

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37529-0-II
Cowlitz Co. Cause NO. 07-1-00817-6

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

STATE OF WASHINGTON,

Respondent,

v.

VIRGINIA LYNN DENNEY,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|-----------|
| I. ANSWER TO ASSIGNMENTS OF ERROR..... | 1 |
| II. STATEMENT OF THE CASE | 2 |
| III. ARGUMENT..... | 4 |
| A. THE COURT’S FINDING THAT QUESTIONS BY JAIL SERVICES STAFF REGARDING DRUG USE AND DEPENDENCY ARE NOT INTERROGATION WAS NOT CLEARLY ERRONEOUS | 4 |
| B. EVIDENCE REGARDING DEFENDANT’S DRUG USE/DEPENDENCY WAS NOT MORE PREJUDICIAL THAN PROBATIVE | 13 |
| C. PROFFERING THE UNWITTING POSSESSION INSTRUCTION WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL..... | 17 |
| IV. CONCLUSION..... | 22 |
| V. APPENDIX..... | 26 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|---|---------------------|
| <i>In re Jeffries</i> , 110 Wn.2d 326, 752 P.2d 1338, <i>cert. denied</i> , 488 U.S. 948, 109 S.Ct. 379, 102 L.Ed.2d 368 (1988) | 18 |
| <i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966) | 4, 5, 8, 9, 10, 13 |
| <i>Rhode Island v. Innis</i> , 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) | 5 |
| <i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.2d 1190 (2004)..... | 20 |
| <i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995)..... | 18 |
| <i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981) <i>cert. denied</i> , 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1982 | 21 |
| <i>State v. Frost</i> , 160 Wn.2d 765, 161 P.3d 361 (2007) | 19, 20 |
| <i>State v. Handley</i> , 54 Wn.App. 377, 773 P. 2d 879 (1989) | 5 |
| <i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)..... | 14 |
| <i>State v. Neal</i> , 144 Wn2d 600, 30 P.2d 1255 (2001) | 15 |
| <i>State v. Pogue</i> , 104 Wn. App. 981, 17 P.3d 1272 (2001)..... | 15 |
| <i>State v. Renfro</i> , 896 Wn.2d 902, 639 P.2d 737 (1982); citing <i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980)..... | 18 |
| <i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988) .. | 6, 8, 9, 12, 22, 23 |

| | |
|---|------------------------------------|
| <i>State v. Stein</i> , 140 Wn.App. 43, 165 P.3d 16 (2007)..... | 14 |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) | 17, 18, 21 |
| <i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992) | 3, 4, 5, 6, 10, 11, 12, 13, 22, 23 |
| <i>State v. Weiss</i> , 73 Wn.2d 372, 438 P.2d 610 (1968) | 15 |
| <i>State v. Wheeler</i> , 108 Wn.2d 203, 737 P.2d 1005 (1987) | 7, 9, 12, 22, 23 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) | 17 |
| <i>United States v. Booth</i> , 669 F.2d 1231 (9 th Cir. 1981) | 5, 7 |
| <i>United States v. Burns</i> , 684 F.2d 1066 (2d Cir. 1982), <i>cert. denied</i> , 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983) | 5, 6 |
| <i>United States v. McLaughlin</i> , 777 F.2d 388 (1985)..... | 10 |

STATUTES

| | |
|--------------------|----------|
| RCW 9.95.200 | 8, 9, 26 |
|--------------------|----------|

OTHER AUTHORITIES

| | |
|--|--------|
| ER403 | 14, 23 |
| RAP 2.5(a)(3) | 14, 23 |
| UNITED STATES CONSTITUTION SIXTH AMENDMENT..... | 1 |
| WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 22 | 1 |

I. ANSWER TO ASSIGNMENTS OF ERROR

It was not clearly erroneous for the trial court to find that the pre-trial questioning of the defendant by jail services staff regarding her drug use/dependency was not interrogation. The questions were administered from a standard pretrial screening sheet and the answers were necessary to determine whether the defendant could be housed, where the defendant would be housed, and where to set bail. Even though the response was incrimination, the court's finding that the question did not constitute interrogation under *Walton* was not clearly erroneous and should not be disturbed on appeal.

Further, the trial court did not abuse its discretion by finding that evidence of the defendant's drug use/dependency was not more prejudicial than probative. The evidence was probative because it contradicted the defendant's assertion that the pills belonged to someone else, and that she had forgotten she possessed them. It was not an abuse of discretion for the trial court to admit the evidence.

The appellant was not denied effective assistance of counsel under Washington Constitution, Article 1, Section 22, and the Sixth Amendment of the United States Constitution. Offering the unwitting possession jury

instruction was a valid trial tactic, given the testimony that emerged. Moreover, the defendant was not substantially prejudiced. Given the evidence offered at trial that the defendant possessed the pills for months, had a morphine dependency, and had used morphine within the last seventy-two hours, the outcome would have been the same. In particular, because counsel continued to argue a general denial theory, the defendant was not prejudiced by the use of an unwitting possession instruction.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's Statement of the Case, but would offer a few additional facts. First, at the pretrial hearing, when asked what the purpose of the questionnaire was, the jail services Officer O'Neill responded that "it's just to make my conclusion on what I think the recommendation for their bail should be set at." RP 21. The questionnaire is a standard form and used on every person booked on a felony charge. RP 21. The questionnaire covers verification of identification and address, drugs, drug use, alcohol use, probation status, and the income of the individual. RP 21. O'Neill indicated that it is helpful to know if the defendant has a drug dependency with regards to whether they should be released, or re-housed inside of the jail, or held in

jail at all. RP 23. She also noted the questionnaire is not meant to help with criminal investigations. RP 14.

Officer Davis was not involved in the questioning process at all. RP 13. He testified that he is required to stand by until the medical questionnaire is completed so that, in the event the defendant does not pass the questionnaire, he can transport them to medical facilities. RP 13. He testified that the purpose of the questionnaire is not to elicit evidence and that the same questionnaire, with the same questions, is asked of every person. RP 14. He did not participate in the questioning, nor is there evidence that he directed the jail services officer to ask particular questions.

When the Honorable Judge Stonier made his ruling, he noted several findings. First, he found that booking process presented “routine questions...done for medical purposes.” RP 41. Noting that he saw a valid argument to the contrary, Judge Stonier held that “*Walton* does control...and I’m going to follow it.” RP 41.

Secondly, on direct examination, defendant indicated that she put the pills in her purse and that was the last she “thought about the pills.” RP 83. The defendant also indicated that she had the pills in her purse for

“quite a while.” RP 87. She also testified that she did not know who the pills belonged to when she was caught at the pharmacy. RP 81.

Finally, at closing, defense counsel pointed out that preponderance of the evidence is the standard for unwitting possession and that it was the lowest burden of proof. RP 113-114. Defense counsel also argued that the defendant forgot that the pills were in her purse and that her confusion in making statements to David Look is due to her forgetfulness. RP 118. Defense counsel also mentions forgetfulness in arguing about instruction ten, the fleeting possession instruction. RP 118.

III. ARGUMENT

A. THE COURT’S FINDING THAT QUESTIONS BY JAIL SERVICES STAFF REGARDING DRUG USE AND DEPENDENCY ARE NOT INTERROGATION WAS NOT CLEARLY ERRONEOUS

The trial court correctly determined that statements made by the Appellant to a jail services officer during the booking process were not the product of interrogation and thus admissible under *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992). *Miranda* warnings are required when the State’s inquiry is 1) custodial, 2) interrogation, 3) by an agent of the State. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The State concedes that the Appellant was in custody when

the questions were asked, and that the jail services officer was an agent of the state. The sole question is whether the trial court committed clear error in finding the statements were not interrogation under *Walton*. The trial court's decision to admit the statements was correct.

Whether the questioning was interrogation is a question of fact and is reviewed by this court under a clearly erroneous standard. *Walton* at 414, 824 P.2d 533; citing *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981). Thus the court should not set aside a finding "unless... the Court is left with a definite and firm conviction that a mistake has been committed." *State v. Handley*, 54 Wn.App. 377, 380, 773 P.2d 879 (1989). The record suggests no such mistake was made.

Per the United States Supreme Court in *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980), "interrogation" for *Miranda* is not only "express questioning, but also any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response." The Court goes on to note that the focus is "primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* However, "it is well established

that routine booking procedures do not require *Miranda* warnings.” *State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988)

Questions asked during booking procedures are only subject to scrutiny in certain cases. The *Walton* court; citing to *United States v. Burns*, 684 F.2d 1066, 1075-76 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983), notes that questioning will only be subject to scrutiny if the agent should have reasonably known the information sought was directly relevant to the offense. *Id.* at 414, 824 P.2d 533. The questioning in the case at the bar did not necessarily invite an incriminating response. There are several cases that illustrate the differences between appropriate and inappropriate questions.

In *Walton*, the court was asked to determine whether statements made by the defendant to a booking officer, and then again to a pretrial investigator, that he lived at a particular address were admissible. The statements related to his denial that he was an occupant at W. 2607 Mallon in Spokane, where the police had executed a search warrant. The police ultimately located heroin and numerous pieces of paraphernalia. *Id.* at 411, 824 P.2d 533. During a pretrial booking interview, he was asked numerous questions, including questions about his residence. The court

noted that “the questions asked were routine background questions necessary for identification and to assist a judge in setting reasonable bail.” *Id.* at 414, 824 P.2d 533. These statements were found to be admissible, “though they ultimately proved to be incriminating.” *Walton* at 414, 824 P.2d 533. A statement is not necessarily interrogation, even though it may be incrimination. *Walton* suggests a safe harbor if the questions are routine background questions.

Another example is *State v. Wheeler*, 108 Wn.2d 203, 737 P.2d 1005 (1987), where the Washington State Supreme Court was faced with a similar question. In that case, detectives had arrested Wheeler and initially booked him. *Id.* at 233, 737 P.2d 1005. The next day a detective approached Wheeler in jail and re-*Mirandized* him. Wheeler refused to waive, so the detective began a Personal Investigation Report, telling Wheeler it was for purposes of arraignment. *Id.* Then, during the course of the questioning, the detective asked Wheeler if he knew Tony Smith, a co-defendant. *Id.* Wheeler denied knowing Smith. *Id.* The detective knew that information was not necessary to complete the report. *Id.*

The court recognized, citing to *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981), that an exception “for routine booking

procedures arises because the questions asked rarely elicit an incriminating response.” *Wheeler* at 238, 737 P.2d 1005. However, the court also noted from *Booth* that there is a potential for law enforcement officers to abuse the booking process to deliberately elicit an incriminating statement. *Wheeler* at 239, 737 P.2d 1005.

Ultimately, the court suppressed the statements, noting that while “the questions contained in the Personal Investigation Report are the kind of routine questions generally permitted... the question asked...however, was not a routine question in the booking process.” *Id.* at 239, 737 P.2d 1005. They also noted that the detective conceded the question “was not necessary to fill out the report.” *Id.*

In *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988), the Washington State Supreme Court dealt with a similar issue involving a post-trial statement. The defendant had been convicted of first-degree murder and first-degree arson and was interviewed by a probation officer for a presentence report under RCW 9.95.200. *Id.* at 642, 762 P.2d 1127. The defendant participated in the interview, was not given *Miranda* warnings, asserted his innocence and notified the probation officer of his intent to appeal. *Id.* at 643, 762 P.2d 1127. The probation officer, during

the presentence interview, essentially told the defendant that he needed to confess to benefit from counseling and left a card with instructions to call him back. *Id.* The defendant subsequently provided a written confession, which was given directly to the prosecutor and integrated into the presentence report. *Id.*

The court in *Sargent* ruled that the confession was the product of custodial interrogation and remanded the case. *Id.* at 655, 762 P.2d 1127. The court used the same analysis as the *Wheeler* court, noting that while RCW 9.95.200 authorizes asking some questions regarding the commission of the crime, the probation officer admitted that the statements were intended to assist the defendant in benefiting from treatment, and not for the report. *Id.* at 652, 762 P.2d 1127. Citing to *Wheeler*, the court noted that “a question which is not necessary for booking the defendant is interrogation for *Miranda* purposes.” *Id.* at 651, 762 P.2d 1127; citing *State v. Wheeler*, 108 Wn.2d 230, 239, 737 P.2d 1005 (1987). The court ultimately ruled that the questioning was interrogation because it was reasonably likely to elicit an incriminating statement and was unnecessary to the performance of the probation officers duties. *Id.*

The Eighth Circuit Court of Appeals dealt with a similar issue in *United States v. McLaughlin*, 777 F.2d 388 (1985). In that case, the defendant had made statements regarding his address and employment to a pretrial services officer, which were later introduced at trial as substantive evidence. The court went through the same analysis as the court in *Walton*, ultimately holding that the statements were admissible. *Id.* at 392. The court, after examining the various circuits, concluded that “a request for routine information for basic identification purposes is not interrogation under *Miranda*, even if the information turns out to be incriminating.” *Id.*

In each of these cases, courts were faced with questions that were either a standard part of the questioning process, or were extra questions added to the booking process. Only where the questions were beyond the scope of the normal questioning process were the statements suppressed. The questions in the case at the bar were not beyond the scope of the normal booking process.

Officer Davis was only present because he had to be present. He testified that he is required to stand by until the medical questionnaire is completed so that, in the event the defendant does not pass the

questionnaire, he can transport them to medical facilities. RP13. He testified that the purpose of the questionnaire is not to elicit evidence and that the same questionnaire, with the same questions, is asked of every person. RP 14. He did not participate in the questioning, nor is there evidence that he directed the jail services officer to ask particular questions.

The jail services officer testified that the questions were for purposes of setting bail, were routine in nature, were asked of every person booked on a felony, and were off a standard sheet. RP 21. The jail services officer testified in regards to the drug dependency question that the information was used to determine whether they should be released, re-housed in the jail, or had medical issues. RP 23. There is no evidence of any nefarious purpose on the part of either officer. The questions were routine in nature and necessary for the purposes of setting bail.

After hearing the testimony of Officer Davis, the jail services Officer O'Neill, and the defendant, as well as argument by both the State and defense counsel, the trial court found that the questions regarding drug dependency and use were not custodial interrogation under *Walton*. Judge Stonier found that they were "asking routine questions." RP 41. Such a

finding should only be disturbed when clear error is observed. Given the testimony and the level of deference given to the trial court in making factual determinations, the trial court's decision was not clearly erroneous and should not be disturbed on appeal.

Indeed, if this court held the opposite, that any question on a pre-existing questionnaire that could elicit an incriminating response would constitute interrogation, jail services personnel would be forced to offer different questionnaires to different defendants based on their crimes. If the defendant was picked up on a warrant, would the jail services personnel be allowed to ask about prior failures to appear in the event it might elicit an incriminating response regarding a bail jump charge? If a jail services officer asked the defendant whether they have had prior failures to appear, it is reasonably likely the answer will be incriminating. Yet, again, under *Walton*, that only begins the inquiry. The real test then becomes whether the question exceeds the scope of the standard intake questionnaire.

The bright-line rule established in *Walton*, *Sargent*, and *Wheeler* is that questions beyond the scope of the questionnaires that could elicit incriminating statements are unacceptable. However, when the questions

are part of standard questionnaires and are closely related to their purpose (setting bail or a presentence investigation), even though they may elicit incriminating statements, there is no interrogation. Such a holding satisfies the needs of *Miranda*, does not reward nefarious changes to the pre-trial booking process, and comports with existing Washington case law.

This court should find that the trial court's determination that the questions were not custodial interrogation under *Walton* was not clearly erroneous.

Even if the court does find that the statements were interrogation, reversal is not warranted. Evidence offered at trial showed that the defendant admitted possessing pills, she knew that the pills were morphine, and that she retained them for months. The evidence showed the possession was not unwitting, was not fleeting, and all the elements were proven. As simple possession does not require knowledge or intent, the evidence admitted at trial was more than enough to prove beyond a reasonable doubt the error was harmless.

B. EVIDENCE REGARDING DEFENDANT'S DRUG USE/DEPENDENCY WAS NOT MORE PREJUDICIAL THAN PROBATIVE

As a threshold issue, this argument was not raised at the trial court level and thus, under RAP 2.5(a)(3), is not necessarily subject to review. The alleged error is based on ER403 and does not implicate a constitutional right, so there can be no manifest error affecting a constitutional right. Because there was no objection at trial, no balancing test was performed as required. *State v. Stein*, 140 Wn.App. 43, 165 P.3d 16 (2007). Thus there is no basis for meaningful review of the trial court. Respondent urges the court to deny review on that basis. However, Respondent will also argue on the merits.

The evidence regarding the defendant's drug use and dependency was more probative than prejudicial. The evidence was directly relevant to the defense theories advanced, and serve to rebut statements made by the defendant. The trial court did not abuse its discretion in finding that the evidence was more probative than prejudicial.

The standard of review in this case is abuse of discretion, as it is with all evidentiary rulings. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The Appellant appropriately notes that the standard for abuse of discretion is whether the decision is manifestly unreasonable, or based

on untenable grounds, citing *State v. Neal*, 144 Wn2d 600, 30 P.2d 1255 (2001). This is where the common ground ends.

Interestingly, Appellant advances *State v. Pogue*, 104 Wn. App. 981, 17 P.3d 1272 (2001) to support the ER 403 claim. Crucial to the court's decision in *Pogue* was the defendant's claim that he did not know the drugs were in the car. Because the defendant in that case argued that he did not even know the cocaine was in the car, "the only logical relevance of his prior possession is through a propensity argument." *Id.* at 985, 17 P.3d 1271.

The case at the bar is the exact opposite scenario. In this case, the defendant admitted having morphine and knowing what it was. The claim was that the morphine belonged to someone else, or that she had forgotten that she had it. The evidence of the defendant's use of morphine on the date of the arrest was directly relevant to establishing that the baggie of morphine pills in her purse were hers and that she knew they were there.

The case at the bar is much more similar to *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968). In that case, the court dealt with a possession arising out of a search warrant, where the asserted defense was unwitting possession. The court allowed testimony by a Mr. Nason that

the defendant has smoked marijuana with him, and that he knew there was marijuana in the house. *Id.* at 377. The evidence was admissible because it tended to show that the “defendant knew of the presence of the marijuana found in the house where the defendant resided.” *Id.*

Similarly, in this case, the defendant advanced the defense of unwitting possession and the evidence of drug use and dependency was directly relevant to show that the drugs belonged to the defendant. This evidence rebutted the defendant’s claims of fleeting possession and unwitting possession. The evidence was not offered as evidence of bad character. Indeed, it is not necessarily even propensity evidence because in some cases, it is legal to possess morphine. It is possible to have a valid prescription for morphine and be addicted to it. There is not necessarily an implication of a bad act.

There is no evidence or argument offered than can show the trial court decision was manifestly unreasonable, or based on untenable grounds. While a different interpretation might have been possible, that is not the standard. This court’s sole duty is to determine whether the trial court’s position was manifestly unreasonable. Given the testimony and the case law, the ruling was not manifestly unreasonable. The ruling was

not based on untenable grounds. The ruling should not be disturbed on appeal.

C. PROFFERING THE UNWITTING POSSESSION INSTRUCTION WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL

Offering an instruction on unwitting possession was a valid trial tactic and did not constitute ineffective assistance of counsel. Defense counsel is entitled under the law to advance multiple theories of the case. In particular with regard to affirmative defenses that do not shift the burden as to an essential element of the crime, a defendant is not required to admit criminal liability to advance such a defense. Defense counsel did not fall below a reasonable standard of representation when he proffered the unwitting possession instruction.

The test for ineffective assistance of counsel, as the Appellant suggests, comes from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden is on the defendant to show (1) that defense counsel's representation was deficient, and (2) there is a reasonable probability that, except for counsel's unprofessional errors, the results of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) (applying the 2-prong test in

Strickland, 466 U.S. at 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674). “[S]crutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” *Thomas*, 109 Wn.2d at 226, 743 P.2d 816.

The deference is more than just a presumption. The court “must distinguish between tactical decision and ineffectiveness.” *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); citing *In re Jeffries*, 110 Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948, 109 S.Ct. 379, 102 L.Ed.2d 368 (1988). The Washington State Supreme Court went so far as to say that the court will not find ineffective assistance of counsel if the challenged actions merely “go to the theory of the case or to trial tactics.” *State v. Renfro*, 896 Wn.2d 902, 909, 639 P.2d 737 (1982); citing *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980). The deficiency must be significant in order to merit reversal.

The claim by the Appellant is that defense counsel was ineffective because he proffered the unwitting possession instruction. Appellant claims the actual theory was not unwitting possession and that the instruction unnecessarily shifted the burden of proof. Staying mindful of

the presumption in favor of finding effective representation, the Respondent will examine these claims.

As a threshold issue it is critical to recognize that defense theories may be argued in the alternative. For example, in *State v. Frost*, 160 Wn.2d 765, 161 P.3d 361 (2007), the court dealt with the affirmative defense of duress, which like unwitting possession, does not negate an element of the offense. The question was whether an affirmative defense that essentially admitted the elements of the crime could be argued in the alternative to a defense of general denial. The court noted that “it is generally permissible for the defendants to argue inconsistent defenses so long as they are supported by evidence.” *Id.* at 772, 161 P.3d 361. The *Frost* court held that “while a defendant may be required to admit that he committed acts constituting a crime in order to claim duress, he or she is not required to concede criminal liability.” *Id.* at 776, 161 P.3d 361. Moreover, on the question of whether the court should prohibit such tactics, the court noted that “to attempt to compel such logic in closing argument may implicate a defendant’s Sixth Amendment right to counsel.” *Id.* at 777, 161 P.3d 361. The defense may argue multiple

theories and inconsistent defenses, which is precisely what defense counsel did in the case at the bar.

In closing arguments, defense counsel argued that the defendant had forgotten that the pills were in her purse (RP 118) and also that the State had not met its burden of proof. RP 120. Both positions were supported by evidence, which under *Frost*, is the only requirement for advancing inconsistent defenses. On direct examination, the defendant indicated that she put the pills in her purse and that “was the last [she] thought about the pills.” RP 83. She also testified that she did not know who the pills belonged to and was confused by the questioning of David Look, which explains her admission that they belonged to someone she knew. RP 81. Defense counsel noted the lack of a lab test indicating the substance was morphine. RP 120. There was either evidence, or a lack of evidence, to support both defenses.

Moreover, unwitting possession does not improperly shift the burden of proof. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.2d 1190 (2004). There is no mens rea element in possession. *Id.* at 537, 98 P.2d 1190. Thus, the defense of unwitting possession merely “ameliorates the

harshness of a strict liability crime.” *Id.* at 538, 98 P.2d 1190; citing *State v. Cleppe*, 96 Wn.2d 373, 380-381, 635 P.2d 435 (1981) *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1982. It does not relieve the state of the burden of proving each element of the crime.

As previously mentioned, it may be argued in the alternative to a general denial defense, so the effect of any perceived burden shift would be negated by defense counsel pursuing both theories. There was a valid tactical reason and evidence to support the proffered unwitting possession instruction. Especially when taken in light of the strong presumption of effective counsel, Appellant fails to show that the representation was below the standard of a reasonably prudent attorney.

Even assuming *arguendo* that the representation was below the standard of a reasonably prudent attorney, the Appellant fails to show that the defendant was prejudiced by counsel’s actions. The defendant bears the burden of showing that the result of the proceeding would have been different but for counsel’s deficient representation. *Thomas*, 109 Wn2d. at 225, 743 P.2d 816. The defendant admitted to possessing the pills (RP

86), that she did not have a prescription for the pills (RP 86), and that the pills were morphine. RP 86. The State offered evidence the defendant had either a morphine dependency or had used morphine that day. RP 68. There was more than enough evidence to overcome the general denial theory.

Appellant's contention that the defendant was prejudiced is premised on the instruction unnecessarily shifting the burden of proof. This contention does not apply where multiple defense theories are advanced. The burden would have shifted only as applied to the defense instruction. Defense counsel could, and did, continue to argue general denial, that the State had failed to meet its evidentiary burden. There was no prejudice to the defendant, assuming that there was ineffective assistance of counsel. The defendant never gave up the defense of general denial.

IV. CONCLUSION

The bright-line rule that emerges from the various cases examined in *Walton*, *Sargent*, and *Wheeler*, deals with scope and regularity. Did the question exceed the scope of the jail questionnaire and attempt to solicit incrimination evidence? If the question is likely to elicit an incriminating

response it is subject to scrutiny, but it is not necessarily interrogation. Consistently, courts that have examined this question have made the determination based on whether the question exceeded the scope of the questionnaire, as in *Wheeler* or *Sargent*, or whether the question was part of the routine process, as in *Walton*. Respondent urges the court find that the trial court's determination that the questions were not interrogation and admissible under *Walton* was not clearly erroneous.

There is no evidence or argument offered that can show the trial court decision was manifestly unreasonable, or based on untenable grounds. While a different interpretation might have been possible, that is not the standard. This court's sole duty is to determine whether the trial court's position was manifestly unreasonable. Given the testimony and the case law, the ruling was not manifestly unreasonable. The ruling was not based on untenable grounds. The ruling should not be disturbed on appeal.

No ER 403 objection was made at trial, no balancing test was performed and no meaningful review can take place. The error does not implicate a constitutional right, and thus is beyond the scope of review under RAP 2.5(a). The court should deny the Appellant's claim on that

basis. Moreover, no testimony, no evidence, and no arguments show that the trial court's decision to admit the drug dependency/use evidence was an abuse of discretion. There was no abuse of discretion and Appellant's claim should be denied.

The presumption is always that the assistance of counsel was effective. The burden is on the Appellant to show that counsel was ineffective and that those actions prejudiced the defendant. That burden has not, and cannot be met. Valid tactical reasons existed to offer unwitting possession and general denial as two defenses. It is legally acceptable to advance to inconsistent defenses. Evidence existed to support both defenses. Offering the unwitting possession instruction was not ineffective assistance of counsel. Moreover, even if it were, no prejudice can be shown, as the admitted evidence was substantial and the defense maintained a theory of general denial. Appellant's only contention that prejudice existed is tied to the unnecessary shifting of the burden of proof.

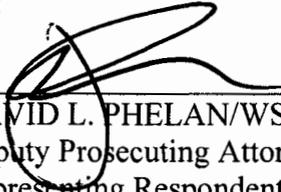
Because defense counsel pursued both general denial and unwitting possession, the burden only shifted for the unwitting possession defense, as it does not negate an element of the crime. Rather it is just a

legal excuse. There was no prejudice to the defendant and this court should deny the Appellant's ineffective assistance of counsel claim.

Respectfully submitted this 12th day of September, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:



DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

V. APPENDIX

RCW 9.95.200 - Probation by court--Investigation by secretary of corrections

After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation, refer the matter to the secretary of corrections or such officers as the secretary may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his prior record, and his family surroundings and environment.

Washington Rules of Evidence, RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rules Of Appellate Procedure, RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

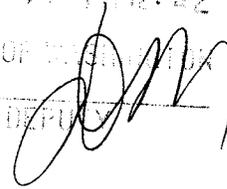
(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 VIRGINIA LYNN DENNEY,)
)
 Respondent.)
 _____)

**NO. 37529-0-II
Cowlitz County No.
07-1-00817-6**

**CERTIFICATE OF
MAILING**

I, Audrey J. Gilliam, certify and declare:

That on the 15 day of September, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of September, 2008.



Audrey J. Gilliam