

NO. 35942-1

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

STATE OF WASHINGTON, RESPONDENT

JEREMY JAMES CLEVELAND, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 06-1-03719-9

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Was the prosecutor's rebuttal argument proper where he argued that knowledge was not an element of simple possession, explained the State's burden of proof beyond a reasonable doubt using a puzzle analogy, and argued that there was no reasonable doubt in this case?
2. Was defense counsel effective where defendant cannot satisfy both prongs of the Strickland test?

B. STATEMENT OF THE CASE.

1. Procedure

On August 10, 2006, the State charged Jeremy James Cleveland, hereinafter "defendant," with unlawful possession of a controlled substance with intent to deliver and second degree unlawful possession of a firearm. CP 1-2. On October 10, 2006, the State filed an amended information charging defendant with unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon. CP 15. On October 23, 2006, the parties appeared for trial before the Honorable Roseanne Buckner. RP 5. On October 24, 2006, a 3.5 and 3.6

hearing was held. RP 16-45¹. The court denied defendant's motion to suppress physical evidence and found all of defendant's statements were admissible. CP 19-20, 21-23; RP 57-58. The court filed findings of fact and conclusions of law for the 3.5 and 3.6 hearing on October 25, 2006. CP 19-20, 21-23; RP 89-90. At the conclusion of the trial, a jury found defendant guilty as charged. RP 243; CP 46, 47. The court imposed a low end, standard range sentence, 12 months flat time for the deadly weapon enhancement, standard costs and fines, and 9-12 months community custody. RP 254-55.

This timely appeal followed.

2. Facts

On May 12, 2006, Tacoma Police Department (TPD) Officers Gary Keefer and Mike Tscheuschner were in the Wapato Park area in a marked patrol vehicle. RP 109. TPD had received complaints from Metro Parks and citizens regarding prostitution and narcotics activity taking place in the park. RP 110. Officers Keefer and Tscheuschner observed defendant and three other individuals sitting in a vehicle parked in a secluded area of a Wapato Park parking lot. RP 110, 112, 176. The right

¹ The verbatim report of proceedings consists of 3 volumes, which will be referred to as follows:

October 4, 2006, motion is referred to as 10/4/06 RP and the two chronologically paginated volumes containing pretrial motions, trial and sentencing are referred to as RP.

rear passenger happened to look back as the officers pulled in the parking lot. RP 112. The right rear passenger looked startled and made a furtive movement toward the floorboard of the vehicle. RP 112-13. Officer Keefer contacted the right rear passenger and noted there was a glass smoking pipe with rubber tubing attached to it on the floorboard. RP 115. 141.

Defendant, who was seated in the driver's seat, was contacted by Officer Tscheuschner. RP 113-14, 176. Officer Tscheuschner located a machete by defendant's right leg and the center console of the vehicle. RP 115, 116, 176. The machete was approximately two inches away from defendant and it had an 18 to 20 inch blade. RP 116, 177. Officer Tscheuschner immediately recognized the item as a machete because he owns one just like it. RP 178.

Defendant was not the registered owner of the vehicle, though he advised officers he had been driving the vehicle all day. RP 130. The vehicle's registered owner was seated in the front passenger seat when defendant was contacted by Officers Keefer and Tscheuschner. RP 133.

In a search of the vehicle, Officer Keefer recovered a backpack from the floor between the two front seats. RP 118, 133-34. Defendant told officers the backpack was his. RP 119. Inside the backpack, Officer Keefer found orange and black ziplock plastic packaging materials, a scale with white powder residue, and a firearm. RP 119, 120, 121, 122, 123, 126, 127, 135, 136, 156. Officer Keefer had previously seen similar

ziplock packaging material associated with drugs. RP 121. The white powder residue on the scale was consistent with cocaine or methamphetamine. RP 122.

Officer Keefer also located a police scanner and a camera case in defendant's vehicle. RP 124. The camera case was located in the vehicle's center console, which is a small compartment in between the driver's and front passenger's seat. RP 130. Inside the camera case, Officer Keefer found another scale, packaging material that was identical to the packaging material located in defendant's backpack, and a vial of white powdery substance that later tested positive for methamphetamine. RP 125, 126, 127, 128, 156. Defendant told Officer Keefer that the camera bag had been passed up to him from the backseat. RP 171, 172. Officer Keefer discovered a plastic baggie with a substance that later tested positive for methamphetamine in the right rear door handle next to the right rear passenger. RP 129, 141, 155. A glass smoking device with the rubber tubing was found on the floorboards between the right rear passenger's legs. RP 141. A second smoking device was found in the door handle where the left rear passenger was sitting. RP 145-46.

In a search incident to arrest, Officer Tscheuschner found \$245.00 in varying denominations on defendant's person. RP 130-31, 141. It is very common for individuals involved in the sales of controlled substances to carry varying denominations of cash on them. RP 131. Defendant, who

was unemployed, told the officers the cash was money left over from a car he purchased. RP 131-32.

After he was transported to the Pierce County Jail, defendant told Officer Keefer he could “order up” and asked Officer Keefer if he wanted “weight.” RP 132-133.

The gun found in defendant’s backpack was later tested and found to be inoperable. RP 144, 147. The gun was missing many of its internal parts including, the firing pin assembly, spring assembly, and slide bolt. RP 145. Officer Keefer testified that the gun appeared operable to him and if someone pointed it at him, he would fear for his safety. RP 144, 148.

On cross examination, Officer Keefer testified that a person who is using drugs, but not selling them, may also have small ziplock baggies like the ones found in the camera case and backpack. RP 138-39. Though Officer Keefer stated it was his experience that only dealers have scales, it was possible that a user could have a scale to weigh the drugs they purchased to make sure they received the right amount. RP 139.

Several weeks after this incident, Puyallup Tribal Police Officer Scrivner contacted defendant driving the same vehicle Officers Keefer and Tscheuschner contacted him in on May 12, 2006. RP 181, 183.

C. ARGUMENT.

1. THE PROSECUTOR'S REBUTTAL ARGUMENT WAS PROPER WHERE HE ARGUED THAT KNOWLEDGE WAS NOT AN ELEMENT OF SIMPLE POSSESSION, EXPLAINED THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT USING A PUZZLE ANALOGY, AND ARGUED THAT THERE WAS NO REASONABLE DOUBT IN THIS CASE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Binkin, 79 Wn. App 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85; State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: 1) the seriousness of the irregularity; 2) whether the statement was cumulative of evidence properly admitted; and 3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925, 846 P.2d 1358 (1993). It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). As an advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel. State v. Brown, 132 Wn.2d 529, 567 quoting State v. Russell, 125 Wn.2d 24, 87.

- a. The prosecutor properly argued that knowledge is not an element of unlawful possession of a controlled substance.

Unlawful possession with intent to deliver has a mental element. State v. Boyer, 91 Wn.2d 342 344, 588 P.2d 1151 (1979). Implicit in an intent to deliver is the knowledge that the substance to be delivered is a controlled substance. State v. Boyer, 91 Wn.2d at 344. In contrast, unlawful possession of a controlled substance or simple possession has no mens rea. State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). Mere possession of a controlled substance, without knowledge or intent, is culpable conduct. Bradshaw, 152 Wn.2d 528, 535. As a result, in a simple possession case the State must only prove: 1) possession; and 2) the item possessed was a controlled substance, but need not prove knowledge or intent. Id. at 538.

In the present case, defendant was charged with unlawful possession of a controlled substance with intent to deliver. Simple possession is a lesser included offense of unlawful possession of a

controlled substance with intent to deliver. See State v. Fernandez-Medina, 141 Wn.2d 448, 459, 6 P.3d 1150 (2000). Defendant's case theory was two-fold. First, that defendant did not possess the methamphetamine. Second, if the jury found that he had possessed the methamphetamine, there was insufficient evidence to prove an intent to deliver. RP 223-27. Consistent with defendant's case theory and at defendant's request, the jury was instructed on the lesser included of simple possession. CP 39, 40; RP 188, 192-93.

In closing argument, defense counsel argued that defendant was not in possession of the methamphetamine because 1) defendant was not the registered owner of the vehicle; 2) there were three other individuals in the vehicle; 3) the methamphetamine was found in the right rear passenger's door handle and in a camera case in the vehicle's center console's compartment. RP 212, 215, 226. Defense counsel argued that defendant did not know the methamphetamine was there because the camera case was closed and the baggie of methamphetamine and drug pipes were in the back seat area. RP 213, 216.

Defense counsel obliquely argued in the alternative that if the jury found defendant possessed the methamphetamine, then the State did not prove an intent to deliver because the evidence was equally indicative of a drug user as a drug dealer. RP 223. Toward this end, defense counsel argued that defendant's offer at the jail to get "weight" for the officer showed that defendant was willing to buy drugs and implicate someone

else. RP 224. Defendant's offer "does not make Mr. Cleveland a dealer. I think just the opposite." RP 224.

On appeal, defendant argues that the prosecutor committed misconduct in his rebuttal when he stated that knowledge was not an element the State had to prove. Brief of Appellant at 8. The record does not support defendant's argument. As noted above, the jury was instructed on two charges: 1) unlawful possession with intent to deliver, and 2) simple possession. CP 33, 40. Along with the intent to deliver instruction was an instruction defining intent. CP 35. The prosecutor's argument that the State did not have to prove knowledge was directed to the lesser included offense of simple possession. RP 229.

The prosecutor stated:

One of the first things [the defense attorney] talked to you about that I want to point out to you is that she talked about, well, Mr. Cleveland didn't know he had methamphetamine. If somebody is walking around with a football full of methamphetamine, they didn't know, they didn't possess. Not so fast. Remember that the last word in how you evaluate the evidence doesn't come from me, it doesn't come from [defense counsel], it comes from her honor and the instructions she gives you.

I want you all to turn very quickly to instruction number 14.² ...Let me read it to you as it it's written, as her honor has instructed you... Knowing is not part of the sentence. That on or about the 12th day of May 2006, the defendant unlawfully possessed a controlled substance, not intentionally, not knowingly, that he possessed. I'm walking down the street with a football stuffed with

² Instruction 14 is the unlawful possession of a controlled substance to convict instruction.

methamphetamine, ladies and gentlemen. I'm in possession, and that's what your instructions tell you.

RP 228-29. (Emphasis added).

The prosecutor, not only referred to the jury instruction on simple possession, but also directed the jurors to turn to that instruction and follow along as the he read it aloud. RP 229. The jury was properly instructed that intent was an element of unlawful possession with intent to deliver and an instruction was given defining intent. CP 33, 35. Jurors are presumed to follow the court's instructions. State v. Kelsey, 46 Wn.2d 617, 625, 283 P.2d 982 (1955). Contrary to defendant's claim, the prosecutor did not misstate the law or lessen the State's burden in his argument. Instead, the prosecutor properly stated that simple possession does not require the State to prove knowledge or intent.

Assuming *arguendo*, that this court was to find the prosecutor incorrectly argued that knowledge was not an element of unlawful possession with intent to deliver, the issue is waived by trial counsel's failure to object unless the prosecutor's statements were so ill-intentioned and flagrant that any resulting prejudice could not have been neutralized by an admonition to the jury. When the prosecutor's comments are reviewed in the context of the total argument and the jury instructions, it is clear the prosecutor's comments were not ill-intentioned and flagrant, nor did they result in an enduring prejudice that could not have been neutralized by a jury admonition. Had trial counsel objected, the court

could have directed the jury to the court's instructions which correctly stated the *mens rea* for unlawful possession with intent to deliver. CP 33, 35.

- b. The prosecutor's puzzle analogy was designed to assist the jurors in understanding reasonable doubt and did not trivialize the State's burden of proof.

In the present case, the prosecutor's rebuttal argument reviewed the elements of both the charged and the lesser included offenses; applied the facts adduced at trial to those elements to show how each element was met; and ultimately addressed reasonable doubt. The prosecutor argued:

Last, but certainly not least, I want to talk to you a little bit about reasonable doubt. [Defense counsel] talked to you about reasonable doubt. In every criminal case, every element of a crime has to be proven beyond a reasonable doubt, and the judge has given you instructions as to what reasonable doubt is. It's a doubt, in short, that you can articulate a reason to support. You have a reason for that specific doubt. Ladies and gentlemen, I submit to you in this case, there are no reasonable doubts when you consider all of the evidence that you have heard in this case.

Now, at the beginning of the trial, I told you that the state intended to prove that the defendant was guilty as charged beyond a reasonable doubt, but it was a blank slate. You hadn't heard any evidence at that point. I can tell you right here that this is a picture of the City of Seattle, but there is no evidence to support that. All you have is a blank slate. But over the course of the trial, you hear from witnesses and you hear their testimony and you see various exhibits and the picture starts to become a little more and more clear.

Now, I want to be brutally honest with you. [Defense counsel] is right. There is a doubt in this case.

Without each of you having been in the car following the defendant around all day, familiar with his practices and patterns, you can't absolutely, positively know for sure what he was planning to do with that methamphetamine. But ladies and gentlemen, that is not the standard. The standard is whether or not, after hearing all of the evidence and taken that evidence together as a whole, you have a reasonable doubt, a doubt that you have a reason to support.

There is a doubt that this is a picture of the City of Seattle. A big chunk is still missing. Is it a reasonable doubt? You have got the Space Needle. You have got a little bit of the Seattle Center. You have got Mount Rainier, which I think Seattle is one of the few cities that can claim it. Tacoma has a better view. So is there a doubt? Yes. Is it reasonable? No. And you would be right. The truth is, this is a picture of the City of Seattle. And the truth is, the defendant is guilty as charged of the crime with which he is accused.

RP 237-39.

The prosecutor's puzzle analogy was merely an effort to demonstrate that a person could obtain a fairly high level of certainty regarding an issue even when every single piece of information is not available. In other words, if the jury is satisfied beyond a reasonable doubt that defendant is guilty based on the evidence presented at trial, the fact that there could be additional evidence that was not presented should not change their verdict because it is possible to be certain about an issue even when some details are missing. The puzzle analogy merely illustrates this point and does not mitigate the burden of proof or fly in the face of the court's instructions to the jury.

Defense counsel did not object to the puzzle analogy at trial, therefore, in order to prevail on appeal, defendant must establish the impropriety of the prosecutor's conduct as well as its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995). Defendant cannot show that the puzzle analogy was improper nor can he establish that he was prejudiced by this analogy. Defendant's prosecutorial misconduct argument must fail.

- c. The prosecutor's arguments on reasonable doubt were proper and consistent with the court's instructions.

The Supreme Court recently instructed trial courts to only use WPIC 4.01 to instruct juries that the State has the burden of proof beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The jury in the instant case was instructed on reasonable doubt

using WPIC 4.01³. CP 33. The prosecutor's arguments on reasonable doubt were based upon this instruction. RP 237-39.

In State v. Harsted, 66 Wash. 158, 159, 119 P. 24 (1911), defendant was convicted of second degree assault. On appeal, Harsted challenged the reasonable doubt jury instruction among other assignments of error. Harsted, 66 Wash. at 162. Harsted asserted the instruction was erroneous and highly prejudicial because of how it defined reasonable doubt. Specifically, Harsted challenged the following portion of the reasonable doubt instruction: “[t]he expression ‘reasonable doubt’ means in law just what the words imply, -- a doubt founded upon some good reason.” Id. The court affirmed, stating “[w]hile it is true...that the jury is not required to report to the court a reason for its verdict, it is equally true that, in the consideration of the evidence one juror has a right to call upon another for a reason for his faith.” Id. at 163.

³ Instruction No. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 33.

Defendant relies on Siberry v. State, 133 Ind. 677, 33 N.E. 681 (1893) and State v. Flores, 18 Wn. App. 255, 566 P.2d 1241 (1977) to support his argument that it is improper to tell the jurors they must be able to assign a reason for their doubts. Brief of Appellant at 16. Defendant's reliance on these cases is misplaced.

In Siberry the challenged instruction stated "a reasonable doubt is a doubt which has some reason for its basis." Harsted at 163, citing Siberry v. State, 133 Ind. 677. The Siberry court stated "[this language] puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with the certainty which the law requires, before there can be a conviction." Id. The court in Harsted specifically rejected Siberry and held that a jury may be instructed that a reasonable doubt is a doubt you could give a reason for. See Harsted at 164 citing People v. Guidici 100 N.Y. 503, 3 N.E. 493 (1995).

In Flores the defendant challenged the reasonable doubt jury instruction because it referred to substantial doubt. Flores, 18 Wn. App. at 256. The challenged instruction read, in part:

The expression "reasonable doubt" means in law just what the words imply – a doubt founded on some good reason. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a *substantial* doubt, such as an honest, sensible, and fair-minded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

Id. (emphasis in original). Flores argued that ‘substantial doubt’ overstated the degree of uncertainty required for reasonable doubt and lessened the State’s burden of proof. Id. The Flores court disagreed. Id. In reaching its decision, the Flores court twice cited the Harsted instruction with approval. Id. at 257-58. Contrary to defendant’s position, Flores does not stand for the proposition that it is improper to tell jurors they must assign a reason for their doubts, but for the proposition that jury instructions should be read as a whole and the term substantial in a reasonable doubt instruction is not favorable, but did not require reversal. Id. at 257-58.

The cases cited by defendant are distinguishable because they deal with challenged jury instructions, not whether the prosecutor has committed misconduct in his argument based upon those instructions. In the present case, as noted above, the jurors were correctly instructed on reasonable doubt in the court’s instructions. Additionally, the court instructed the jurors “[t]he law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP 25-27. Jurors are presumed to follow the court’s instructions. State v. Kelsey, 46, Wn.2d 617, 625.

Defendant bears the burden of establishing the impropriety of the prosecutor’s conduct as well as its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640. Because defense counsel did not object at trial,

defendant must meet the higher burden of showing the statements were so flagrant and ill-intentioned that they resulted in an enduring prejudice that could not have been neutralized by an admonition to the jury. The defendant cannot meet his burden because the prosecutor's remarks were not improper, nor were they ill-intentioned and flagrant. Even if the prosecutor's remarks were improper, defendant cannot show that they resulted in enduring prejudice that would deprive defendant of a fair trial. The fact that defense counsel did not object to the prosecutor's reasonable doubt arguments indicates a perceived lack of prejudice, and the trial court's written jury instructions minimize the risk of any prejudice.

Defendant's claims of prosecutorial misconduct are without merit and must fail.

2. DEFENSE COUNSEL WAS EFFECTIVE WHERE DEFENDANT CANNOT SATISFY BOTH PRONGS OF THE STRICKLAND TEST.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the

adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel’s representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel’s deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney’s conduct failed to meet an objective

standard of reasonableness. State v. Huddleston, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. State v. McFarland, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. McFarland, 127 Wn.2d at 337; see also,

Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

- a. Defense counsel was effective when she chose not to propose an unwitting possession instruction because defendant had not proven his possession of methamphetamine was unwitting by a preponderance of the evidence.

Unwitting possession is an affirmative defense in a simple possession case. State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). If a defendant affirmatively established that his controlled substance possession was unwitting, “then he had no possession for which the law will convict. Cleppe, at 381. A defendant must prove unwitting possession by a preponderance of the evidence. State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005), review denied, 157 Wn.2d 1009 (2006). A defendant is only entitled to an unwitting possession instruction when

the evidence presented at trial would permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. State v. Buford, 93 Wn. App. 149, 151, 967 P.2d 548 (1998).

If the defendant is entitled to an unwitting possession instruction and the court fails to give one, the error is harmless where the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error. State v. Mills, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005). Such is the case here.

In the instant case, defendant presented no evidence, thus any evidence that defendant's possession was unwitting came from the State's witnesses. The State's witnesses testified that defendant was seated in the driver's seat of a parked vehicle along with three passengers. Defendant admitted he had been driving the vehicle all day and, six weeks later, was again contacted by police in that same vehicle. On the day of defendant's arrest, officers found ziplock baggies with orange and black print on them, a firearm, and a scale with residue on it inside defendant's backpack. Officer Keefer testified the residue on the scale was consistent with cocaine or methamphetamine. Inside the camera case was a vial of methamphetamine, a second scale, and orange and black ziplock baggies. The orange and black ziplock baggies found inside the camera case were

identical to the orange and black ziplock baggies found inside defendant's backpack. Officers found \$245 in varying denominations on defendant's person and, when he arrived at the jail, he offered to get Officer Keefer "weight".

Defendant argues that defense counsel was deficient for failing to propose an unwitting possession instruction. However, even if defense counsel had proposed the instruction, the court would not have given it because defendant did not prove by a preponderance of the evidence that his possession was unwitting. Because counsel cannot be deficient for failing to propose an instruction that would not be given, defendant's ineffective assistance of counsel claim is without merit and must fail. See Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

If, however, this court were to find defense counsel was deficient for failing to propose an unwitting possession instruction, defendant's argument still fails because he cannot show he was prejudiced by defense counsel's failure. The jury convicted defendant of the more serious offense of unlawful possession of a controlled substance with intent to deliver. Unlike simple possession, unwitting possession is not a defense to possession with intent to deliver. To convict defendant of unlawful possession with intent to deliver, the jury had to find defendant's

possession was knowing and that he intended to deliver the methamphetamine. Because the jury had to find intent when they found defendant guilty of the charged offense, the jury clearly rejected defendant's argument that he unwittingly possessed the drugs⁴. A jury instruction on unwitting possession would have made no difference in the jury's verdict.

- b. Defense counsel was effective when she moved in limine to exclude the admission of the firearm. Alternatively, defendant was not prejudiced by defense counsel's motion.

Unlawful possession of a controlled substance with intent to deliver is a fact specific crime where the intent to deliver may be inferred from circumstances surrounding the crime. However, intent to deliver cannot be inferred from "bare possession of a controlled substance, absent other facts and circumstances[.]" State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976).

In State v. Lane, 56 Wn. App 286, 297, 786 P.2d 277 (1989), the court affirmed an intent to deliver conviction where the evidence consisted of 1 ounce of cocaine, a large amount of cash, scales, and the officer's testimony that cocaine was typically sold in one-eighth ounce.

⁴ Defense counsel argued unwitting possession in her closing argument even though there was no jury instruction to that effect. RP 215-16.

Similarly, in State v. Perry, 10 Wn. App 159, 160, 516 P.2d 1104 (1973), Perry was convicted of possession of heroin with intent to deliver. Perry owned and managed an apartment building. Id. at 160. He lived in apartment 203, but was the only person with a key to apartment 204. Id. Inside apartment 204, officers found balloons and spoons containing heroin, a tightly wrapped condom also containing heroin, a paper bag containing receipts and other papers with Perry's name on them, and a sawed-off shotgun. Id. at 160. On appeal, Perry argued the trial court erred in admitting evidence of the shotgun because reference to the shotgun was inflammatory and he was not in possession of the weapon. Id. at 167. The court noted "[t]he fact that the gun was found in apartment No. 204 is a circumstance supportive of the state's charge, permitting the state to argue defendant was a dealer in controlled substances and needed the shotgun for protection in a business not protected by police." Id. at 167-68.

Conversely, in State v. Brown, 68 Wn. App. 480, 484-85, 843 P.2d 1098 (1993), the court reversed an intent to deliver conviction and remanded for sentencing on simple possession because the only evidence the State produced to show delivery was the quantity of crack in Brown's possession and the officer's testimony that 20 rocks of crack was in excess of that amount commonly possessed by users. The court noted "[t]his is a

naked possession case. Brown had no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery...” Id. at 484 (emphasis added).

In both Perry and Brown the court considered the presence of a firearm as one factors to be considered when determining whether defendant merely possessed a controlled substance or whether he possessed with intent to deliver. In Perry, the presence of a shotgun was one factor in support of the State’s argument that Perry possessed the heroin with intent to deliver. In Brown, the lack of a firearm was one of the factor’s the reviewing court considered when it reversed Brown’s conviction for possession with intent and remanded for sentencing on simple possession.

In the present case, the firearm along with the two scales (one with residue), the orange and black packaging material in both the camera case and defendant’s backpack, the methamphetamine, and the \$245 in varying denominations found on defendant’s person were all factors the State argued showed intent to deliver. Prior to selecting a jury, defense counsel moved in limine to exclude evidence of the firearm found in defendant’s backpack and the assorted pills found in the camera case located in the vehicle’s center console. RP 68.

In support of her motion in limine, defense counsel provided the court with a copy of State v. Trickler, 106 Wn. App 727, 25 P.3d 445 (2001). In Trickler, the defendant alleged the trial court erred when it admitted 404(b) evidence in the form of stolen property found in Trickler's vehicle along with the victim's stolen property. The court outlined the test that must be met before 404(b) evidence can be admitted. Trickler at 732. The court must 1) find by a preponderance of the evidence that the misconduct occurred; 2) determine whether the evidence is relevant to a material issue; 3) state on the record the purpose for which the evidence is being introduced ; and 4) balance the probative value of the evidence against the danger of unfair prejudice. Id. citing State v. Brown, 132 Wn.2d 529, 571.

The 404(b) test is precisely the test defense counsel asked the court to apply in her motion to exclude the firearm and the pills in the present case. RP 68. After applying the test, the court denied defense counsel's motion with respect to the firearm. RP 77-78. Defense counsel was not deficient because her motion in limine was, in essence, the 404(b) objection defendant's asserts should have been made. Additionally, if this court were to find defense counsel was deficient, there was no prejudice because court applied the 404(b) test and found the evidence, with respect to the firearm, admissible.

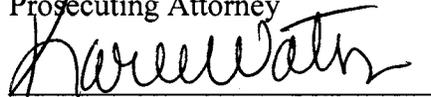
Defendant's ineffective assistance of counsel claims are without merit and must fail.

D. CONCLUSION.

For the reasons stated above, the State asks that this court affirm defendant's convictions.

DATED: FEBRUARY 22, 2008

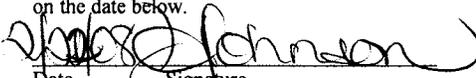
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

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