

NO. 75071-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WHITAKER,

Appellant.

FILED
Nov 04, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA L. THORP

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE WHITAKER’S PROPOSED INSTRUCTION ON “MERE POSSESSION”	4
a. Relevant Facts.....	5
b. Whitaker’s Proposed Instruction Was Potentially Misleading And He Was Able To Argue The Theory Of His Case From The Instructions That Were Given.....	6
2. OFFICER LEDNICKY DID NOT IMPROPERLY GIVE HIS PERSONAL OPINION AS TO WHITAKER’S GUILT	11
a. Relevant Facts.....	12
b. Officer Lednický’s Testimony Was Relevant To Establish The Identity Of Whitaker As The Seller Of Cocaine And Was Not An Improper Opinion On His Guilt.....	14
c. Whitaker’s Attorney’s Lack Of Objections Was Not Ineffective Assistance Of Counsel.....	20
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 20, 21, 22

Washington State:

City of Seattle v. Heatley, 70 Wn. App. 573,
854 P.2d 658 (1993)..... 14, 15

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004)..... 21, 22

State v. Barnes, 153 Wn.2d 378,
103 P.3d 1219 (2005)..... 10

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 6, 7

State v. Cobelli, 56 Wn. App. 921,
788 P.2d 1081 (1989)..... 7

State v. Crittenden, 146 Wn. App. 361,
189 P.3d 849 (2008)..... 7

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 14, 15

State v. Ehrhardt, 167 Wn. App. 934,
276 P.3d 332 (2012)..... 7, 8, 10

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011)..... 21

State v. Hagler, 74 Wn. App. 232,
872 P.2d 85 (1994)..... 9

<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	21
<u>State v. Johnston</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	21
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	15, 17, 19
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	9
<u>State v. Mace</u> , 97 Wn.2d 840, 650 P.2d 217 (1980).....	8
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662 (1998).....	22
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	18, 19
<u>State v. Reichert</u> , 158 Wn. App. 374, 242 P.3d 44 (2010).....	9
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988).....	7
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	17
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	16
<u>State v. Vander Houwen</u> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	6

Constitutional Provisions

Federal:

U.S. CONST. amend. VI..... 20

Rules and Regulations

Washington State:

RAP 2.5..... 19

A. ISSUES

1. A proposed jury instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. Further, a trial court is under no obligation to give a potentially misleading instruction. Here, the trial court found Whitaker's proposed instruction that "mere possession" was insufficient to prove intent to deliver a controlled substance to be potentially misleading. The "to convict" instruction set forth possession and intent to deliver as separate elements that must be proved beyond a reasonable doubt. Has Whitaker failed to show that the trial court erred by declining to give his proposed instruction?

2. No witness may offer testimony in the form of an opinion on the defendant's guilt, but courts do not take an expansive view of claims that testimony constitutes an opinion of guilt. Admission of witness testimony alleged to have been an improper opinion on guilt that was not objected to at trial is not manifest constitutional error unless the opinion on the defendant's guilt was "explicit or nearly explicit" and caused actual prejudice. Here, the unobjected to testimony was not an opinion on guilt, but rather fact-based testimony meant to establish the identity of the suspect by the only eyewitness to the crime. Has Whitaker failed to show that admission of the testimony was manifest constitutional error? Has he

also failed to show that his attorney's lack of objections constituted ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Richard Whitaker was charged by information with one count of violation of the Uniform Controlled Substances Act (VUCSA), possession with intent to manufacture or deliver cocaine. CP 1. After a jury trial, Whitaker was convicted as charged. CP 60. The trial court imposed a standard range sentence. CP 66-74.

2. SUBSTANTIVE FACTS

Seattle Police Officer Forrest Lednicky is a member of the West Precinct anti-crime team, which focuses on "street level" crime including narcotics, prostitution, and "pattern-based" property crimes. RP 81-82. Lednicky has been involved in several hundred narcotics investigations over the course of his career. RP 90. Among the unit's activities is to stakeout areas where numerous narcotics-related complaints have been received. RP 83.

On September 27, 2013, at about 1:45 a.m., Lednicky was on the roof of a building in downtown Seattle conducting surveillance of a known trouble-spot below. RP 84-85. Using binoculars from a distance of about 150 feet, Lednicky saw a man, later identified as the defendant,

Richard Whitaker, standing alone on a sidewalk, with his back to a building, looking up and down the street. RP 87-88. After about five minutes, Whitaker was approached by two pedestrians who stopped and engaged him in conversation. RP 88-89. After a few seconds, the two men took money out of their pockets and appeared to combine their money. RP 89-90. One of the men then turned back to Whitaker and he and Whitaker then walked north for a few steps, paused and looked around, then continued walking in the same direction before stopping and again looking around. RP 90. Lednicky saw Whitaker retrieve something from his waistband. RP 91. With his binoculars, Lednicky could see that Whitaker had a clear plastic baggie that contained "several small, white-colored rocks." RP 91. Whitaker removed a rock from the baggie and gave it to the other man who then put it in his mouth. RP 91-92. Based on his experience, Lednicky was aware that purchasers of rock cocaine often put the product in their mouth to conceal it and also to test it, since crack cocaine is not water soluble. RP 92-93. After the man put the rock in his mouth, he and Whitaker "parted ways." RP 94.

Believing he had probable cause to arrest Whitaker for selling narcotics, Lednicky called in the arrest team, who detained and arrested Whitaker. RP 94-95. The team did not have the resources to pursue the other two men. RP 96. At the precinct, one of the arresting officers,

David Lewis, searched Whitaker and found that he had \$359 and 10 rocks of crack cocaine in a pocket in the waistband of his jeans. RP 145-47. Each piece of crack was individually wrapped in cellophane, and each wrapped piece, according to Lewis, who had experience purchasing crack while undercover, had a street value of \$20 to \$30. RP 153. The fact that the pieces of crack were individually wrapped indicated to Lewis that they had been packaged for sale. RP 153-54. Lewis weighed the suspected cocaine and found it to total three and one-half grams. RP 147.

A forensic scientist for the Washington State Patrol Crime Laboratory randomly selected one of the 10 pieces of “off-white, chunky material” for testing because they all “looked consistently the same across the board.” RP 111, 114-15. The sampled material tested positive for cocaine. RP 122.

Whitaker did not testify at trial. RP 182. The defense called no witnesses. Id.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE WHITAKER’S PROPOSED INSTRUCTION ON “MERE POSSESSION.”

Whitaker contends that the trial court erred by declining to give his proposed jury instruction that possession of cocaine alone was insufficient to establish intent to deliver. Whitaker is incorrect. His proposed

instruction was misleading, and, the other instructions provided to the jury allowed him to argue his theory of the case.

a. Relevant Facts.

Whitaker proposed that the trial court instruct the jury as follows:

An inference of an intent to deliver cannot be based on mere possession of a controlled substance, absent other facts and circumstances.

CP 33. The trial court declined to give the proposed instruction, believing it to be “misleading,” and, specifically, that the phrase “mere possession” was a “loaded statement.” RP 213. The court found that the other instructions provided to the jury were “frankly clearer, [and] less a comment on the evidence.” RP 213. The trial court believed that Whitaker would be able to argue his theory of the case based on the provided instructions. RP 213-14.

Pertinent instructions that were provided to the jury included:

To convict the defendant of the crime of Violation of the Uniform Controlled Substances Act — Possession with Intent to Deliver a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the (sic) September 27, 2013, the defendant possessed a controlled substance;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and,
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 54.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 56.

Deliver or delivery means the actual or attempted transfer of a controlled substance from one person to another.

CP 57.

- b. Whitaker's Proposed Instruction Was Potentially Misleading And He Was Able To Argue The Theory Of His Case From The Instructions That Were Given.

Errors in jury instructions are reviewed *de novo*. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). Jury instructions are to be read as a whole and each instruction is read in the context of all others given.

Id.

Jury instructions are improper if they do not permit the defendant to argue his theory of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). “[A] specific instruction need not

be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case.” Brown, 132 Wn.2d at 605 (quoting State v. Rice, 110 Wn.2d 577, 603, 757 P.2d 889 (1988)). A trial court is under no obligation to give inaccurate or misleading instructions. State v. Crittenden, 146 Wn. App. 361, 369, 189 P.3d 849 (2008).

Whitaker’s premise in proposing his instruction was correct, mere possession of drugs, without more, does not raise an inference of the intent to deliver. State v. Cobelli, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989). However, the trial court properly declined his proposed instruction because it was misleading, and because other instructions, namely the “to convict” instruction, correctly stated the law and allowed Whitaker to argue his theory of the case.

State v. Ehrhardt, 167 Wn. App. 934, 276 P.3d 332 (2012), is instructive. In that case, a prosecution for burglary and theft, the defendant sought a jury instruction that read, “Mere possession of stolen property alone is insufficient to find the defendant guilty of either theft 2 or burglary 2.” Ehrhardt, 167 Wn. App. at 938. The court of appeals held that, even though it was a correct statement of the law, the trial court did not abuse its discretion in declining to give the proposed instruction because it was misleading and the other instructions allowed Ehrhardt to

argue the theory of his case. Id. at 940-41. The proposed instruction was held to be misleading because it failed to inform the jury that possession of stolen property plus inculpatory circumstances could suffice to support a burglary conviction. Id. at 940 (citing State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1980)). Ehrhardt held:

Ehrhardt's proposed instruction did not inform the jury that Ehrhardt's presence at the scene of the burglary, combined with his possession of recently stolen property, could be sufficient proof of second degree theft or second degree burglary. Ehrhardt's instruction could have misled a layperson to believe that Ehrhardt's possession of stolen property was not at all probative of burglary or theft. As such, the trial court was under no obligation to give Ehrhardt's instruction.

Ehrhardt, 167 Wn. App. at 940.

Whitaker's attempt to distinguish Ehrhardt is unpersuasive. He argues that his proposed instruction differs from Ehrhardt's and is not misleading because it included the words, "absent other facts and circumstances." But Ehrhardt's instruction clearly implied the same thing by stating that "mere possession alone" was insufficient. The essence of the problem is the same in both cases, that the proposed instruction might cause jurors to reject any probative value of the fact of possession. Here, Whitaker's proposed instruction could have misled a layperson to believe that Whitaker's possession of crack cocaine was not at all probative of an

intent to deliver the drugs, despite the fact that the 10 rocks were individually wrapped in cellophane.

Moreover, the additional words in the proposed instruction that Whitaker argues save it, are, actually, in and of themselves, misleading.

An inference of an intent to deliver cannot be based on mere possession of a controlled substance, *absent other facts and circumstances*.

CP 33 (emphasis added). The problem lies in Whitaker's use of the plural forms of "fact" and "circumstance." "[T]he State must prove *at least one additional factor*, suggesting a sale and not mere possession, to corroborate the defendant's intent to deliver." State v. Reichert, 158 Wn. App. 374, 391, 242 P.3d 44 (2010) (emphasis added) (citing State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994)). In Hagler, the evidence was sufficient where the defendant was found in possession of 24 rocks of cocaine as well as \$342 in cash. Hagler, 74 Wn. App. at 236. In another case, the court found sufficient evidence of intent where the defendant possessed drugs along with a gram scale and \$850 in cash. State v. Lane, 56 Wn. App. 286, 290, 297-98, 786 P.2d 277 (1989).

Whitaker possessed 10 rocks of crack cocaine and \$359 in cash. The proposed instruction's phrase "absent other facts and circumstances," with "fact" and circumstance" both being plural, is misleading, an incorrect statement of the law, and a potential comment on the evidence,

because all that is necessary is “one additional factor.” The phrasing could have resulted in the jury believing that more than one additional factor was required to find that Whitaker had an intent to deliver cocaine.

Ehrhardt also held that even if the proposed instruction was not misleading, the trial court did not abuse its discretion in rejecting it because the other instructions allowed the defendant to argue his case. Ehrhardt, 167 Wn. App. at 940. The same holds true here. “Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.” State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Ehrhardt held that because the court gave the correct “to convict” instructions for burglary in the second degree and theft in the second degree, the instructions “allowed Ehrhardt to argue his theory that the State’s evidence was insufficient to show every element of the crimes charged.” Ehrhardt, 167 Wn. App. at 940.

Here, the jury was properly instructed that to convict Whitaker of possession with intent to deliver the State was required to prove beyond a reasonable doubt two separate elements: (1) that he possessed a controlled substance, and (2) that he had the intent to deliver the controlled substance. CP 54. Indeed, in closing argument, Whitaker’s attorney highlighted the “to convict” instruction in arguing that possession alone

was insufficient to convict Whitaker — that the law requires proof beyond a reasonable doubt of both possession *and* of intent to deliver:

Let's go to instruction No. 8 for a moment. This is the to convict instruction that the state mentioned earlier. Possession alone is not enough...

Even if you find that beyond a reasonable doubt that Mr. Whitaker had possession of this, that alone is not enough to make him guilty of the crime that he's charged with here. If you find that Mr. Whitaker — if you find beyond a reasonable doubt that Mr. Whitaker had possession of cocaine but you can't find beyond a reasonable doubt that he had the intent to deliver then it would be your duty to return a verdict of not guilty. Nobody here can dispute that.

CP 241-42.

There was no error. Whitaker's proposed instruction was potentially misleading, and the instructions provided to the jury allowed Whitaker to argue his theory of the case.

2. OFFICER LEDNICKY DID NOT IMPROPERLY GIVE HIS PERSONAL OPINION AS TO WHITAKER'S GUILT.

Whitaker claims that Officer Lednick, by testifying that there was probable cause to arrest Whitaker and that the arresting officers had detained the "correct suspect," improperly gave his personal opinion that Whitaker was guilty. Whitaker's argument is without merit. Lednick informed the members of his arrest team that there was probable cause for arrest because they had not witnessed the drug transaction. The purpose

of that testimony was made clear to the jury. Similarly, at the time of the arrest, Lednicky, who was 150 feet away on a rooftop, confirmed for the arrest team that they had arrested “the correct suspect.” Identity of the accused is always at issue, and Lednicky’s eyewitness testimony established Whitaker’s identity as the person engaged in the charged drug offense. The testimony was not an improper opinion on Whitaker’s guilt.

a. Relevant Facts.

After Officer Lednicky described witnessing the transaction and seeing the cocaine purchasers leave the scene, the following exchange occurred:

[Prosecutor]: And after the -- or Mr. Whitaker and the subject parted ways, where did the two individuals that contacted him go?

[Lednicky]: I don’t know. At that point I had believed that I had developed probable cause to arrest Mr. Whitaker –

[Defense attorney]: Objection; relevance.

THE COURT: Overruled.

[Prosecutor]: You may continue.

[Lednicky]: I believed that I had developed probable cause to arrest Mr. Whitaker for selling narcotics. I was maintaining visual on him while calling in the arrest team, giving out Mr. Whitaker’s physical description, physical location, and continued watching him until the arrest team arrived and arrested him.

RP 94-95.

Then, without an objection by Whitaker, the following exchange occurred between the prosecutor and Lednicky:

Q. Did the arrest team contact the person that you observed selling crack cocaine?

A. Yes.

RP 95.

After Lednicky's testimony that he had called in his arrest team to apprehend Whitaker, the following exchange between the prosecutor and Lednicky occurred, again without objection:

Q. Officer, just a few more questions. After you saw Mr. Whitaker, that he was taken or contacted by the arrest team, what did you do if anything?

A. **I advised them over radio that they had contacted the correct suspect.** I asked that they arrest him and provide transport for him to the West Precinct so that we can complete the arrest.

Q. And after that point did you have any other involvement in the investigation?

A. I returned to the West Precinct, completed the necessary paperwork. I never actually contacted Mr. Whitaker face to face.

RP 100 (emphasis added).

Officer Lewis, from the arrest team, testified that he was one of three officers in an undercover car standing-by near the arrest scene. RP 140-41. The arrest team purposely stays nearby but out of sight of a

suspected drug dealer or the dealer's scouts. RP 140-41. When the spotting officer, in this case Lednicky, communicates to the arrest team by radio that a drug transaction has occurred, the arrest team moves in to apprehend the suspect. RP 141. Lewis testified that when the arrest team contacts a person, "we'll hold on to them for a second and then he'll [the spotting officer] verify that we do have the correct person before we actually put handcuffs on them." RP 142. Here, Lednicky informed the arrest team that a drug transaction had occurred and gave the location and description of the suspect. RP 142. As the arrest team approached and then detained Whitaker, Lednicky confirmed by radio that they had arrested the correct person. RP 142.

- b. Officer Lednicky's Testimony Was Relevant To Establish The Identity Of Whitaker As The Seller Of Cocaine And Was Not An Improper Opinion On His Guilt.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invad[es] the exclusive province of the [jury]." State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the

circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759 (citing Heatley, 70 Wn. App. at 579).

Opinion testimony is defined as “testimony based on one’s belief or idea rather than on direct knowledge of facts at issue.” Demery, 144 Wn.2d at 760 (citations omitted). Courts “ha[ve] expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” Demery, 144 Wn.2d at 760 (quoting Heatley, 70 Wn. App. at 579).

A claim that witness testimony was an improper opinion on guilt is not automatically reviewable for the first time on appeal as a manifest constitutional error. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). To constitute manifest constitutional error, the opinion on the defendant’s guilt must be “explicit or nearly explicit.” Id. “This exception is a narrow one, and we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences.” Id. at 934-35.

First, the State will address the two snippets of Lednicky’s testimony that Whitaker failed to object to and now, for the first time on appeal, claims was improper opinion testimony: (1) Lednicky’s

affirmative response to the prosecutor's question as to whether the arrest team contacted the person that "you observed selling crack cocaine," and (2) Lednicky's testimony that he advised the arrest team that "they had contacted the correct suspect." There is no merit to Whitaker's claim that Officer Lednicky expressed an opinion on his guilt. This doesn't even constitute opinion testimony, let alone an improper opinion on guilt. Whitaker, the only officer who observed the drug transaction, was simply communicating with his arrest team to insure that the man they were arresting was the same man he had seen selling the drugs, rather than one of the other two men involved. Thus, Lednicky's testimony was based on his "direct knowledge of facts at issue," not on his "belief or idea."

Bluntly, this was fact-based testimony establishing the identity of the perpetrator by the only eyewitness to the crime. It is no wonder that Whitaker did not object to the testimony. The absence of an objection by defense counsel strongly suggests that the argument or event in question did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). This was not an "explicit or nearly explicit" opinion on Whitaker's guilt that may be raised for the first time on appeal.

Whitaker also alleges that Lednicky's testimony that he believed there was probable cause to arrest Whitaker was an improper expression

of his opinion on Whitaker's guilt. It was not. At trial, Whitaker did not object on the basis that the witness had expressed an improper opinion; rather, Whitaker's objection was "relevance," which was overruled by the court. The trial court properly determined that the testimony was relevant. In context, Lednicky's testimony, "I believed that I had developed probable cause to arrest Mr. Whitaker for selling narcotics," was offered to explain that he, the only officer to have witnessed the transaction, had a basis to order his arrest team to move in and detain and arrest Whitaker. It was relevant to explain the sequence of the arrest and to identify Whitaker as the person who had been observed selling cocaine.

By raising the issue for the first time on appeal, Whitaker must prove that Lednicky's use of the term "probable cause" was an "explicit or nearly explicit" opinion on guilt. Kirkman, 159 Wn.2d at 936. This he cannot do. The cases on which Whitaker relies are not comparable and are therefore unpersuasive. In State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993), a drug prosecution, the prosecutor in closing argument violated a pretrial motion in limine by referring to the defendant's prior drug conviction and also informed the jury that there had been a *judicial* finding of probable cause. Stith, at 21-22. Stith held the egregious misconduct to be reversible error. Stith, 71 Wn. App. at 22. The difference is clear. In Stith, a prosecutor in closing argument assured a jury of the defendant's

guilt by telling them a judge had already found probable cause. Here, an officer merely explained his decision to direct his colleagues to make an arrest.

Whitaker also relies on State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), a prosecution for possession of pseudoephedrine with intent to manufacture methamphetamine. In Montgomery, after a detective testified that he had followed the codefendants from store to store as they acquired pseudoephedrine, the prosecutor asked whether the detective had “formed any conclusions.” Id. at 587. The detective replied: “I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I’d seen those actions several times before.” Id. at 588. There was no objection to the question or response. Id. Also without objection, the detective testified that “those items were purchased for manufacturing.” Id. Further, a forensic chemist called by the State, after reviewing the materials possessed by the codefendants, testified: “these are all what lead me toward this pseudoephedrine is possessed with intent.” Id. The defense did not object. Id.

Montgomery held that the above-quoted testimony of the detective and forensic chemist amounted to improper opinions on guilt. Id. at 594.

However, despite finding that the expressions of opinion on guilt had been direct and explicit, the court held that Montgomery had not established manifest error affecting a constitutional right necessary to challenge the testimony for the first time on appeal. Id. at 595 (citing RAP 2.5).

Montgomery had not established actual prejudice because the jury had been properly instructed, the jury was presumed to follow the instructions, and there had been no written jury inquiry or other evidence that the jury was unfairly influenced. Id. at 596 (citing Kirkman, 159 Wn.2d at 928).

Unlike in Montgomery, where the improper opinion testimony was direct, explicit, and relatively extensive in response to the prosecutor's questions, here, the officer made a fleeting reference to having probable cause to arrest only to explain his communication with the arrest team. If there was error at all, it was not manifest constitutional error that resulted in actual prejudice. The jury was properly instructed and the evidence of Whitaker's intent to deliver cocaine was very strong. In addition to Whitaker being found in possession of 10 rocks of cocaine — individually wrapped in cellophane for sale — and \$359 in cash, a police officer saw him engage in a drug transaction. As the defense called no witnesses, the State's evidence was unrebutted.

None of the complained of testimony amounted to an improper opinion on Whitaker's guilt. If there was any error at all, it was harmless given the strength of the State's case.

c. Whitaker's Attorney's Lack Of Objections Was Not Ineffective Assistance Of Counsel.

Whitaker also claims that his attorney's failure to object that Lednicky's testimony included his opinions on Whitaker's guilt constitutes ineffective assistance of counsel. This claim must also be rejected. For the reasons argued above, Lednicky's testimony was not an improper opinion on guilt; therefore, Whitaker's attorney's lack of objections did not amount to sub-standard performance. Moreover, even if his attorney should have objected, the evidence of Whitaker's guilt was so strong that the outcome would not have been different.

A criminal defendant has the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing such a claim falls on the defendant. Strickland, 466 U.S. at 687. To prevail, Whitaker must show that (1) his attorney's conduct fell below a professional standard of reasonableness (the performance prong),

and that, (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different (the prejudice prong). State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If he fails to establish either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

To establish deficient performance in the context of a failure to object to testimony, a defendant must show that the failure to object fell below prevailing professional norms and that the objection would likely have been sustained. State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). As argued above, Lednicky's testimony was not an opinion on Whitaker's guilt. Lednicky, as the only eyewitness to the drug transaction, communicated to the arrest team the information necessary to apprehend the correct person. His attorney cannot be faulted for failing to object to unobjectionable testimony.

Moreover, even if his attorney *could have* objected to the testimony based upon one inference to be drawn from it, the decision whether to object is a “classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1998). Reviewing courts presume that the failure to object was legitimate trial strategy, and Whitaker bears the burden of rebutting this presumption. Davis, 152 Wn.2d at 714. At trial, Whitaker did not truly contest identity, but rather argued that there was not sufficient evidence of Whitaker’s intent to distribute the cocaine. It is likely that his attorney saw the testimony for what it was — evidence that the correct person had been apprehended — and tactically decided not to object. Whitaker has not established that the failure to object was not a tactical decision.

Even if his attorney should have objected, Whitaker fails to establish the prejudice prong of Strickland. For the same reasons that any error in the admission of the testimony was harmless beyond a reasonable doubt, Whitaker cannot show that there is a reasonable probability the outcome of the trial would have been different absent the testimony. His claim of ineffective assistance of counsel should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Whitaker's judgment and sentence.

DATED this 4 day of November, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jennifer J. Sweigert, containing a copy of the Brief of Respondent, in STATE V. RICHARD WHITAKER, Cause No. 75071-2-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.

Done in Seattle, Washington

Date : Nov. 4, 2016