

NO. 66438-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DERRICK THOMPSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

CHARLES I. SHERER  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUN -1 PM 1:10

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	2
1 THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.....	2
2. THOMPSON RECEIVED A FAIR TRIAL AND THOMPSON FAILED TO PRESERVE THE ISSUE FOR APPEAL BY FAILING TO TIMELY OBJECT .....	8
3. THOMPSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	12
D. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Harrington v. Richter, \_\_\_ U.S. \_\_\_,  
131 S. Ct. 770 (2011) ..... 14

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13, 14

Washington State:

State v. Barragan, 102 Wn. App. 754,  
9 P.3d 942 (2000) ..... 15

State v. Becker, 132 Wn.2d 54,  
935 P.2d 1321 (1997)..... 7

State v. Bezemer, 169 Wn. 559,  
14 P.2d 460 (1932)..... 8

State v. Cerny, 78 Wn.2d 845,  
480 P.2d 199 (1971)..... 4, 5, 6, 7

State v. Deal, 128 Wn.2d 693,  
911 P.2d 996 (1996)..... 4

State v. Dykstra, 127 Wn. App. 1,  
110 P.3d 758 (2005)..... 4

State v. Hendrickson, 129 Wn.2d 61,  
917 P.2d 563 (1993)..... 13, 16

State v. Hoffman, 116 Wn.2d 51,  
804 P.2d 577 (1991)..... 9

State v. Jacobsen, 78 Wn.2d 491,  
477 P.2d 1 (1970) ..... 4

<u>State v. Johnson</u> , 60 Wn.2d 21, 371 P.2d 611 (1962).....	9, 10, 11
<u>State v. Jones</u> , 70 Wn.2d 591, 424 P.2d 665 (1967).....	8
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	4
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	14
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>review denied</u> , 113 Wn.2d 1002 (1989).....	14
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<u>State v. Nesteby</u> , 17 Wn. App. 18, 560 P.2d 364 (1977).....	5
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	8, 9
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	15, 16
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	5, 7
<u>State v. Taylor</u> , 60 Wn.2d 32, 371 P.2d 617 (1962).....	9
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<u>State v. Thompson</u> , 90 Wn. App. 41, 950 P.2d 977 (1998).....	11
<u>State v. Weber</u> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	9, 10, 11

Storey v. Storey, 21 Wn. App. 370,  
585 P.2d 183 (1978) review denied,  
91 Wn.2d 1017 (1978)..... 9

Constitutional Provisions

Washington State:

Const. art. IV, § 16 ..... 3

Rules and Regulations

Washington State:

RAP 2.5 ..... 8

A. ISSUES PRESENTED

1. Was appellant Derrick Thompson denied a fair trial when the judge encouraged the prosecutor to move along with his questioning of an officer and did not comment on any evidence?

2. Did the prosecutor commit misconduct when an officer offered up testimony in violation of a motion in limine which was not elicited by the prosecutor's questioning? Did Thompson fail to preserve this issue for appeal by failing to timely object or ask for a curative instruction?

3. Does counsel's failure to object reflect legitimate trial strategy? If not, can Thompson show prejudice from counsel's failure to object?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Derrick Thompson was charged via information on May 13, 2010 with one count of Possession with Intent to Manufacture or Deliver Cocaine. CP 1. The Honorable Judge Jim Rogers presided over this jury trial which took place from August 23, 2010 through August 25, 2010. 1 RP 4; 1 RP 47. The jury

found Thompson guilty as charged on August 25, 2010. CP 7.

Thompson timely filed this appeal. CP 38-39.

## 2. SUBSTANTIVE FACTS

Thompson was seen by Seattle police officers in the Pioneer Square area of Seattle on March 9, 2010. 1 RP 37. An officer witness observed Thompson interact with several people in a nearby park and engage in hand to hand transactions which closely resembled drug sales. 1 RP 38-42. In fact, the witness observed Thompson hand little white rocks, which appeared to be crack cocaine, to the three other individuals. 1 RP 41-42. Assisting officers arrived in the area and arrested Thompson, who had \$526 in cash located in various places in his clothing as well as a baggie of crack cocaine on him at his arrest. 1 RP 92, 104, 110-11.

## C. ARGUMENT

### 1 THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Thompson contends that the trial court issued an unconstitutional comment on the evidence when the court encouraged the prosecutor to move along to a new line of

questioning. Thompson's claim should be rejected. The court's statement could not be construed as conveying the court's attitude towards the evidence or issues presented in Thompson's case. It was clearly nothing more than encouraging the prosecutor to move along to his next question for that witness. As such, it was not an unconstitutional comment on the evidence requiring reversal.

The prosecutor began a line of questioning regarding the average street deal of drugs.

Prosecutor: What does the average street deal go for?

Answer: Depending on --

Thompson: I'd object. It's not relevant to this case.

Judge: What's the relevance?

Prosecutor: Should we have a sidebar, your Honor?

Judge: No, you can tell me.

Prosecutor: Excuse me?

Judge: No, you can just tell me. What are you trying to establish, the fact?

Prosecutor: This is a marketable amount of crack cocaine on the streets of Seattle that's bought and sold every day.

Judge: You have already established that with this witness. Why don't you move to your next question.

1 RP 113-14.

Under article IV, section 16 of the state constitution, a judge is prohibited from conveying his personal opinion about the merits of the

case to the jury or from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark "that has the potential effect of suggesting that the jury need not consider an element of an offense" is a judicial comment on the evidence. Id.

The purpose of the prohibition against judicial comments on the evidence is to prevent the jury from being influenced by the trial judge's opinion of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A statement by the court is a comment on the evidence only if the comment conveys to the jury the judge's personal attitude towards the merits of the case or allows the jury to infer that the judge personally believed the testimony in question. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Washington courts have repeatedly held that a court's explanation of an evidentiary ruling does not constitute a prohibited comment on the evidence. State v. Dykstra, 127 Wn. App. 1, 8-9, 110 P.3d 758 (2005). In State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), a murder case, the trial judge responded to a defense objection to certain circumstantial evidence by stating, "I think the chain of evidence has been established." In holding that the trial court's statement was not a comment on the evidence, the

court explained, "A trial court, in passing upon objections to testimony, has the right to give its reasons therefore and the same will not be treated as a comment on the evidence." Id. See also State v. Nesteby, 17 Wn. App. 18, 22, 560 P.2d 364 (1977) (trial court's statement that "we are not talking about possibilities" in sustaining objection not a comment on the evidence).

Similarly, in State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), the court rejected the defendant's claim that the trial court commented on the evidence when the court ruled upon whether the State's witness had qualified as an expert. The trial court stated, "Well, I think the evidence establishes her qualifications in the general subject of sexual abuse of children. The court will accept her as an expert on that subject." Id. The state supreme court explained that a trial court must be allowed to rule on evidentiary questions put to it, and must be allowed to inform counsel of its decision. Id. The court concluded that the trial court's comment did not offer a personal opinion about the doctor's testimony and was not a comment on the evidence. Id. at 658.

As in Cerny and Swan, the trial court in the present case was simply explaining its reasoning for encouraging the prosecutor to move on to a new question. In light of the record, the court's

comment cannot reasonably be construed as offering a personal opinion about the amount of cocaine the defendant possessed. It was not a comment on the evidence.

Moreover, the Cerny court noted that the jury in that case was instructed that anything said by the court should not be taken as an opinion of the court as to the facts of the case, and that the jury is presumed to follow the court's instructions. Cerny, 78 Wn.2d at 856. Likewise, in the present case, the court instructed the jury, both before the evidence was presented, and in the final instructions to the jury as follows:

The law does not permit me to comment on the evidence in any way, and I will not intentionally do that. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight to be given to it. If it appears to you that I do comment on the evidence, you are to disregard such apparent comment entirely.

1 RP 28-29.

It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 13. As in Cerny, the jury is presumed to follow the court's instructions.

Thompson relies upon State v. Becker, though the facts in that case are distinguishable from the present case. 132 Wn.2d 54, 935 P.2d 1321 (1997). The trial court in Becker submitted a special verdict form to the jury which effectively informed the jury that a place in question was in fact a school, which was a disputed issue of fact in that case. Id. at 65. The comment in that case is a far cry from the trial court's brief explanation of its evidentiary ruling in this case.

Thompson also argues that Becker applies here because the apparent comment affected an important and disputed issue at trial. That cannot be the case. The disputed issue in the present case was whether Thompson possessed the requisite intent to deliver the cocaine, not whether the cocaine *could* have been sold. Even if the trial court commented on the evidence, the apparent comment certainly had nothing whatsoever to do with any intent, but merely an amount of cocaine possessed.

The trial court's explanation for its evidentiary ruling was not an unconstitutional comment on the evidence pursuant to Cerny and Swan. The jury is presumed to have followed the court's repeated instructions, and thus, the brief statement explaining the court's ruling

would not have been construed by the jury as an expression of the court's opinion of the testimony. The trial court did not issue an unconstitutional comment on the evidence.

2. THOMPSON RECEIVED A FAIR TRIAL AND  
THOMPSON FAILED TO PRESERVE THE ISSUE  
FOR APPEAL BY FAILING TO TIMELY OBJECT.

As a general rule defendants must preserve issues for appeal.

RAP 2.5. Testimony admitted without objection is not reviewable on appeal. State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665, 669 (1967) (citing State v. Bezemer, 169 Wn. 559, 14 P.2d 460 (1932)).

An objection must be made when testimony is offered. An objection to the admission of testimony will not be considered on appeal where the objection was not made until all the evidence on the particular matter was in the record. Id. at 597. A party must object to improper questions and inadmissible evidence at his earliest opportunity. Id.

In cases where defendant alleges prosecutorial misconduct, the failure to object to an improper remark constitutes waiver of 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, 785 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991)).

Here, Thompson failed to make a timely objection or ask for a curative instruction. Thus, Thompson failed to preserve this issue for appeal and waived any error of law.

Should the court find that the issue is in fact preserved for appeal, the witness' inadvertent comment did not so taint the entire proceedings that Thompson was deprived of a fair trial.

Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. See Storey v. Storey, 21 Wn. App. 370, 585 P.2d 183 (1978) review denied, 91 Wn.2d 1017 (1978). The Supreme Court of Washington has consistently focused on the effect of the testimony or conduct forming the basis for a witness misconduct appeal. See State v. Johnson, 60 Wn.2d 21, 371 P.2d 611 (1962); State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962); State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983). The proper inquiry is: "Did the inadvertent remark, which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint the entire proceedings that the accused did

not have a fair trial?" Johnson, 60 Wn.2d at 29, 371 P.2d at 616; see also Weber, 99 Wn.2d at 164, 659 P.2d at 1106.

In Weber, the Supreme Court answered the debate over the proper weight to be given to the intentional nature of the witness testimony or conduct. In Weber, the defendant appealed a trial judge's denial of the defendant's motion for mistrial based on an experienced officer's testimony. 99 Wn.2d 158, 659 P.2d 1102. At defendant's trial for felony eluding, the prosecutor asked the arresting officer whether the defendant had said anything about his conduct. The officer then testified that the defendant had told him "he felt that he was in a lot of trouble for not stopping." Weber, 99 Wn. 2d at 160, 659 P.2d at 1104. Apparently, the prosecutor had failed to provide this statement to the defense prior to trial. Id. Defense counsel immediately objected and the court instructed the jury to disregard the statement. Id. The prosecutor resumed direct examination and again the officer reiterated this inadmissible evidence. Id. at 161, 659 P.2d at 1104. Defense counsel then moved for a mistrial, which was denied, but the judge again instructed the jury to disregard the statement. Id.

The Supreme Court acknowledged conflicting caselaw on whether the intent of the witness was important to witness

misconduct analysis. Id. at 164, 659 P.2d at 1106. Ultimately, the Court ruled that "the judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" Id. at 164-65, 659 P.2d at 1106. To determine whether a trial was fair, or more specifically the prejudicial effect of an irregularity during the course of the trial; this court should consider the seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. Johnson, 60 Wn.2d 21, 371 P.2d 611; Weber, 99 Wn.2d 158, 659 P.2d 1102; State v. Thompson, 90 Wn. App. 41, 950 P.2d 977 (1998) (citations omitted) (disagreed with on other grounds).

In this case, Officer Fry inadvertently said a lot of people deal crack cocaine outside a particular location. 1 RP 38. The reference was unsolicited by the prosecutor. In fact, it was an explanation for how the officer was able to state that three individuals smoked crack cocaine prior to meeting Thompson. Further, the trial court encouraged the prosecutor to ask leading questions in order to bring about the desired testimony, which the prosecutor did. Id. The officer went on to explain other particular details about why she was

sure she had seen those individuals smoke crack cocaine, besides the general reference to the location. Id.

As previously stated, to succeed on a claim of prosecutorial misconduct, Thompson must show that the remark was flagrant or ill-intentioned. Thompson cannot succeed on this point because the remark at issue was not even uttered by the prosecutor, but rather a witness. Even after the witness made the comment, the prosecutor was able to ask questions in order for the witness to reasonably explain her testimony. 1 RP 38-40.

There was no misconduct by the prosecutor. More importantly, Thompson failed to immediately object. Should this court find that Thompson did in fact preserve this issue for appeal, the comment standing alone did not so taint the proceedings as to deny Thompson a fair trial.

### 3. THOMPSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Thompson argues that the trial counsel was ineffective by failing to object to speculative testimony as well as testimony in violation of a pretrial ruling. Given that the objection would have drawn unwanted attention to the testimony, it was a legitimate tactical

decision. Moreover, Thompson cannot show that he was prejudiced by counsel's failure to object.

To prevail on an ineffective assistance of counsel claim, Thompson must show 1) that his attorney's conduct fell below an objective standard of reasonableness and 2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1993). If a defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction ... and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard

must be scrupulously applied. Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 788 (2011).

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. There is a "wide range" of reasonable performance, and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategy or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Counsel's decisions about whether or not to object are quintessentially tactical decisions, and only in egregious circumstances relating to evidence central to the State's case will failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). To prevail on a claim of ineffective assistance of counsel based on a decision not to object,

the defendant must show three things: 1) that there were no legitimate tactical reasons for not objecting; 2) that the trial court would have sustained the objection if one had been made; and 3) that the result of the trial would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Courts generally presume that counsel decided not to request a limiting instruction so to avoid reemphasizing damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Such a presumption is appropriate in this case.

Thompson argues that his attorney should have objected on three occasions, for two different reasons. First, he contends that counsel should have objected to speculative testimony; when Officer Fry testified to seeing three individuals who had just smoked crack and when Officer Legaspi testified to seeing Thompson exchange an unknown narcotic for money. 1 RP 38, 105. Next, Thompson contends that counsel should have objected when Officer Fry testified that lots of people deal crack cocaine in a particular area, in violation of a pretrial motion prohibiting such testimony. 1 RP 38. Instead, Officer Fry should have testified that the area in question is a high crime area. 1 RP 17.

Any objection to the officers' testimony would have drawn unnecessary attention to the fact that the officers know the area to be a high drug trafficking area or to allow the officers to further explain why they testified as they did with regards to drug use and sales. Given the brief references to the topics, it was a legitimate tactic to avoid drawing attention to them. This court should presume that trial counsel provided effective representation.

Even if trial counsel was deficient, Thompson cannot show prejudice. To prevail, Thompson must show a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. In the case of a missed evidentiary objection, Thompson must show that the proposed objection would likely have been sustained and that the result of the trial would have been different if the evidence had not been admitted. Saunders, 91 Wn. App. at 578.

Thompson offers no evidence rule or other authority to support his claim that the trial court would have sustained an objection to speculative testimony. Thompson simply states that both Officers Fry and Legaspi testified based on assumptions they each made. This does not provide insight into how the trial court would have ruled on an objection to the questions and testimony at issue here. Thompson

has not met his burden to demonstrate that any objection would have been sustained.

Moreover, Thompson cannot show that the result of the trial would have been different had an objection been sustained. In all likelihood, Fry or Legaspi would have clarified the details they observed which led them to their respective conclusions that three individuals had apparently just smoked crack cocaine or engaged in behavior synonymous with participating in a drug deal. Again, these conclusions or explanations were based on direct observations. Such testimony would have reminded the jury of the evidence supporting Officer Fry and Officer Legaspi's testimony.

In the instance of Officer Fry commenting that a lot of drug deals take place in a particular area, the trial court asked the prosecutor to ask leading questions. The prosecutor successfully asked the officer leading questions to bring out the observations relevant to the probative facts. There was no prejudice and Thompson received effective assistance of counsel.

D. CONCLUSION

Accordingly, the trial court did not comment on the evidence and Thompson received both a fair trial and effective assistance of

counsel. For the reasons stated, this court should affirm Thompson's conviction.

DATED this 30 day of June, 2011.

Respectfully submitted,

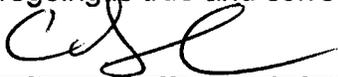
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
CHARLES I. SHERER, WSBA #39277  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DERRICK THOMPSON, Cause No. 66438-7-I, in the Court of Appeals, Division I, for the State of Washington.

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



\_\_\_\_\_  
Name Charles Sherer  
Done in Kent, Washington

6/30/11

\_\_\_\_\_  
Date 6/30/11

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUL - 1 PM 1:10