

ORIGINAL

NO. 36227-9-II

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

COURT OF APPEALS
STATE OF WASHINGTON
BY _____
Clerk

STATE OF WASHINGTON,

Respondent,

v.

JAMES NEWTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-01197-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED December 12, 2007, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether counsel was ineffective for advising Newton to stipulate to the location of the school and bus stop where the State listed the school district's transportation director as a witness, who presumably would have testified had Newton not entered the stipulation?

2. Whether the prosecutor's closing argument was so flagrant and ill-intentioned that it may be raised as an issue for the first time on appeal where she merely commented on the evidence tending to show that one of the State's witnesses was credible?

II. STATEMENT OF THE CASE

The State accepts Newton's statement of the case for purposes of the issues raised on appeal, as supplemented in the argument portion of this brief.

III. ARGUMENT

A. COUNSEL WAS NOT INEFFECTIVE FOR ADVISING NEWTON TO STIPULATE TO THE LOCATION OF THE SCHOOL AND BUS STOP WHERE THE STATE LISTED THE SCHOOL DISTRICT'S TRANSPORTATION DIRECTOR, AS A WITNESS, WHO PRESUMABLY WOULD HAVE TESTIFIED HAD NEWTON NOT ENTERED THE STIPULATION.

Newton argues that counsel was ineffective for stipulating to the location and distance from the site of the alleged offenses of a school-bus

stop and a school. Newton fails to show that counsel was deficient or that he was prejudiced. .

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial

would have been different.” *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Newton complains that there is no “indication on the record as to why” the stipulation was entered. Brief of Appellant at 8. He is incorrect.

Rather than deficient performance, it is plain that counsel was merely engaging in professional courtesy and/or avoiding boring the jury with ministerial testimony from a school district employee. As Newton noted in the stipulation:¹

I understand that this stipulation is being entered in lieu of the State of Washington submitting testimony from the Bremerton School District.

CP 111.

The record suggests that the State was prepared to introduce such testimony. Included on the State’s witness list was one Douglas Wagner. Supp. CP. “Doug Wagner” is identified on the Bremerton School District website as the Director of the District’s Transportation Department, which,

¹ Contrary to the impression given in his brief, counsel did not willy-nilly stipulate to these facts out of the blue. Newton signed a formal written stipulation that advised him of the rights he was forgoing. CP 111. The trial court also briefly went over it with him. RP 251.

according to the site, oversees the District's school buses and their routes.² Wagner no doubt could have authoritatively testified consistently with the stipulated facts. Notably, the State was not prepared to rest its case until it determined whether Newton would enter the stipulation. RP 234. Presumably it would have called Wagner had the stipulation not been entered.

Newton does not suggest that there was anything that could have called into doubt Wagner's testimony. Moreover, since his defense was that he was not the one who sold the drugs, counsel was not unreasonable to stipulate to ministerial evidence that in no way pertained to his identity as the seller. Likewise since the State could no doubt have presented this evidence,³ Newton also fails to show prejudice. This claim should be rejected.

B. THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT SO FLAGRANT AND ILL-INTENTIONED THAT IT MAY BE RAISED AS AN ISSUE FOR THE FIRST TIME ON APPEAL WHERE SHE MERELY COMMENTED ON THE EVIDENCE TENDING TO SHOW THAT ONE OF THE STATE'S WITNESSES WAS CREDIBLE.

Newton next claims that the trial prosecutor improperly argued that

² See <http://www.bremertonschools.org/departments/transportation> (last accessed Dec. 7, 2007).

³ Newton makes much of the fact that it did not present this evidence, but considering that there was a stipulation, it is not surprising that no testimony was presented on the subject.

the jury had to believe its witnesses were lying to acquit. A review of the argument shows that the prosecutor did nothing of the kind, but instead merely, and properly, argued that the State's prime witness, a confidential informant, was credible.

A defendant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. McKenzie*, 157 Wn.2d 44, ¶ 13, 134 P.3d 221, (2006). Comments will be deemed prejudicial only where "there is a *substantial likelihood* the misconduct affected the jury's verdict." *Id.* (emphasis the Court's). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Id.* Where the defense fails to object to an improper comment, the error is considered waived "unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *Id.* Newton did not object below.

The essence of the misconduct Newton alleges is the giving of the jurors "a false choice." *State v. Miles*, 139 Wn. App. 879, ¶ 26, 162 P.3d 1169 (2007). The "false choice" that is condemned in *Miles* and like cases is

telling the jury that it had to believe the defendant's testimony in order to acquit him. The choice is false because the jury does not need to believe the defendant to acquit, or believe that the State's witnesses are lying, it need only have a reasonable doubt as to the defendant's guilt. *Id.*

Here, on the other hand, the prosecutor did not make such an argument. She only submitted that the State's chief witness, the informant, was credible, and gave reasons why. She did argued that the jury could believe the witness. But that was not an improper "false choice" argument. It was merely a reasonable inference argued from the evidence. It is entirely proper for the prosecutor to call the jury's attention to the facts and circumstances in evidence tending to support the credibility of the State's witness. *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990). That is all that occurred here. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Newton's conviction and sentence should be affirmed.

DATED December 12, 2007.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'R D Hauge', written over a horizontal line.

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