

No. 40586-5-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MIRANDA THOMAN

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY
COURT REPORTERS

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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SUPPLEMENTAL STATEMENT OF THE CASE

On December 3, 2009, Officer Doug Lowrey was on patrol and noticed the vehicle in front of him had a "modified exhaust system" and that the driver failed to use her turn signal prior to making a turn. RP 38. The vehicle was driven by Miranda Thoman. RP 37,38. The vehicle was stopped in front of the Washington School on Field Avenue. RP 38. There were passengers and infants inside the vehicle. RP 40.

As the passenger was stepping out of the vehicle, the officer saw a methamphetamine smoking pipe. RP 41; 63. Upon seeing the pipe, officers removed all occupants from the vehicle and sealed the vehicle until officers could secure a search warrant. RP 41, 64. The pipes had white crystal matter in them. RP 65. After getting the search warrant, officers searched the trunk of the vehicle and found a "machete case" which contained several small, "Batman logo," little ziplock style bags. RP 42. There were 35 to 45 small ziplock baggies. RP 68. Inside a removable panel inside the back of the trunk, officers found additional narcotics and pipes and scales. RP 42, 70; Ex. 2. There was also a spoon used to distribute the controlled substance into individual baggies, and a

large amount of U.S. currency removed from a passenger. RP 45;
Ex. 3, 5.

Inside a cell phone case in the trunk officers found two glass smoking devices and a spoon. RP 66. One of the pipes did not appear to have been used. RP 67. Officers also located Miranda Thoman's identification information in two backpacks in the vehicle. RP 50, 86. Ms. Thoman told one of the officers that she and her boyfriend had recently installed a speaker inside the trunk a couple of days prior to the stop. RP 99. Ms. Thoman said the backpacks were hers. RP 101. Ms. Thoman told Officer Smerer that her fingerprints could be on the scale because it was "mixed up in her property." RP 78. Leonard Young, Ms. Thoman's boyfriend, said that Ms. Thoman did not know the items found in the trunk were there and that the cell phone case and the scales belonged to him. RP 120-122. Young agreed that the backpacks and clothing in the basket and the makeup case belonged to Ms. Thoman. RP 123, 126. Young said that Ms. Thoman had the only key to the vehicle when they were stopped by the police. RP 125. Ms. Thoman was ultimately charged with possession of a controlled substance with intent to deliver.

ARGUMENT

A. THE JURY INSTRUCTIONS WERE CORRECT AND DID NOT "SHIFT THE BURDEN OF PROOF."

Thoman claims the jury instructions "shifted the burden of proof." In the first place, Thoman did not object to the jury instructions. Nor did she propose any instructions of her own. Furthermore, in her argument on appeal, Thoman goes on to simply set out the law on what the State has to prove for possession of a controlled substance with intent to deliver. Brief of Appellant 9, 10. Those elements were proven by the State in this case. Thoman also relies on the ruling in State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992), for much of her argument. But Sims involved language in the charging document, not the jury instructions. Sims, 141, 142("[e]ach defendant petitioned for review, limited solely to sufficiency of the information"). As such, the Sims ruling is irrelevant to Thoman's argument regarding the jury instructions in this case. Additionally, as the Sims case also notes, the State is not required to prove "knowledge" when proving a case of possession of a controlled substance with intent to deliver.

Jury instructions are reviewed *de novo*, evaluating it in the context of the instructions as a whole. State v. Brett, 126 Wash.2d

136, 171, 892 P.2d 29 (1995); State v. Benn, 120 Wash.2d 631, 654-55, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970); State v. Schulze, 116 Wash.2d 154, 167-68, 804 P.2d 566 (1991); State v. Acosta, 101 Wash.2d 612, 615, 683 P.2d 1069 (1984). It is reversible error to instruct the jury in a manner that would relieve the State of this burden. State v. Allen, 101 Wash.2d 355, 358, 678 P.2d 798 (1984); State v. Roberts, 88 Wash.2d 337, 340, 562 P.2d 1259 (1977); State v. Pirtle 127 Wash.2d 628, 656-657, 904 P.2d 245 (1995).

However, an objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994); State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990); see also State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900(1998)(jury instructions not objected to become of the law of the case); State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995)(“If no exception is taken to jury instructions, those

instructions become the law of the case."); State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994)(parties must object to jury instructions before they are given on penalty of such objection); State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968).

Here, Thoman did not object to the jury instructions below, nor did she propose any jury instructions. RP 18,19. She therefore has waived the right to raise these issues for the first time on appeal. Hames, supra. In addition, while Thoman blames the State for proposing the "unwitting possession" instruction, the fact of the matter is that it is clear that Thoman wanted an instruction on "unwitting possession," and she also wanted a lesser-included instruction for "straight" possession. RP 18, 19. For example, when the parties were discussing motions in limine and instructions before the trial started, the following exchange took place:

PROSECUTOR: I guess I'd ask the court to clarify with the defense as to what their unwitting defense is. There is [sic] two prongs to that. She can claim it was possessed, or unwittingly, she knew what it was. If she is claiming she didn't know what it was, it's probative as to that issue.

DEFENSE COUNSEL: No, the defense is we didn't know it was there.

PROSECUTOR: Okay.

DEFENSE COUNSEL: That's exactly what she told law enforcement from the beginning.

RP 17 (emphasis added). "We didn't know it was there" was

Thoman's "unwitting possession" defense as stated by her. RP 17.

Then, as to the issue of jury instructions, was the following

exchange:

DEFENSE COUNSEL: [a]ctually, I was going to have some [instructions], but I think the prosecutor has included everything I was going to develop, so I don't think I'll have anything additional.

COURT: All right. Do you have some idea when you'll know for sure?

DEFENSE COUNSEL: Well, I am almost 100 percent positive, I can't think of anything right now. I told Mr. Meagher I was going to be asking for a lesser included of straight possession--he has those in there so. . . .

COURT: All right. Are we otherwise ready for the jury then?

RP 19. Thoman had the opportunity to object to the instructions or to propose her own instructions but she did not do so. She should not be able to complain about the instructions now, when she agreed to them below.

Furthermore, the very case cited by Thoman on appeal--State v. Sims--negates Thoman's argument that the State had to prove Thoman's "knowledge--as a component of her alleged intent

to deliver." Brief of Appellant 12. Sims itself states that "knowledge" of the nature of the controlled substance is not an element that the state has to prove for possession of a controlled substance with intent to deliver:

[i]t 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. RCW 9A.08.010(1)(a)& (2). . . . Therefore, there is no need for an additional mental element of guilty knowledge.

Sims, 119 Wn.2d at 142(emphasis added). In sum, the case Thoman cites in support of her argument does not support her argument at all, nor does she cite any other on-point law to support her arguments that instruction number 10 or any other instruction was incorrect. This Court should affirm.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Thoman also claims the prosecutor committed misconduct . This argument is also without merit.

To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and that the conduct had a prejudicial effect, which means there must be a substantial

likelihood the conduct affected the verdict. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A defendant's failure to object constitutes a waiver of the error "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. York, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987), review denied, 110 Wn.2d 1009 (1988)), cert. denied, 514 U.S. 1129 (1995).

Here, Thoman now claims that it was improper for the prosecutor to discuss the instructions pertaining to "unwitting possession"--instructions that Thoman herself agreed to. Not only did Thoman agree to the instructions, she did not object when the prosecutor referred to the unwitting possession instruction in closing. RP 143. Not only did Thoman not object, but everything the prosecutor said was a correct statement of the law. The prosecutor explained, "possession of a controlled substance is unwitting if that person did not know the substance was in her possession, the second paragraph, the burden is on the defendant to prove by a preponderance of the evidence that the substance

was possessed unwittingly." RP 143. All the prosecutor did was read verbatim from instruction number 10. Thoman wanted an instruction on unwitting possession because "the defense is we didn't know it was there." RP 17. She asked for it. She got it. All the prosecutor did was read from the instruction that Thoman asked for. RP 17, 143. This was not "burden shifting." Nor was it misconduct. This Court should affirm.

C. THE SEARCH ISSUE CANNOT BE DECIDED BECAUSE NEITHER THE AFFIDAVIT FOR SEARCH WARRANT OR THE SEARCH WARRANT ITSELF IS PART OF THIS RECORD.

Thoman claims there was no probable cause to support the search warrant and that there was no probable cause to believe evidence of a crime would be found in the trunk of the vehicle. Brief of Appellant 16, 17. However, this issue cannot possibly be addressed because the vehicle was searched pursuant to a *search warrant* and the affidavit for search warrant or the search warrant itself are not a part of this record. Therefore, we have absolutely no idea what facts are contained in the affidavit for the search warrant and thus it cannot be determined whether those facts are sufficient for probable cause to issue the warrant. Obviously, the judge who signed the search warrant felt there was probable cause for the warrant.

Nonetheless, because the search warrant and affidavit for search warrant are not part of the record, the question of whether there was probable cause to issue the warrant simply cannot be decided on this record. This Court should accordingly affirm.

D. THE PROSECUTOR DID NOT ELICIT "IMPERMISSIBLE OPINION TESTIMONY."

Ms. Thoman also claims that the State "introduced impermissible opinion testimony" in the form of a response by one of the officers, and that this violated her right to a jury trial. Brief of Appellant 18. This argument is without merit.

The so-called "opinion testimony" was nothing of the sort and it certainly was not "elicited" or "introduced" intentionally by the prosecutor. The exchange went like this:

PROSECUTOR: Did you actually fingerprint the scale?

OFFICER SMERER: No.

PROSECUTOR: Why not?

OFFICER SMERER: Well, she said her fingerprints may be on there and it was in her possession in the trunk, then there is no reason to send it to the lab.

RP 78. That's it. This mere blip of a reference to the scale being "in her possession in the trunk" was not objected to--probably because it was such a minor thing that no one noticed it--including defense counsel and the jury. RP 78. And there is no way the

prosecutor could have known that the officer would word his answer in this way--the prosecutor certainly did not intentionally elicit this response. All the officer was doing was stating the fact that the items were found in the trunk of the vehicle. RP 78. This was not "impermissible opinion testimony." Even if this remark were stretched to be seen as "opinion evidence," such an error should be deemed harmless because it was trivial and surely did not affect the outcome of this case. City of Bellevue v. Lorang, 140 Wn.2d 19, 32, 992 P.2d 496(2000). This Court should affirm.

E. MS. THOMAN HAS NOT SHOWN THAT HER TRIAL COUNSEL WAS INEFFECTIVE.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance of counsel claim, Ms. Thoman must show (1) that her trial counsel's performance was deficient and (2) that this deficiency prejudiced her. Strickland, 466 U.S. at 687. An ineffective assistance of counsel claim fails without proof of both elements. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). To demonstrate prejudice, Ms. Thoman must show that her trial counsel's performance was so

inadequate that there is a reasonable probability that the trial result would have been different, thereby undermining confidence in the outcome. Strickland, 466 U.S. at 694; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We begin with the presumption that defense counsel's decisions regarding the manner in which to conduct a trial fall within the wide range of reasonable professional assistance. Pirtle, 136 Wn.2d at 487 (citing Strickland, 466 U.S. at 689). Because a presumption runs in favor of effective representation, Ms. Thoman must show that his trial counsel lacked legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Ms. Thoman cannot meet these high burdens here.

Ms. Thoman claims her counsel was ineffective for failing to seek suppression of evidence seized pursuant "to the illegal vehicle search." Brief of Appellant 23. The State disagrees. There are many reasons why competent defense counsel would not move to suppress evidence. As one Court explained this issue:

[w]e will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is per se deficient representation. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate

strategic or tactical reasons supporting the challenged conduct by counsel. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. See *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel) The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below.

State v. McFarland 127 Wash.2d 322, 336-338, 899 P.2d

1251(1995)(internal citations omitted). Thus, as the McFarland Court notes, failure to move for suppression of evidence is not necessarily considered deficient representation. McFarland, 127 Wash.2d at 337. Furthermore, Defense counsel need not pursue strategies that appear unlikely to succeed. McFarland, 109 Wash.2d at 334 n. 2. And absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice. Id.

In the present case, Thoman has not shown that a motion to suppress probably would have been granted. As discussed previously, since the search of the vehicle was done pursuant to a search warrant and because the affidavit for search warrant and the warrant are not part of this record, we cannot possibly decide if the search was "illegal" or whether the court would have granted a

motion to suppress. Thus, Ms. Thoman's ineffective assistance claim on this issue fails.

Ms. Thoman also claims her counsel was ineffective for failing to object to Officer Smerer's allegedly violating a pre-trial order and for failing to object to Instruction No. 10 and the prosecutor's "improper" closing argument. Brief of Appellant 24. As previously discussed, "Instruction No. 10" in the first place is a correct statement of the law, and Ms. Thoman requested Instruction No. 10--she asked for an instruction on unwitting possession. RP 17. Trial counsel cannot be expected to object to an instruction that he himself requested. As to the statement made by Officer Smerer, even the trial court's ruling regarding that statement is not very clear:

PROSECUTOR: May I ask the officer, may he testify with the statement that Miranda said, "people give her methamphetamine, occasionally she'll make jewelry in exchange for methamphetamine"? That's not under use.

COURT: That's correct, it's not use. If it was her use, that's not relevant.

RP 18. This ruling appears to say that the statement about making jewelry in exchange for methamphetamine is not about "use" and therefore it is relevant and thus admissible. Id. This ruling appears to say that the statement is admissible. RP 18. Which is probably

why defense counsel did not object to it. Furthermore, because the prosecutor's remarks were not "misconduct," they were not objectionable in the first place (see argument above regarding prosecutor misconduct allegations). Additionally, when and whether to object is a classic example of trial strategy. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as the basis for a claim of ineffective assistance. State v. Lord, 117 Wash.2d 829, 883, 822 P.2d 177 (1991). In sum, Ms. Thoman has not met the very high burden for showing her trial counsel was ineffective. Accordingly, this Court should affirm.

F. MS. THOMAN WAIVED HER RIGHT TO CHALLENGE HER OFFENDER SCORE WHEN SHE DID NOT OBJECT TO CALCULATION OF HER CRIMINAL HISTORY OR ASK THE COURT TO DECIDE THE SAME CRIMINAL CONDUCT ISSUE.

Ms. Thoman also claims the trial court erred when it did not make a finding as to whether any of her prior convictions were the "same criminal conduct" for purposes of determining her offender score. Because Thoman did not object to the calculation of her offender score or criminal history, the State believes she has waived the right to challenge that computation for the first time on appeal.

A criminal defendant's " 'failure to identify a factual dispute for the [trial] court's resolution and ... failure to request an exercise of the court's discretion' waive[s] the challenge to his offender score." In re Pers. Restraint of Shale, 160 Wash.2d 489, 495, 158 P.3d 588 (2007) (second alteration in original) (quoting State v. Nitsch, 100 Wash.App. 512, 520-23, 997 P.2d 1000 (2000)); State v. Naillieux, 2010 WL 4643842, 5 (2010). The defendant in Shale waived his challenge to his offender score because he agreed to the score and did not challenge its computation in the sentencing court. 160 Wash.2d at 495. In the Naillieux case, the Court said, "Mr. Naillieux did *not* agree to his offender score, but neither did he challenge it. He also did not ask the trial court to pass on the same criminal conduct issue. . . . He, then, has waived his challenge to his offender score." Naillieux, supra. The same is true here. Like in Shale and Naillieux, Ms. Thoman did not challenge her offender score, nor did she "ask the trial court to pass on the same criminal conduct issue." Id. RP 169, 170. Accordingly, she has waived her right to challenge her offender score or the same criminal conduct issue for the first time on appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm Ms. Thoman's conviction and sentence.

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RESPECTFULLY SUBMITTED this 9th day of December, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by: 
LORI SMITH, WSBA 27961
Deputy Prosecutor

Declaration of Service

The undersigned certifies that on this date a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

BACKLUND AND MISTRY
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OLYMPIA, WA 98507

Dated this 9th day of December, 2010, at Chehalis, Washington.

