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Restatement of Issues Presented

1. Was defense counsel ineffective when he advanced the unwitting possession defense?
2. Were defense counsel's arguments to the jury erroneous and prejudicial to Ms. Switzer?

Statement of the Case

On or about midnight of March 29, 2006, police stopped Nina Switzer for Driving With License Suspended in the third degree, a misdemeanor. RP 187-190. There were three other people in the car she was driving, one of which was Randy Switzer, her husband. Ms. Switzer was arrested and the car was searched incident to arrest. The police found 6.4 ounces (over 181 grams) of methamphetamine hidden in the center console of the car between the driver and front passenger seat (RP 194, 210); empty baggies and a digital scale (RP 197-198); and a factory-sealed box of syringes (RP 233). Police also found an estimated two day supply of methamphetamine, marijuana, and cocaine in Ms. Switzer's purse. RP 191-192. Ms. Switzer was arrested and charged with Possession of Methamphetamine with Intent to Deliver. CP 1-2.

While still in the back of the police car and again at the jail, Nina Switzer told Deputy Pernsteiner that her husband had nothing to do with the methamphetamine and that she bought the methamphetamine to resell

it. RP 222-223. At about 8:45 a.m. on March 30, 2006, at the jail, Ms. Switzer stated to the Jail Superintendent, Steven Richmond, in a spontaneous utterance, that she had bought the methamphetamine in Olympia from a man named Todd, she was trying to raise money to save her house, and that she was scared for her life from her husband Randy and Todd. RP 248-249. Immediately after this, Superintendent Richmond notified Detective Miller who interviewed Ms. Switzer later that same morning. Ms. Switzer repeated her prior statement that she had told Superintendent Richmond and added details about how she met Todd and how she planned to get some additional assistance in marketing the drug. RP 256-259.

During trial Ms. Switzer testified in her own behalf. Ms. Switzer testified that when the police found the large quantity of methamphetamine hidden in the center console they asked her if it was hers and she told them it was hers and Randy did not know anything about it. RP 313. Ms. Switzer then testified that the methamphetamine was not hers. RP 313. Ms. Switzer testified that the drugs found in her purse were hers. RP 316-317. Ms. Switzer testified that she lied to the police about owning the drugs in order to protect her husband. RP 318, 319.

The court gave jury Instruction # 13 that described possession with intent to deliver and the lesser included offense of simple possession. RP 361. The court also gave Instruction # 16 on unwitting possession, which

includes the phrase: “The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly.” RP 362. 11 Washington Pattern Jury Instructions: Criminal 52.01, at 679 (2d ed.1994). This instruction is reproduced in its entirety in the Appendix.

Defense counsel, in closing statements, reiterates jury instruction number 16 several times:

“...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.

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

...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.

...Did I prove to you that she didn’t know it was there by a preponderance of the evidence?

...when we’re talking about unwitting possession, I need to convince you that it was unwitting and, by, ...just preponderance. RP 379-382.

III. Statement of Prior Proceedings

Ms. Switzer was arraigned on April 7, 2006. RP 2.

Ms. Switzer moved to suppress her statements under CrR 3.5 and hearings were held Feb. 9, 2007. CrR 3.5 Findings of Fact were presented on Mar. 16, 2007. RP 2

A jury trial was held on May 21-22, 2007. The jury convicted Nina Switzer as charged. RP 2

Ms. Switzer was sentenced on June 1, 2007, within her standard range and this appeal followed. CP 7-16.

Argument

A Was defense counsel ineffective when he advanced the unwitting possession defense?

No. A party bringing an ineffective assistance of counsel challenge must meet a two-part test: (1) demonstrate that the attorney's performance was deficient, considering all the circumstances and gauged on an objective reasonableness standard; and (2) demonstrate that the deficient performance prejudiced the client, i.e., the outcome, with reasonable probability, would have differed if not for the attorney's deficient performance. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.3d 1049 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In analyzing an ineffective assistance claim, the court engages in a strong presumption that a defendant received effective representation. *Studd*, 137 Wn.2d at 551; *State v. Summers*, 107 Wn.App. 373, 382, 28 P.3d 780, 43 P.3d 526 (2001). Furthermore, defense counsel's trial conduct cannot serve as a basis for a claim of ineffective assistance of counsel if it can be characterized as legitimate trial strategy or tactics.

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)), cert. denied, 506 U.S. 856 (1992). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Ms. Switzer must satisfy both prongs of the ineffective assistance of counsel test. If one prong of the test fails, we need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The affirmative defense of unwitting possession “does not improperly shift the burden of proof.” *State v. Bradshaw*, 152 Wn.2d a528, 538, 98 P.3d 1190 (2004).

Ms. Switzer's contention that her trial attorney denied her effective assistance of counsel fails the first prong. Unwitting possession is not generally an affirmative defense that the defendant has to prove in a charge of possession with intent to deliver, because the State must prove the intent element to convict on the charge. See Unwitting Possession jury

instruction, *supra*, RP 362. See *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992) (no separate guilty knowledge element in the crime of possession with intent to deliver, as this mental state is subsumed in the mental state of intent to deliver, because a person intending to deliver a controlled substance, by necessity, knows that he or she possesses a controlled substance). But the choice to pursue the affirmative defense based on a defense theory of unwitting possession does not automatically convert legitimate, although possibly flawed trial strategy, into ineffective assistance of counsel. Otherwise defense counsel would be able to invalidate any trial for possession with a knowledge element by simply pursuing the “unwitting possession“ defense.

In the instant case the jury heard testimony from three police officers that Ms. Switzer made a separate statement to each of them that she intended to sell the methamphetamine. Three officers testified Ms. Switzer told them she was planning to sell the drugs to save her house from foreclosure. They also heard testimony that the police found a digital scale, plastic baggies and hypodermic syringes - items useful for selling the drug - in the car along with the drugs. Without any other evidence to refute guilty knowledge the defense theory was unwitting possession. To that end, Ms. Switzer elected to testify at trial, claiming that she did not know of the methamphetamine hidden in her car. Defense strategy relied on Ms. Switzer's credibility. The jury could have decided

from her testimony that Ms. Switzer did not know the drugs were in the car.

The proposed jury instruction, Ms. Switzer's decision to testify, and closing arguments clearly suggest a deliberate and strategic decision by defense counsel. This was a legitimate trial strategy and Ms. Switzer's ineffective assistance claim fails.

B. Were Defense Counsel's Arguments to the Jury Erroneous and Prejudicial to Ms. Switzer?

No. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Ms. Switzer asserts that defense counsel's argument tying the unwitting possession defense to the charge of possession with intent to deliver was erroneous. Br. Of Appellant at 8. In this case possession was not an issue. The use of the unwitting possession defense is valid trial strategy as shown in the previous argument, and describing it in closing argument was not, per se, erroneous. Defense counsel appropriately

argued in closing that it was his burden to show “unwitting possession” by a preponderance of the evidence. Defense Counsel never said it was defense’s burden to show lack of intent, and stated twice that it was the state’s burden to show she had intent. RP 379-382. Thus Defense Counsel’s statements were not in fact erroneous.

Credibility is the province of the finder of fact, in this case... not us. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Defense strategy rested on Ms. Switzer’s credibility, which the jury found inadequate. The state bore the burden of proving intent beyond a reasonable doubt. If Ms. Switzer had successfully born the burden of proving unwitting possession to the jury by a preponderance of the evidence, the state would failed its burden. These burdens were clearly spelled out in the jury instructions and by defense counsel. Defense counsel properly differentiated the defense and prosecution’s burdens and did not cause the result to be different. Ms. Switzer’s argument also fails the second prong.

Defense Counsel’s statements were not erroneous and not prejudicial. Ms. Switzer’s motion for a new trial is without foundation and should be denied.

CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 21st day of November, 2007

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

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2
3 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
4 DIVISION II *mm*

5 STATE OF WASHINGTON,)
6 Respondent,)
7 vs.)
8 NINA SWITZER,)
9 Appellant.)

Case No.: 36358-5-II
Superior Court No.: 06-1-00061-2

DECLARATION OF MAILING

10 Janice N. Chadbourne declares:

11 That at all times mentioned herein I was over 18 years of age and a citizen of the United
12 States; that on the 20th day of November, 2007, I mailed, postage prepaid, a copy of the State's
13 Brief of Respondent to the following:

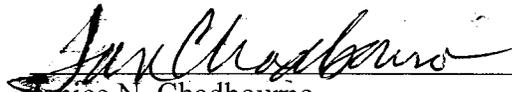
14 David C. Ponzoha, Clerk
15 Court of Appeals, Division II
16 950 Broadway, Suite 300
Tacoma, WA 98402-4454

Manek R. Mistry
Backlund and Mistry
331 NW Park Street
Chehalis, WA 98532

17 Nina Switzer, DOC #970291
18 PLCCW
19 P.O. Box 300
Medical Lake, WA 99022

20 I declare under penalty of perjury under the laws of the State of Washington that the
21 foregoing declaration is true and correct.

22 Dated this 20th day of November, 2007, at Port Townsend, Washington.

23
24 
25 Janice N. Chadbourne
Legal Assistant

26
27 DECLARATION OF MAILING
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28
JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
Courthouse -- P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180