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NOV 15, 2013
Court of Appeals
Division III
State of Washington

NO. 315061-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RICHARD EDWARD FENTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01173-2

BRIEF OF RESPONDENT

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I. ISSUES

1. **Whether the trial court erred in concluding that the defendant did not have automatic standing to raise an issue regarding the alleged illegal stop of a third party's vehicle in which the defendant was not present.**

2. **Whether jury instruction number eight was a proper instruction regarding the law.**

3. **Whether the decision to not request an unwitting possession instruction constituted ineffective assistance of counsel.**

II. STATEMENT OF THE CASE

On the evening of October 5th through the morning of October 6th, Kennewick Police Detective Trujillo and other officers with the Criminal Apprehension Team were conducting surveillance of a residence located at 108 North Conway in Kennewick, Washington. (RP[1] 56-57). While at the location, officers observed numerous people coming and going from the residence and observed that it did not appear to be a party based on the nature of the short duration of the visits to the residence. (RP 58-59). The residence was described as an upstairs apartment that was accessible by an exterior stairway. (RP 61).

Detective Trujillo observed a woman arrive at the location in a

[1] Unless otherwise dated, "RP" refers to the jury trial Verbatim Report of Proceedings of June 18-19, 2012, filed by Court Reporter Lisa S. Lang.

vehicle that she parked across the street from the apartment. (RP 61). Detective Trujillo observed the woman go up the stairs to the defendant's apartment and then return to her vehicle approximately five minutes later. (RP 61). She was observed retrieving a bag from the trunk of her car and then returning to the apartment with an obvious object inside the bag. (RP 61). Detective Trujillo observed the woman return from the apartment approximately five minutes later with an apparently empty bag, and then put the apparently empty bag back into the trunk of her car. (RP 62). Officers then stopped the woman's vehicle a short distance away, identified her as a Ms. Fuentes, and obtained a search warrant to search the defendant's apartment using some information obtained during the stop of the Ms. Fuentes's vehicle. (RP 63).

Upon serving the search warrant, Officers located a male right outside the defendant's apartment door. (RP 64). Detective Trujillo observed the male drop some items that later were determined to be drugs and drug evidence. (RP 68). Inside the apartment officers located the defendant and two females. (RP 65-66). Upon entering the apartment, Detective Merkl observed the defendant in a bedroom that was later identified as the defendant's bedroom. (RP 91). During the execution of the search warrant, Detective Dorame performed a search of the defendant's bedroom. (RP 104).

During a search of the defendant's bedroom Detective Dorame recovered small plastic baggies, sized one-by-one inch, that he testified were consistent with the type commonly associated with narcotics dealing. (RP 106-07). Detective Dorame located a glass smoking device of the type commonly used to smoke methamphetamine. (RP 108). The device was tested by the Washington State Crime Lab and found to contain methamphetamine residue. (RP 147-48). Detective Dorame located two larger bags of marijuana in the defendant's bedroom that were later tested and weighed and found to contain 6.3 grams and 20.4 grams of marijuana. (RP 83-85, 111). Detective Dorame also located two digital scales in the defendant's bedroom and observed that one of the scales was disguised to look like an iPhone. (RP 111-1).

The defendant was placed under arrest and transported to the Benton County Jail by Detective Slocombe. (RP 138). During the ride to the jail, the defendant initiated conversation with the detective and accused the police of smoking all of his weed. (RP 138).

The defendant was charged with one count of unlawful possession of methamphetamine and one count of unlawful possession of marijuana with intent to deliver. (CP 1-2). Prior to trial, the defense filed a motion to suppress evidence pursuant to CrR 3.6. (CP 4-8). The State filed a response to the brief. (CP 9-38). The trial court reviewed the defense

brief and the State's response and determined that an evidentiary hearing was not required, and ruled that the defendant lacked standing to challenge the alleged illegal stop of the woman's vehicle. (CP 83-85; RP 05/02/13, 5-13).

The defendant was convicted as charged after a jury trial. (CP 68-69).

III. ARGUMENT

1. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT THE DEFENDANT DID NOT HAVE STANDING TO CONTEST THE LEGALITY OF A TRAFFIC STOP THAT WAS PERFORMED ON A THIRD PARTY OUTSIDE OF THE DEFENDANT'S PRESENCE.

The doctrine of automatic standing remains a tool to challenge police action in the State of Washington. A person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). To assert automatic standing, a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. *State v. Simpson,* 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). However, automatic standing is not a "vehicle to collaterally attack every police search that results in a seizure of

contraband or evidence of a crime." *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000). The State will concede that the first prong of the test is met in the present case as the defendant was charged with possessory crimes. However, the second prong is not met in this case. The defendant was not in possession of the "subject matter" at the time of the search and seizure. The "subject matter" of the challenged search and seizure in this case was information that was provided by Ms. Fuentes after her vehicle was stopped. The defendant had no possessory or privacy interest in the information Ms. Fuentes voluntarily provided to law enforcement.

Furthermore, there was an insufficient nexus between the contraband found in the defendant's apartment and the stop of Ms. Fuentes's vehicle. The relationship between the alleged illegal search of Ms. Fuentes and the contraband found in the defendant's apartment is even more attenuated than the relationship between the search and contraband found in *Williams*. In that case, the Court held that the defendant who was inside a third-party's residence did not have automatic standing to challenge law enforcement's entry into the residence, because the "fruits of the search" did not bear a direct relationship on the search the defendant sought to contest. *State v. Williams*, 142 Wn.2d at 23. The *Williams* Court analyzed the purpose underlying Washington's automatic standing doctrine:

> We cannot agree that the automatic standing rule as originally conceived by the Supreme Court would have any application where there is no conflict in the exercise of his Fourth and Fifth Amendment rights. Moreover, as expressed by the plurality opinion in *Simpson,* the automatic standing rule may not be used where the defendant is not faced with "the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment."

State v. Williams, 142 Wn.2d at 23.

Here, the defendant is not faced with any conflict between his Fourth and Fifth Amendment rights. He was not present during the stop of the vehicle and would not be able to give any relevant statements in relation to the vehicle stop and seizure of Ms. Fuentes. The facts of the case do not give rise to automatic standing and the suppression judge did not err in holding that the defendant lacked standing to question the legality of the vehicle stop.

Additionally, as asserted in the State's Response Memorandum on Motion to Suppress, the issue regarding the stop of Ms. Fuentes was litigated by Ms. Fuentes in her own case, and the trial judge denied her motion to suppress evidence from that stop. (CP 20-24). After an evidentiary hearing, Benton County Superior Court Judge Bruce Spanner found that the stop of her vehicle was supported by reasonable suspicion. (CP 21).

2. THE TRIAL COURT'S INSTRUCTION NUMBER EIGHT WAS PROPER.

The defendant argues that jury instruction number eight was an improper comment on the evidence. Appellate Courts review a trial court's legal determinations regarding jury instructions de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). An appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Jury instructions are sufficient as long as they permit each party to argue his or her theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *State v. Howell*, 119 Wn. App. 644, 649, 79 P.3d 451 (2003). A judicial comment on the evidence is a constitutional violation. *Id.* When an instruction assumes as true something which is in dispute, it is a comment on the evidence. *State v. Haack*, 88 Wn. App. 423, 430, 958 P.2d 1001 (1997). The defendant now argues that the contested instruction was a comment on the evidence because it assumed a fact in dispute. In the present case, it was undisputed that methamphetamine was found in the glass pipes that were found in the defendant's bedroom. However, the given instruction stated the law and

did not make any assumptions regarding the evidence.

The trial court's decision to instruct the jury with Jury Instruction number Eight was properly based on the law. There is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction. *State v. Larkins*, 79 Wn.2d 392, 394, 486 P.2d 95 (1971). Residue is sufficient to support a conviction for simple possession. *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991). In the present case, the State alleged that the defendant was in possession of methamphetamine based on the methamphetamine residue that was found and two smoking devices that were found in his bedroom. There was no defense challenge as to the fact that the substances found and tested were in fact methamphetamine. The defense questioned the State's expert regarding the "very small amount" of drugs that were found. (RP 151). This line of questioning was an apparent attempt to persuade the jury that the amounts were insignificant. The State requested instruction number eight, and the court gave the instruction after reviewing case law on the issue and evaluating the evidence and line of questioning used by the defense. (RP 156-57). The trial court properly instructed the jury on the law as required, and made no comment as facts or evidence in the case.

3. TRIAL COUNSEL'S DECISION TO NOT REQUEST AN UNWITTING POSSESSION INSTRUCTION DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant argues that trial counsel should have requested an unwitting possession instruction, and that failure to do so constitutes ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance on the part of counsel, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If one of these two elements is absent, an ineffective counsel claim will fail. *Id.* at 687-89.

Deficient performance of trial counsel is that which falls below an objective standard of reasonableness. *State v. Horton,* 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Appellate courts engage in a strong presumption that representation is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *citing State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). 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. *Id.* at 336. Counsel's legitimate trial strategy or tactics cannot provide a basis for a claim of ineffective

assistance of counsel. *State v. Aho,* 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Unwitting possession is an affirmative defense that the defendant must prove by a preponderance of the evidence. *See State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); *State v. Hundley*, 126 Wn.2d 418, 419 FN1, 895 P.2d 403 (1995). A defense of unwitting possession may be supported by a showing that the defendant did not know he was in possession of the controlled substance or that he did not know the nature of the substance he possessed. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). The Washington Pattern Jury Instruction for unwitting possession reads as follows:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in *[his][her]* possession] *[or][did not know the nature of the substance]*.
>
> The burden is on the defendant 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.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 52.01 (3d Ed).

Here, the trial record shows that trial counsel argued that since two other women were found in the defendant's apartment, the State could not prove beyond a reasonable doubt that the defendant was the person in

possession of the drugs found in his bedroom. (RP 174-75). In making that point, the defense pointed to a small baggie with apparent drug residue that was found in the pocket of a pair of woman's jeans that was located in the apartment. (RP 175). Defense counsel now argues that the drug residue was so small that he was unaware of it and that an unwitting instruction was appropriate. The facts elicited at trial do not support this argument. The drug residue discovered in the defendant's bedroom was found inside two glass smoking devices. This location does not support a finding that a person would not know the nature of the substance inside. The amount of drug-related items that were recovered from the defendant's bedroom along with the defendant's statement to Detective Slocombe do not support a finding that the defendant unwittingly possessed narcotics.

To satisfy the prejudice prong of the ineffective assistance of counsel claim, the appellant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent counsel, the result would have differed, thereby undermining this court's confidence in the outcome of the trial and requiring that it begin anew. *Strickland,* 466 U.S. at 694.

Again, the facts elicited at trial do not support the notion that an unwitting instruction would have changed the outcome of the trial.

Evidence at trial showed that multiple drug-related items were found in the defendant's bedroom. The methamphetamine residue was found inside two glass smoking devices that were located in the defendant's bedroom. Two digital scales and several small baggies of the type typically used for packaging narcotics were found inside the defendant's bedroom. Two bags of marijuana were found in the defendant's bedroom. Officers observed numerous people coming and going after short stays from the defendant's apartment throughout the evening. The defendant also indicated that he knew he had drugs in his apartment when he accused Detective Slocombe of smoking his marijuana. There was no evidence that anyone else was living at the defendant's residence. The evidence was overwhelming that the defendant was dealing in narcotics from his apartment, and he would have been aware of numerous items of drugs and drug paraphernalia that were located inside his bedroom.

In the case at bar, the defendant is unable to show that his trial counsel was defective or that he was prejudiced by the alleged defective behavior, therefore the defendant was not denied effective assistance of counsel.

IV. CONCLUSION

The trial court properly denied the defendant's motion to suppress evidence based on the defendant's lack of standing. The trial court

properly instructed the jury on the law of the case. The defendant was not denied effective assistance of counsel. Accordingly, the conviction of the defendant for Possession of a Controlled Substance and Possession of a Controlled Substance with Intent to Deliver should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of November 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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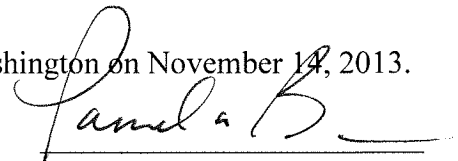

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