

NO. 45109-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TYRONE M. ST. OURS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 13-1-01217-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Where defendant’s due process rights protected where the State dismissed all counts related to evidence that was not preserved for trial and the evidence was neither material nor exculpable as to the remaining count? 1

2. Did the trial court properly allow a witness to testify regarding his observations? 1

3. Has defendant failed to show that his trial counsel’s performance fell below an objective standard of reasonableness or that he was prejudiced? 1

4. Has defendant failed to show that the prosecutor committed misconduct in closing where her argument was based on reasonable inferences drawn from the evidence presented at trial?..... 1

B. STATEMENT OF THE CASE. 1

1. Procedure..... 1

2. Facts 3

C. ARGUMENT.....4

1. DEFENDANT’S DUE PROCESS RIGHTS WERE NOT VIOLATED WHERE LAW ENFORCEMENT FAILED TO PRESERVE EVIDENCE WHICH WAS NOT MATERIAL OR EXCULPATORY.4

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED OFFICER THIRY TO TESTIFY REGARDING HIS OBSERVATIONS8

3. DEFENDANT HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL’S PERFORMANCE WAS REASONABLE AND NOT PREJUDICIAL9

4. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR COMMITTED ANY MISCONDUCT IN CLOSING, LET ALONE REVERSIBLE MISCONDUCT WHERE THE PROSECUTOR ARGUED REASONABLE INFERENCES BASED ON THE EVIDENCE11

D. CONCLUSION.14

Table of Authorities

State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993)	9
<i>In re Personal Restraint of Rice</i> , 118 Wn.2d 876, 888–89, 828 P.2d 1086, <i>cert. denied</i> , 506 U.S. 958 (1992)	10
<i>State v. Campbell</i> , 103 Wn.2d 1, 18, 691 P.2d 929 (1984)	5
<i>State v. Canaday</i> , 90 Wn.2d 808, 585 P.2d 1185 (1978)	6
<i>State v. Clafin</i> , 38 Wn. App. 847, 850–51, 690 P.2d 1186 (1984)	12
<i>State v. Copeland</i> , 130 Wn.2d 244, 279–80, 922 P.2d 1304 (1996)	6
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003)	11
<i>State v. Fisher</i> , 165 Wn.2d 727, 747, 202 P.3d 937 (2009)	11
<i>State v. Gilcrist</i> , 91 Wn.2d 603, 590 P.2d 809 (1979)	6
<i>State v. Gilmore</i> , 76 Wn.2d 293, 456 P.2d 344 (1969)	10
<i>State v. Gregory</i> , 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)	11
<i>State v. Grier</i> , 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)	9
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	10
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006)	11
<i>State v. Vaster</i> , 99 Wn.2d 44, 659 P.2d 528 (1983)	5, 6
<i>State v. White</i> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	10
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	5, 8
<i>State v. Wright</i> , 87 Wn.2d 783, 557 P.2d 1 (1976)	7

Federal And Other Jurisdictions

Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333,
102 L. Ed. 2d 281 (1988).....6

California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528,
81 L.Ed.2d 413 (1984).....6

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984).....9, 10

Constitutional

Fourteenth Amendment4

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were defendant's due process rights protected where the State dismissed all counts related to evidence that was not preserved for trial and the evidence was neither material nor exculpable as to the remaining count?
2. Did the trial court properly allow a witness to testify regarding his observations?
3. Has defendant failed to show that his trial counsel's performance fell below an objective standard of reasonableness or that he was prejudiced?
4. Has defendant failed to show that the prosecutor committed misconduct in closing where her argument was based on reasonable inferences drawn from the evidence presented at trial?

B. STATEMENT OF THE CASE.

1. Procedure

On March 25, 2013, the State charged TYRONE MANSON ST. OURS, hereinafter "defendant," with one count of unlawful possession of a controlled substance (heroin), and one count of unlawful possession of drug paraphernalia. CP 1-2. Prior to trial, the State moved to dismiss the paraphernalia count as the syringes that formed the basis of the charge had been destroyed. RP 4-5.

Defendant moved to suppress all evidence of the arresting officer's observations of the contents of a backpack based on the destruction of the syringes and the officer's failure to retain the backpack. RP 9-10. The court found that the officer's failure to retain the items went to weight, rather than admissibility. RP 11. The court ultimately concluded that the officer's observations were admissible, but prohibited the State from eliciting testimony as to the actual or even potential use of the syringes or a tin cup¹ that the parties believed had not been retained. RP 16, 50-55.

Jury trial commenced July 9, 2013, before the Honorable Jerry T. Costello. RP 63. At the close of the State's case, defendant moved to suppress the evidence found in the backpack based on an unlawful search incident to arrest. RP 96. While the court acknowledged that the motion was untimely, it considered the matter on the merits. RP 96. The court denied the motion. RP 97.

On July 11, 2013, the jury found defendant guilty of unlawful possession of a controlled substance. CP 58; RP 137. Defendant began berating the jury and had to be removed from the courtroom. RP 139. On July 12, 2013, the court sentenced defendant to a high-end, standard-

¹ Black tar heroin was found within a small tin cup inside the backpack. RP 73. The court had based its ruling that the officer could not reference this cup as a cooking tool as it had not been preserved. RP 50-51. As the cup had been preserved as evidence, the court allowed Officer Thiry to identify the cup as a "heroin cooker." See RP 74.

range sentence² of 24 months in custody, together with community custody and mandatory costs. CP 65-78; RP 155-57.

Defendant filed a timely notice of appeal. CP 59.

2. Facts

On March 22, 2013, Tacoma Police Officer Jeff Thiry was working routine bicycle patrol in Tacoma when he saw defendant walking with another man in the 2100 block of Pacific Avenue. RP 69-70. Officer Thiry recognized defendant and knew there was an outstanding warrant for defendant's arrest. RP 70. Officer Thiry asked defendant to remove the backpack he was carrying before placing him in handcuffs. RP 70. Inside the backpack, Officer Thiry observed numerous hypodermic syringes, one of which contained a dark brown liquid. RP 70-71. Officer Thiry disposed of all the syringes in accordance with safety protocol without testing the liquid. RP 71-73. In the same pocket as the syringes, Officer Thiry also found a tin cup, approximately one inch in diameter and one-half inch deep, and inside the cup was a clump of brown, tar-like substance. RP 73.

The backpack did not contain any items that identified defendant as the owner. RP 78. Once Officer Thiry determined the backpack

² Defendant had an offender score of 9+, giving him a standard range of 12+ - 24 months on Count I. CP 65-78.

contained no weapons or other contraband, he acquiesced to defendant's request to give the backpack to defendant's companion. RP 79.

Maureena Dudschus, a forensic specialist with the Washington State Patrol Crime Laboratory tested the brown, tar-like substance and identified it as heroin. RP 89.

Defendant testified on his own behalf. RP 104. According to defendant, he was just carrying the backpack for a man named Herbert, whom he was supposed to meet at the mission. RP 106. Defendant was walking to the mission with another man, "Kenny."³ RP 107. Defendant testified that he did not look in the backpack and had no idea of its contents. RP 108-09. Defendant denied asking Officer Thiry to give the backpack to Kenny because "you don't ask police officers to do anything for you," and even if he had, the office would not have done as he asked, anyway. RP 111.

C. ARGUMENT.

1. DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHERE LAW ENFORCEMENT FAILED TO PRESERVE EVIDENCE WHICH WAS NOT MATERIAL OR EXCULPATORY.

The Fourteenth Amendment and the Washington Constitution both require "that criminal prosecutions conform with prevailing notions of

³ This man's name might have also been "Kevin." RP 110.

fundamental fairness and that criminal defendants be given a meaningful opportunity to present a complete defense.” *State v. Wittenbarger*, 124 Wn.2d 467, 474–75, 880 P.2d 517 (1994). Due process requires that the prosecution disclose and preserve material exculpatory evidence for use by the defendant. *Wittenbarger*, 124 Wn.2d at 474–75. A showing that the evidence might have exonerated the defendant is not enough to subject the evidence to the duty to preserve. *Wittenbarger*, 124 Wn.2d at 475.

In cases which there has been an inadvertent or good faith loss or destruction of evidence Washington courts have devised a two-part test. *State v. Campbell*, 103 Wn.2d 1, 18, 691 P.2d 929 (1984). The first consideration is “whether there exists a reasonable possibility that the missing evidence would have affected the defendant’s ability to present a defense.” *Campbell*, 103 Wn.2d at 18 (citing *State v. Vaster*, 99 Wn.2d 44, 49, 659 P.2d 528 (1983)). Burden of establishing “reasonable possibility” rests with the defendant. *Campbell*, 103 Wn.2d at 18. “Reasonableness” is determined in light of the particular circumstances of each case. *Campbell*, 103 Wn.2d at 18-19. Lost or destroyed evidence that does not rise to the level of establishing a reasonable possibility that it will exculpate a defendant will be deemed insufficiently material to constitute a due process violation. *Campbell*, 103 Wn.2d at 19. To be materially exculpable, evidence must both (1) possess an exculpatory value that was apparent before it was destroyed, and (2) be of such a nature that the defendant would be unable to obtain comparable evidence

by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). If the State fails to preserve evidence that meets this standard, it must dismiss the criminal charges against the defendant; the State’s good or bad faith is irrelevant to the analysis. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *State v. Copeland*, 130 Wn.2d 244, 279–80, 922 P.2d 1304 (1996).

Next, the court must balance the consideration of “reasonableness” against the ability of the prosecution to have preserved the evidence, considering the procedures established for preserving evidence, the nature of the lost evidence, and the circumstances surrounding the loss. *Vaster*, 99 Wn.2d at 52. Where evidence does not rise to the level of being materially exculpable but is only potentially useful, a failure to preserve evidence does not constitute a due process denial unless a defendant can demonstrate the State’s bad faith. *Youngblood*, 488 U.S. at 58.

In *Vaster*, the inadvertent destruction of a rape victim’s vaginal fluid sample was held not to violate defendant’s due process right to a fair trial when there was unusually detailed eyewitness identification and there was a low percentage of probability that the fluid sample could be exculpatory. 99 Wn.2d at 53. *See also, State v. Gilcrist*, 91 Wn.2d 603, 590 P.2d 809 (1979) (lost hair sample did not violate due process); *State v. Canaday*, 90 Wn.2d 808, 585 P.2d 1185 (1978) (destruction of used

Breathalyzer ampoules did not violate due process); *State v. Wright*, 87 Wn.2d 783, 557 P.2d 1 (1976) (destruction of all direct evidence against defendant, found at murder scene, constituted a due process violation requiring dismissal of charges).

Here, defendant claims that his due process rights were violated because the State failed to preserve the backpack and alleged drug paraphernalia found within it. Appellant's Opening Brief at 7. However, defendant fails to show that either was "materially exculpatory." The fact that the backpack did not contain any indication of ownership was not exculpatory. It was found on defendant's back. While defendant could certainly raise the theory that he was carrying it for another person, the lack of identification only shows that the backpack may have been potentially useful, not that it possessed exculpatory value before it was released to defendant's friend. Moreover, defendant had the opportunity to cross examine Officer Thiry as to the lack of identification within the backpack. Defendant was able to present his defense of unwitting possession.

Likewise, the syringes found within the backpack were not materially exculpable, nor even potentially helpful. Defendant's theory of the case was that of unwitting possession. Defendant makes no argument explaining how the syringes were either exculpatory or useful for presenting this theory, but limits his argument to how he could not acquire "comparable evidence." See Appellant's Opening Brief at 11-12. Any

exculpatory value in the evidence would have involved whether or not the brown liquid was heroin or if the syringes were the type used for drugs. Since defendant was not charged with possession of a controlled substance based on the full syringe and the State dismissed the possession of drug paraphernalia charge based on the destruction of all the syringes, the evidence was not material to the possession charge, which was based on the bundle of heroin contained within the tin cup. And again, defendant had the opportunity to cross-examine Officer Thiry regarding this failure to either test the brown liquid or to retain the empty syringes.

Finally, defendant failed to show bad faith on the part of the State. The syringes were hazardous materials that were properly destroyed per safety protocol. RP 71, 73. Compliance with an established policy supports good faith. *Wittenbarger*, 124 Wn.2d at 477-78. The backpack was given to defendant's companion at defendant's request. RP 79. Nothing here supports a finding of bad faith on the part of the State.

As defendant has failed to show that the destroyed evidence was exculpatory or bad faith on the part of the State, his due process claim fails.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED OFFICER THIRY TO TESTIFY REGARDING HIS OBSERVATIONS.

A trial court's decision to deny a motion to suppress is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d

1182 (1985). A witness may testify as to what he or she observed. *See generally, City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Here, the trial court did not abuse its discretion when it allowed Officer Thiry to testify that he found syringes in the backpack defendant was carrying. Officer Thiry observed the syringes with his own eyes. RP 70. The trial court did not allow him to opine as to the potential use of those syringes as they were not preserved. *See* RP 16, 53-55. The trial court did not abuse its discretion because the officer's testimony was limited only to what he saw.

3. DEFENDANT HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S PERFORMANCE WAS REASONABLE AND NOT PREJUDICIAL.

In reviewing an ineffective assistance of counsel claim, the court begins with a strong presumption of counsel's effectiveness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient, and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness and is not based on a legitimate strategic or tactical decision. *State v. McFarland*, 127

Wn.2d 322, 334–36, 899 P.2d 1251 (1995). There is a strong presumption that counsel’s conduct constituted sound trial strategy. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888–89, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

Here, defendant claims he received ineffective assistance of counsel because his attorney did not move for dismissal based on the destruction of evidence, and made an untimely motion to suppress evidence based on an unlawful search. *See* Appellant’s Opening Brief at 12, 16.

Counsel did not move to dismiss the case based on due process violations. *See* RP 9. However, as defendant’s due process rights were met, he has failed to show either deficient performance or prejudice based on counsel’s failure to argue an unsupported motion. Also, while counsel brought an untimely motion to suppress all the evidence found in the backpack, there was no prejudice because the trial court considered the motion on the merits. RP 96-97. Had the trial court found that the bundle of heroin should have been suppressed, the case would have been dismissed for lack of evidence to support the charge.

Finally, the record as a whole supports a finding that counsel was competent. His attorney made pretrial motions, made appropriate objections, cross-examined the State's witnesses, reviewed jury instructions, made a coherent closing argument that supported his client's theory of the case, and argued for a low-end, standard-range sentence. Counsel appropriately challenged the State's case and defendant received a fair trial. Counsel's performance was neither deficient nor prejudicial.

4. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR COMMITTED ANY MISCONDUCT IN CLOSING, LET ALONE REVERSIBLE MISCONDUCT WHERE THE PROSECUTOR ARGUED REASONABLE INFERENCES BASED ON THE EVIDENCE.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The State has wide latitude to argue inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). But a prosecutor commits reversible misconduct by urging the jury to

decide a case based on matters outside the evidence. See *State v. Clafin*, 38 Wn. App. 847, 850–51, 690 P.2d 1186 (1984).

Here, defendant claims that the prosecutor committed misconduct by arguing facts not in evidence. Specifically, the prosecutor argued in rebuttal:

You heard testimony from Officer Thiry when he was asked, you know, what other items were in it. There really wasn't anything else in it. There was nothing that had a bill in Mr. St. Ours' name. Pretty clear that's not there, otherwise I could have been talking about it with you earlier. You know what? There was also nothing else in it with Herbert's name. Herbert, who doesn't have a last name.

RP 128. This argument was not reciting facts not in evidence, but was a reasonable inference based on Officer Thiry's testimony. Officer Thiry testified that he did not know the name of defendant's companion, that there was nothing in the backpack that identified it as belonging to defendant, that he searched the backpack, that he gave the backpack to defendant's companion at defendant's request, and that it was possible that the backpack belonged to defendant's companion. RP 78-79. This evidence suggests that there was nothing in the backpack to identify *any* person as the owner, and that Officer Thiry assumed it was defendant's because defendant was carrying it.

Moreover, this evidence also refutes defendant's second prosecutorial misconduct claim, that it was improper for the State to argue that the officer believed the drugs belonged to defendant. Officer Thiry, when asked if the backpack could have belonged to defendant's companion stated, "[i]t could have been, but it was on his back." RP 79. Clearly the officer believed that the backpack was defendant's because he was the person carrying it. The prosecutor's argument that Officer Thiry believed the contents of the backpack were defendant's because defendant was carrying the backpack and he followed defendant's request to give the backpack to his companion, was a reasonable inference based on Officer Thiry's testimony.

Even if the State's comments were improper, defendant has failed to show prejudice. A small bindle of heroin was found in a back pack defendant was carrying on his back. RP 70, 73, 89. Defendant was clearly in possession of the heroin. The jury⁴ did not accept defendant's affirmative defense of unwitting possession because it found his testimony that he was carrying the backpack for another person, who was not present at the scene, not credible. Defendant's claim of prosecutorial misconduct fails.

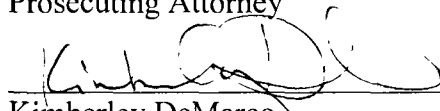
⁴ At sentencing, the trial court also noted that he did not find defendant's testimony credible. RP 157.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction.

DATED: May 12, 2014.

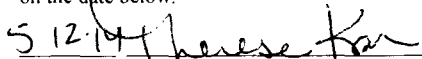
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