

original

No. 36358-5-II *Am*

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nina Switzer,

Appellant.

Jefferson County Superior Court

Cause No. 06-1-00061-2

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR iv

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR iv

1. Did defense counsel’s representation fall below an objective standard of reasonableness when counsel confused the prosecution’s burden of proving intent with the affirmative defense of unwitting possession? Assignments of Error Nos. 1-3. iv

2. Did defense counsel’s erroneous arguments to the jury prejudice Ms. Switzer? Assignments of Error Nos. 1-3. .. iv

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 3

Ms. Switzer was denied the effective assistance of counsel..... 3

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 5, 6, 8,
.....9

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763
(1970)..... 4

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984)..... 4, 5

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182
(1993)..... 6

WASHINGTON CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 4, 10

In re Hubert, 138 Wn. App. 924, 158 P.3d 1282 (2007)..... 5

State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (2000) 4

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981)..... 7

State v. Holm, 91 Wn.App. 429, 957 P.2d 1278 (1998) 4

State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978) 5

State v. Lopez, 107 Wn.App. 270, 27 P.3d 237 (2001)..... 4

State v. S.M., 100 Wn.App. 401, 996 P.2d 1111 (2000)..... 4

State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998) 4, 10, 11

State v. Sims, 119 Wn.2d 138, 829 P.2d 1075 (1992)..... 6

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003)..... 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 3
U.S. Const. Amend. XIV 5
Wash. Const. Article I, Section 22 3

STATUTES

RCW 69.50.401 6

ASSIGNMENTS OF ERROR

1. Ms. Switzer was denied the effective assistance of counsel.
2. Defense counsel erred by shifting the burden of proof.
3. Defense counsel erred by confusing the affirmative defense of unwitting possession with the state's burden to prove intent to deliver.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Nina Switzer was charged with possession of methamphetamine with intent to deliver. At trial, she testified that she was unaware there was methamphetamine in the console of the car she'd been driving when arrested.

Defense counsel erroneously told the jury that Ms. Switzer bore the burden of proving by a preponderance of the evidence that she was ignorant of the methamphetamine's presence. Instead of relying on the prosecution's burden to prove intent to deliver, defense counsel needlessly argued that Ms. Switzer bore the burden of establishing by a preponderance of evidence the affirmative defense of unwitting possession.

1. Did defense counsel's representation fall below an objective standard of reasonableness when counsel confused the prosecution's burden of proving intent with the affirmative defense of unwitting possession? Assignments of Error Nos. 1-3.
2. Did defense counsel's erroneous arguments to the jury prejudice Ms. Switzer? Assignments of Error Nos. 1-3.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

When Nina Switzer was arrested for Driving While License Suspended, she had three passengers in her car. RP 187-190. While the police searched her car, the passengers were released without being searched. One of these passengers was her husband, whom the police suspected was a methamphetamine dealer. RP 181, 190, 210, 215, 221. Mr. Switzer was in the process of buying the car from a friend. CITE. The officers found six ounces of methamphetamine hidden in the console between the driver and passenger seat. RP 194, 210. They also located empty baggies and a scale in the vehicle. RP 197-198. In Ms. Switzer's purse, they found a roughly two-day supply of methamphetamine, as well as some marijuana and cocaine. RP 191-192, 207.

Ms. Switzer was charged with Possession of Methamphetamine with Intent to Deliver. CP 1-2. At trial, she acknowledged the drugs found in her purse, but testified that she did not know about the six ounces of methamphetamine discovered in the console.¹ RP 297-338, 372-385. Upon defense counsel's request, the court gave instructions on the lesser-

¹ She had told officers (on several occasions) that she had planned to sell the methamphetamine, but she testified at trial that she lied to protect her husband, whom she feared. RP 297-338, 222-227.

included offense of simple possession and an instruction on unwitting possession. Supp. CP.²

During his closing argument, defense counsel argued to the jury that Ms. Switzer bore the burden of proving that she was unaware of the six ounces of methamphetamine discovered in the console:

...But, the burden is on the defendant—that's Ms. Switzer, in this case—to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

...The burden is on Ms. Switzer, me to convince you that the big bag of methamphetamine in the center console was there unwittingly to her.

You've heard her account today that she didn't know it was there... But, this is difficult. This is difficult for me to convince you guys of: that it's more probably true than not true that she didn't know it was there.

You've heard the evidence, and, her testimony, and the testimony of the officers. So, did she know it was there? Did I prove to you that she didn't know it was there by a preponderance that's more likely than not: I'd submit to you it's a close call.

But, even if I haven't proved to you that it was unwitting possession... that that bag of methamphetamine she didn't know it was there.

The State still has to show that she possessed it constructively...and that she—she, Ms. Switzer, intended to deliver it. ...[Y]ou have to find that it was Ms. Switzer that intended to sell this stuff, to deliver this stuff. And the State hasn't proved that. ...It's your job to determine whether that testimony is credible. And, I'd submit to you it is. And, so, even if I haven't been able to convince you that this bag of methamphetamine was

² The defense handed forward an unwitting possession instruction during discussion, but it apparently was not made part of the court file. RP 281.

unwittingly possessed, because that's my burden, it's like the burden shifts. Most of the time the State has to prove anything, and I can sit down there like a potted plant and do nothing. We talked a little bit about voir dire.

But, when we're talking about unwitting possession, I need to convince you that it was unwitting and, by, you know, just preponderance. But, it remains the State's burden to show, even if I can't do that, or, haven't done it, that Nina Switzer intend—possessed this because it was in her car, or at least the car she was driving, and that she intended to deliver. Not as an accomplice, not driving anybody around so that they could do that. But, that she, herself, intended to deliver the methamphetamine found there. RP 379-382.

The jury convicted Ms. Switzer as charged. She was sentenced within her standard range and this timely appeal followed. CP 7-15, 16.

ARGUMENT

MS. SWITZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Although a legitimate trial tactic will not justify reversal for ineffective assistance, any strategy “must be based on reasoned decision-making: ‘[S]trategic choices made after thorough investigation of law and facts... are virtually unchallengeable... In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’” *In re Hubert*, 138 Wn. App. 924 at ___, 158 P.3d 1282 (2007), quoting *Strickland* at 690-691. The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775 at 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256 at 263, 576 P.2d 1302 (1978).

In this case, defense counsel erroneously assumed the burden of proving by a preponderance Ms. Switzer’s lack of intent to deliver. RP 379-382. This error of law fell below an objective standard of reasonableness and prejudiced Ms. Switzer. Accordingly, she was denied the effective assistance of counsel.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). As the U.S. Supreme Court has noted in a different context, proper instruction on the reasonable doubt standard is

crucial because that standard “provides concrete substance for the presumption of innocence,” which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363; *see also Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

An essential element of the charged crime is the intent to deliver. RCW 69.50.401; *see also* CP 2 and Instructions Nos. 6 and 8, Supp. CP. Under *Winship*, the prosecution bore the burden of proving beyond a reasonable doubt Ms. Switzer’s intent to deliver methamphetamine. The defense was not required to disprove intent; nor was even it required to prove that a reasonable doubt existed on the issue of intent. *See* Instruction No. 4, Supp. CP.

Proof of intent to deliver presupposes that the accused has knowledge of the controlled substance. Knowledge is subsumed within the intent requirement. As the Supreme Court has put it,

It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly... Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge. *State v. Sims*, 119 Wn.2d 138 at 142, 829 P.2d 1075 (1992).

If a person is unaware that she is in possession of a controlled substance, she cannot intend to deliver it. *See also* Instruction No. 11, Supp. CP. This is in contrast to simple possession of a controlled substance, which does not require proof of any mental element. *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981).

In this case, defense counsel erroneously argued to the jury that Ms. Switzer bore the burden of proving by a preponderance of the evidence that she lacked the mental state necessary for conviction. RP 379-382. In particular, defense counsel relied on Instruction No. 16, the court's "unwitting possession" instruction, which, by its terms, applied only to simple possession of a controlled substance.³ Supp. CP. After pointing out the instruction, defense counsel argued as follows:

...But, the burden is on the defendant—that's Ms. Switzer, in this case—to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

...The burden is on Ms. Switzer, me to convince you that the big bag of methamphetamine in the center console was there unwittingly to her.

³ It is arguable whether or not this instruction was properly given. Defense counsel submitted a lesser-included instruction on simple possession, and Ms. Switzer admitted to possessing methamphetamine in her purse. Instruction No. 16, Supp. CP; RP 317. Unwitting possession is an affirmative defense to simple possession (as Instruction No. 16 makes clear). However, Ms. Switzer's strategy was to argue for the lesser included offense, rather than to seek acquittal. RP 283-338, 372-385. Under these circumstances, the decision to propose an unwitting possession instruction was, at best, questionable.

You've heard her account today that she didn't know it was there... But, this is difficult. This is difficult for me to convince you guys of: that it's more probably true than not true that she didn't know it was there.

You've heard the evidence, and, her testimony, and the testimony of the officers. So, did she know it was there? Did I prove to you that she didn't know it was there by a preponderance that's more likely than not: I'd submit to you it's a close call. RP 379-380.

Defense counsel's argument tying the unwitting possession defense to the charge of possession with intent to deliver was erroneous. Ms. Switzer could not intend to deliver the methamphetamine found in the car's console if she were unaware that it was there. Accordingly, her lack of knowledge would negate the "intent to deliver" element of the charged crime. Under *Winship* the burden was on the state to show Ms. Switzer's knowledge, as a component of her intent to deliver. Defense counsel's erroneous reference to the affirmative defense of unwitting possession incorrectly shifted the burden of proof.

Defense counsel further muddied the case by juxtaposing his erroneous statements about unwitting possession with statements about the prosecution's burden to show intent:⁴

⁴ Defense counsel also made nonsensical statements relating to the lesser included offense of simple possession. *See* RP 382-384.

...But, even if I haven't proved to you that it was unwitting possession... that that bag of methamphetamine she didn't know it was there.

The State still has to show that she possessed it constructively...and that she—she, Ms. Switzer, intended to deliver it... [Y]ou have to find that it was Ms. Switzer that intended to sell this stuff, to deliver this stuff. And the State hasn't proved that. ...It's your job to determine whether that testimony is credible. And, I'd submit to you it is. And, so, even if I haven't been able to convince you that this bag of methamphetamine was unwittingly possessed, because that's my burden, it's like the burden shifts. Most of the time the State has to prove anything, and I can sit down there like a potted plant and do nothing. We talked a little bit about voir dire.

But, when we're talking about unwitting possession, I need to convince you that it was unwitting and, by, you know, just preponderance. But, it remains the State's burden to show, even if I can't do that, or, haven't done it, that Nina Switzer intend—possessed this because it was in her car, or at least the car she was driving, and that she intended to deliver. Not as an accomplice, not driving anybody around so that they could do that. But, that she, herself, intended to deliver the methamphetamine found there. RP 380-382.

Because defense counsel confused the state's burden to prove intent with the affirmative defense of unwitting possession, his representation fell below an objective standard of reasonableness. By conflating the two issues for the jury, defense counsel prejudiced Ms. Switzer. His comments (placing the burden on Ms. Switzer to prove facts establishing her lack of intent) undermined the presumption of innocence and the reasonable doubt standard. *Winship, supra*.

Ms. Switzer's defense was premised on her lack of intent to deliver. As defense counsel acknowledged in closing, this was a "difficult" defense that presented a "close call" for the jury.⁵ RP 380. Her lack of intent-- based on her ignorance of the methamphetamine in the console-- was established through Ms. Switzer's testimony. RP 297-336. Unfortunately for her, this testimony was undermined by her prior confessions to the police. RP 222-227, 256-269. She explained to the jury that these confessions were misguided attempts to protect her husband from the consequences of his criminal behavior; she also told the jury that she feared her husband's violence. RP 297-336.

If Ms. Switzer's testimony had been considered using the correct standard (proof beyond a reasonable doubt that she intended to deliver methamphetamine), there is a reasonable probability that the result of the proceedings would have been different. *Saunders, supra*. A reasonable jury could well have accepted her testimony (that she knew nothing about the methamphetamine in the console and that she confessed to protect her husband) at least to the extent necessary to raise a reasonable doubt as to her guilt. Confidence in the outcome is undermined. *Fleming, supra*.

⁵ Defense counsel was speaking in the context of his misunderstanding requiring proof by a preponderance of unwitting possession as an affirmative defense; nonetheless, his words apply to the evidence under the correct standard as well.

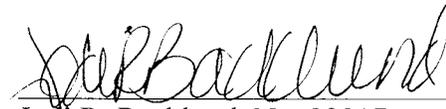
Because Ms. Switzer was denied the effective assistance of counsel, her conviction must be reversed. The case must be remanded to the trial court for a new trial. *Saunders, supra.*

CONCLUSION

For the foregoing reasons, Ms. Switzer's conviction must be reversed and the case remanded to the Superior Court for a new trial.

Respectfully submitted on September 26, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 26, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 26, 2007.



Jodi R. Backlund, No. 22917
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