found two .41 caliber rounds which matched the caliber of the revolver found in the other tent. RP 78. Deputy Matulovich was unable to find any evidence of a third party, besides Brock and the defendant at the isolated campsite. RP 81. Subsequent testing of the .41 caliber revolver confirmed that it was a functional weapon. RP 88. The five pills found in the woman's jacket were tested by the Washington State Patrol Toxicology Lab, four were found to contain oxycotton and the other one contained acetaminophen. RP 104-06.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION FOR BOTH CRIMES.

The jury found the defendant guilty of violations of RCW 9.41.040, Unlawful Possession of a Firearm, and RCW 69.50.4013, Unlawful Possession of a Controlled Substance. Prior to reaching its guilty verdicts the jury was properly instructed that to find the defendant guilty of unlawful possession of a firearm the State had to prove beyond a reasonable doubt: 1) that on or about July 14, 2019, the defendant – the defendant knowingly had a firearm, to wit: a pistol in her possession or control; 2) that the defendant had previously been convicted of a felony; and 3) that the possession or control of a firearm occurred in the State of Washington. Instruction No 8; RP 123-124. The jury was also instructed that the State had the burden of proving beyond a reasonable doubt that: 1) that on or about July 14, 2019, the defendant possessed a controlled substance; and 2) that this act occurred in the State of Washington. Instruction No 14; RP 126. The jury was also instructed on the appropriate definitional instructions and informed of the “Old Chief” stipulation regarding her prior underlying felony conviction. RP 117-128.

To determine whether the State has produced sufficient evidence to support the charged crime, courts view the evidence in the light most

favorable to the State and determine whether any rational trier of fact could have been found guilty beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. Credibility determinations are made by the trier of fact and are not subject to review. *State v. Miller*, 179 Wn.App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.* A challenge to the sufficiency of the evidence supporting a criminal conviction is highly deferential to the jury's decision and Courts do not consider "questions of credibility, persuasiveness, and conflicting testimony." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

The defendant essentially makes the same arguments in this appeal that were made during her closing argument. These arguments were rejected by the jury in this case. The evidence presented was more than sufficient to support the jury's verdict of guilt for both the possession of a firearm and of a controlled substance.

The evidence shows the defendant and Cody Brock were the sole occupants of the two tents at a remote and isolated campsite where no evidence of a third party was found. A location in an isolated portion of the woods in Klickitat County that would circumstantially suggest the need for some type of protection, for example, a firearm, from various dangerous

animals. Neither Brock nor the defendant, as convicted felons, were permitted to lawfully possess a firearm. A pair of pants with a pistol holster was found in the first tent where the defendant was sleeping. A holster attached to a pair of pants that would be known to anyone wearing the pants or observing another wearing the pants was present in their belongings and suggests the knowledge and presence of a firearm.¹ The defendant's cash, that she claimed and directed the officer to, was stored in the small bag attached to the tent along with a firearm cartridge. The firearm and loose ammunition for that firearm were located under the bedroll and between where the defendant and Brock were sleeping and where the defendant had the immediate ability to take actual possession of the firearm. The presence of firearm cartridges and the holster would lead a reasonable trier of fact to suspect a firearm was present, justify the search warrant that was granted and the discovery of the firearm. It is even circumstantially possible that the revolver and loose ammunition found under the bedroll that the defendant was sleeping on when contacted by law enforcement, standing alone, would justify a jury finding that the defendant possessed the firearm. She had been awoken by a law enforcement officer who had then left her alone in the tent for a short period of time before she was re-contacted. As a convicted felon

¹ The defendant, in her brief, mentions that she told the officer the holster was for a BB gun which had been recently lost. This evidence while presented in the CR. 3.5 hearing, was never presented to the jury.

she knew that possession of a gun was illegal but, in a misconception of the applicable law, thought that if the gun was found unloaded it may be less serious. This would be along the lines of the incorrect urban myth that somehow black powder weapons are not illegal and it is only modern firearms that felons are prohibited from possessing or that a law enforcement officer must identify themselves as such if asked directly.

The jury was also justified in finding that the controlled substances were possessed by the defendant. Immediately upon beginning the search of the tent for a firearm, law enforcement observed numerous items of paraphernalia which suggested the presence of controlled substances. After stopping the initial search and obtaining another warrant to search for controlled substances a second search revealed the controlled substances located in a woman's coat in the storage tent. The defendant was the only woman present at this campsite. Also located were documents of dominion and control in the defendant's name. And while the defendant's campsite, as the defendant points out, is not a place where she receives mail, it is isolated, not close to other campsites, and contains important personal documents of the defendant. The fact that Brock and the defendant were living in an isolated and remote area where everything had to be unloaded and stored in the tents would suggest they were well aware of the items that were contained within their tents and had to be placed into the tents. The evidence also suggests that everything stored in the tents would have had to

be carried in person for approximately 30 yards from the road to the campsite. RP 70. The jury, as a rational trier of fact was justified in finding sufficient evidence the defendant knowingly possessed a controlled substance.

Ultimately a properly instructed jury presented with properly admitted evidence, as here, determines if the State has proved a charge beyond a reasonable doubt. The jury in this case made that determination when finding the defendant guilty as charged. This Court should find that there was sufficient evidence to justify the jury's findings of guilt.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT.

Prosecutorial misconduct may deprive a defendant of his guarantee to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012) . “To prevail on a claim of prosecutorial misconduct, the defendant must establish ‘that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.’” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).) “Prosecutors may. . . argue an inference from the evidence, and prejudicial error will not be

found unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.” (*State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985); *see State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (“[P]rosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective.”)).

An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor’s conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). To establish prejudice, the appellant must then show that the improper comments had a substantial likelihood of affecting the verdict. *Id.*, at 760; *see State v. Chacon*, 200 Wn.App. 1033.

The defendant has not objected to the trial court’s instructions to the jury. RP 117-129. Rather the defendant has focused on two statements made to the jury during the prosecutor’s opening closing argument which she claims to be misconduct. The statements were not objected to during trial and were appropriate in their context.

The first statement the defendant claims constitute misconduct was made by the prosecutor:

Now, my job is to prove this case beyond a reasonable doubt. And reasonable is a word that’s thrown about in the law quite a bit and reasonable is decided by you. You know we say that what would a

reasonable person do in these circumstances, in self-defense, would a reasonable person knowing what the defendant know, act in this manner. And, I would suggest for you to ask yourself two questions. Do I have a doubt? And, is it a reasonable doubt? RP 130.

The second allegation of claimed misconduct is where the prosecutor used an example of constructive possession:

Instruction Number 11 it defines what possession is and possession can be actual or it can be constructive. And constructive possession occurs when there is no actual physical possession, but there is dominion and control over the item. An example would be you're a convicted felon, you're at work and from some circumstances that I can't tell you right now, police are looking in your locked closet and you've got a firearm. You're in constructive possession of that firearm. If you have a firearm at home as you sit here today, you have constructive possession of that firearm. RP 132-133.

Neither of these comments constitute prosecutorial misconduct. They were not clear and unmistakable misconduct or an expression of personal opinion. The first statement, while including an arguably inarticulate but legally correct definition of "reasonable" in a self-defense context, simply tells the jury that reasonable doubt is a doubt that is reasonable. It does not present a fill in the blank situation nor does it shift or lessen the burden of proof. The statement simply states, correctly, that a reasonable doubt is a doubt that is reasonable. The second comment objected to is an example used to explain constructive possession. Read fairly, this example refers to a situation where "you've got a firearm" clearly and implicitly refers to one who knowingly has a firearm. Nothing in the context of the example suggests that one who unknowingly is in possession of contraband is guilty

of possessing that contraband.

Moreover, both statements were made during the opening closing of the State's case, discussed once and not repeated during rebuttal. Obviously, the court did not believe any misconduct occurred and interjected about a clear misstatement of the law. But the defendant's attorney did not object and no request for a curative instruction was made. RP 137-138. Additionally, while the defendant's trial attorney did not object when the statement was made he fully and fairly argued reasonable doubt and a lack of constructive possession in his closing statement. RP 137-138. He correctly identified the sole issue as constructive possession and argued facts from the evidence as to why the State failed to meet its burden of proof. RP 137-138. He argued a failure to prove dominion and control over the tent. RP 137-139. He even argued that given the campsite, where you have "lots of people flopping," someone else could have left the guns and drugs under the defendant's bedroll and in the female's jacket in the other tent where the defendant stored her personal papers and belongings. RP 137-138. While these arguments were eventually rejected by the jury, he did address and respond to arguments made by the State that the defendant claims constitute misconduct.

In determining misconduct Courts focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d

at 762. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Emery*, 174 Wn.2d at 763, (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464, (1932)). Here, the prosecutor’s comments were not misconduct, flagrant, ill-intentioned or prejudicial to the defendant’s right to a fair trial. They were simply proper argument that were not objected to, were consistent with the Court’s instructions were obviously not so flagrant or ill-intentioned that they could not have cured by an objection or an admonition to the jury.

3. DEFENSE COUNSEL WAS NOT INEFFECTIVE.

To prevail in an ineffective assistance claim a defendant must show that his counsel’s performance fell “below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This threshold is high due to the great deference afforded to decisions of defense counsel. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (defendant must overcome “a strong presumption that counsel’s performance was reasonable”). “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kylo*, 166 Wn.2d at 863. However, a defendant can rebut this presumption by showing that “there is no conceivable legitimate tactic

explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To satisfy the prejudice prong, a defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. This reasonable probability is a prospect "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The defendant argues that counsel was ineffective because he failed to object to the State's closing argument, specifically the phrases or statements he previously raises and challenges in her prosecutorial misconduct argument. But the defendant cannot demonstrate prejudice. As discussed above, none of the prosecutor's statements that the defendant challenges as constituting prosecutorial misconduct were improper nor were they "so flagrant and ill-intentioned" that they could not have been cured by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, at 719, 940 P.2d 1239 (1997). As such, the defendant's trial counsel did not provide deficient performance by failing to object to the prosecutor's statements nor was the defendant prejudiced by his failure to object to the challenged statements.

D. CONCLUSION

The defendant's challenges to her convictions are without merit and her

conviction should be affirmed.

Respectfully submitted this day 10th of , September 2020.

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