SUPREME COURT NO. _____ Case #: 1035853

NO. 85372-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEVON EVANS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Cindy Larsen, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Devon Skye Evans seeks review of the Court of Appeals' unpublished decision in State v. Evans, No. 85372-4-I filed September 30, 2024 (attached).

B. ISSUES PRESENTED FOR REVIEW

1. In its decision, Division One indicated that a criminal defendant is bound by law of the case doctrine. While this Court has long held that law of the case doctrine may *increase* the prosecution's burden proof, the reverse cannot be true without violating the due process rights of the accused as well as separation of power principles. Is this Court's review warranted to address whether that law of the case doctrine can bind criminal defendants?

2. Drugs and drug-dealing supplies were found in a bag in a vehicle that Mr. Evans had been a passenger in. None of Mr. Evan's belongings were found in the vehicle, and there is no evidence that Mr. Evans was aware that the drugs were there. The driver of the vehicle did not testify. Nevertheless, he was

convicted of possession with intent to distribute based on the theory that he was in constructive possession of the bag. Division One held that there was sufficient evidence that Mr. Evans constructively possessed the items found in the vehicle. Is this Court's review warranted to address what circumstances beyond proximity constitute sufficient evidence of constructive possession beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Substantive Facts

The charges in this case stem from an incident that took place when a police officer who was familiar with Mr. Evans discovered that there was an administrative warrant for his arrest and went to Mr. Evans's apartment building to patrol. RP 264.

When the officer arrived, Mr. Evans was being dropped off at his home by Mazen Sadia, who was driving a truck. RP 265, 316-17. When Mr. Evans got out of the truck, the officer instructed Mr. Evans to stop, and Mr. Evans ran away while the officer chased him. RP 271-72, 318. While he was running, the officer

heard a "thud" sound. RP 273. Eventually, the officer tackled Mr. Evans and arrested him. RP 274.

A search incident to arrest revealed a holster, $200 in cash, brass knuckles, and a small jar with 15 blue-green pills, stamped with M30. RP 62, 280, 421. A firearm was found near where the officer had heard the "thud." RP 279-280.

Mr. Sadia's truck impounded and searched. RP 322-24. Mr. Sadia lived in the truck, and he asked officers to simply search the truck rather than to impound his home. RP 322-24, 332. The truck was messy and full of Mr. Sadia's belongings; items including mail addressed to him and a credit card with his name on it were also found in his truck. RP 258, 331.

There were also multiple bags found throughout the truck that contained various substances, some of which were tested for drugs. RP 57-59. These included a black zippered bag, a black "Nike bag," and a red backpack. RP 23, 57-59. The "Nike bag" was located on the floorboard of the passenger side of the vehicle. RP 63. It contained a glass jar with an untested crystalline

substance, "two small pouches of blue M30 pills that returned as fentanyl," a scale, small baggies, rubber bands, and a knife with residue on it. RP 58-60. The fentanyl pills were light blue. RP 421. The red backpack contained a scale and a plastic bag with another untested crystalline/powder substance. RP 60, CP 1-2.

2. Procedural History

Mr. Evans was charged with two counts of unlawful possession of a controlled substance with intent to manufacture or deliver, one based on fentanyl and the other based on methamphetamine, with a firearm allegation. CP 111-12, RP 13-15. He was also charged with one count of unlawful possession of a firearm. CP 111-12, RP 13-15. After the court excluded evidence of the untested substances found in the vehicle, the court granted Mr. Evans's motion to dismiss the count related to methamphetamine. RP 245-47.

After the prosecution rested, Mr. Evans moved to dismiss the remaining unlawful possession with intent to manufacture or deliver charge, arguing that the State had failed to prove Mr. Evans

possessed the fentanyl found in Mr. Sadia's truck. RP 386. The court described it as a "close case" and "certainly not the strongest," but ultimately denied the motion, inviting Mr. Evans to seek a motion notwithstanding the verdict if the jury convicted. RP 395, 406.

The jury found Mr. Evans guilty of both remaining charges and the firearm allegation. CP 73-75; RP 443-44. Mr. Evans moved to set aside the verdict as to the unlawful possession of a controlled substance charge, and the court denied his motion. RP 456. The court sentenced Mr. Evans to 108 months in prison, CP 39-40.

3. Appeal

On appeal, Mr. Evans argued that there was insufficient evidence that he was in possession of the black Nike bag and its contents.

The Court of Appeals asserted it was relying on law of the case doctrine based on the instruction defining possession, which Mr. Evans did not object to. Opinion at 6. It found that there was

sufficient evidence of constructive possession because the black Nike bag was on the passenger side of the car, close to where Mr. Evans's knees would be while he was sitting in the passenger seat. Opinion at 6-7. The Court of Appeals reasoned that this "close proximity" gave Mr. Evans the immediate ability to take possession of the controlled substance inside the bag and gave him the "ability to exclude others from possession." Opinion at 6-7. The Court of Appeals also held that some evidence beyond proximity "linked" Mr. Evans to the Nike bag—specifically, the items found on Mr. Evans's person and Mr. Sadia's request that officers search the truck he lived in, rather than impound it. Opinion at 7-8.

D. ARGUMENT IN SUPPORT OF REVIEW

1. This Court should grant review to clarify whether law of the case doctrine can bind the accused.

On appeal, Mr. Evans argued that there was insufficient evidence that he possessed the drugs found in Mr. Sadia's truck. In rejecting his challenge, the Court of Appeals relied on "law of the case doctrine" and held that Mr. Evans was bound by law of the case, because he did not object to the instruction defining possession. Opinion at 5- 6.

The law of the case doctrine, a long-established doctrine that applies in both civil and criminal cases, "means different things in different circumstances." State v. Anderson, 198 Wn.2d 672, 498 P.3d 903 (2021) (quoting State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017)).

In the context of jury instructions in a criminal case, it means "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction."

State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). The law of the case doctrine may apply to instructions other than the 'to convict' instruction—such as definitional instructions—when such instructions include additional facts that the prosecution is required to prove. See State v. France, 180 Wn.2d 809, 816-817, 329 P.3d 864 (2014).

The Court of Appeals opinion flips this principle on its head, holding that Mr. Evan's appellate challenge to the sufficiency of the evidence is limited by a definitional instruction he did not object to. Opinion, at 5-6. The Court of Appeals did not make clear in what way this limitation altered its analysis. Id. There is no precedent for this use of law of the case doctrine.

There are several significant reasons why the law of the case doctrine cannot be applied in reverse. A conviction based on a jury instruction which erroneously lowers the prosecution's burden of proof violates the due process rights of the accused. State v. Tyler, 191 Wn.2d 205, 216, 422 P.3d 436 (2018); State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005).

Allowing such convictions would functionally allow courts to criminalize conduct not proscribed by the legislature, in violation of separation of powers principles. See State v. Batson, 196 Wn.2d 670, 674, 478 P.3d 75 (2020). And if statutes are subject to modifications that broaden the scope of criminal conduct at the time of trial, they cannot give citizens fair warning of what is prohibited, creating an additional due process violation. See State v. Evans, 177 Wn.2d 186, 298 P.3d 724 (2013).

No Washington Court has ever addressed the application of law of the case doctrine to an instruction that the *accused* did not object to, or made clear how law of the case could constitutionally apply under such circumstances. Because this issue necessarily implicates constitutional due process rights and constitutional separation of powers violations, and because law of the case doctrine is routinely used by appellate courts, this Court's review is warranted under both RAP 13.4(b)(3) and RAP 13.4(b)(4).

2. This Court should grant review to address what "other circumstances" beyond mere proximity are necessary to prove beyond a reasonable doubt that the accused is in constructive possession of contraband.

This Court should grant review to clarify what the prosecution must prove to obtain a conviction based on a theory of constructive possession. Since this Court's adoption of the Jackson[1] standard, this Court has never explained what circumstances would amount to proof beyond a reasonable doubt that the accused is in constructive possession of contraband, rather than merely proving proximity or passing control. Without such guidance, appellate courts have continued to rely on a rule of law derived from Washington's prior, less rigorous "substantial evidence" test that does not comport with due process.

Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I,

[1] Jackson v. Virginia, 443. U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

§ 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) (Green II). There is insufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Jackson, 443 U.S. at 319. While all reasonable inferences should be drawn in favor of the prosecution, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

This Court adopted this standard to review the sufficiency of evidence in Green II, 94 Wn.2d at 221-222. In so doing, it rejected the less demanding "substantial evidence" test which had previously been used by Washington courts. Id. Under the substantial evidence test, appellate review was limited to "whether the State has produced substantial evidence tending to establish certain circumstances from which a jury could reasonably infer the

fact to be proved." State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979)(Green I). This Court rejected the substantial evidence test because it does not require proof beyond a reasonable doubt. Vasquez, 178 Wn.2d at 6.

Washington law allows a person to be convicted for possessing contraband that is not in their physical custody when it is still within their "dominion and control." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Courts "examine the totality of the circumstances and look to a variety of factors to determine whether an individual has dominion and control over an item." State v. Listoe, 15 Wn. App. 2d 308, 326, 475 P.3d 534 (2020). The ability to reduce an object to actual possession is an aspect of dominion and control, but mere proximity is not enough. State v. Chouinard, 169 Wn. App. 895, 282 P.3d 117 (2012). Similarly, the momentary handling of an object establishes only "passing control," which is insufficient to prove possession, whether it is actual or constructive. State v. Staley, 123 Wn.2d 794, 799, 872

P.2d 502 (1994) (citing State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)).

"Factors supporting dominion and control include ownership of the item, and in some circumstances, ownership of the premises" where the item is located. State v. Davis, 182, Wn.2d 222, 234, 340 P.3d 820 (2014). As a general rule, "courts hesitate" to find sufficient evidence when the prosecution charges passengers with constructive possession, because proximity and momentary handling are not enough to prove dominion and control. Chouinard, 169 Wn. App. at 900; see e.g. State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008); State v. Enlow, 143 Wn. App. 463, 178 P.3s 366 (2008); State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

Since the adoption of the Jackson standard, this Court has addressed sufficient evidence to prove constructive possession only once. In Davis, this Court considered the sufficiency of the evidence that the two defendants possessed a stolen firearm. 182 Wn.2d at 226. Davis was at his home when Maurice Clemmons

arrived, told Davis that he had killed four police officers and had been shot, and asked for a ride to Nelson's home. Id. at 225. Davis complied, and at Nelson's home, Clemmons was given fresh clothing and medical aid for his gunshot wound. Id. Nelson put a gun Clemmons had stolen from one of the officers into a shopping bag and placed it on a counter. Id. Before leaving, Clemmons asked where the gun was, and Davis replied that it was in the bag, which he handed to Clemmons. Id. Davis and Nelson were each convicted of possession of a stolen firearm, and Davis was also convicted of unlawful possession of a firearm. Id. at 225-26.

The Davis court was divided. In a dissent by Justice Stephens which expressed the opinion of the majority of the Court, the Court held that there was insufficient evidence of constructive possession. The Court determined the evidence did not show that Davis or Nelson exercised sufficient control over the gun, because neither asserted any interest in the gun, and merely handled it briefly for Clemmons. Id. at 235 (Stephens, J., dissenting). The four-justice lead opinion, authored by Justice Fairhurst, would

have held there was sufficient evidence of constructive possession based on the theory that Clemmons had relinquished control of the gun to Davis and Nelson while he was in Nelson's home. Id. at 228.

With only this limited guidance, appellate courts have continued to rely on a rule set forth in State v. Mathews, 4 Wn. App. 653, 484 P.2d 942 (1971). In Mathews, the court declined to reverse a conviction for possession of heroin based on heroin found in the backseat of a car in which Mathews was a passenger. Id. at 557-658. The court held that based on circumstantial evidence—such as that Mathews was a known heroin user and had acknowledge purchasing heroin that day, and that the others in the car either disclaimed ownership or were not heroin users—there was "substantial evidence in the record establishing circumstances which would justify a finding that defendant was in constructive possession of the narcotic drug heroin because he exercised dominion and control of the area in which the heroin was found." Id.

Notably, because Mathews was decided prior to Washington's adoption of the Jackson standard, the Mathews court was applying the less rigorous "substantial evidence standard" Id. The Mathews court affirmed the conviction because "proximity coupled with the other circumstances linking [Mathews] to the heroin was sufficient *to create an issue of fact on constructive possession*." Id. (emphasis added). It did not hold that the circumstantial evidence at issue was sufficient such that a rational juror could, without speculating, conclude beyond a reasonable doubt that Mathews exercised dominion and control over the heroin.

Despite this, appellate courts have continued to hold that proximity, coupled with other circumstances "linking" the accused to the contraband is sufficient to prove constructive possession, seemingly regardless of whether those circumstances are sufficient for a rational juror to conclude that the accused has dominion and control over the item at issue beyond a reasonable doubt.

In State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008), the Court of Appeals held there was not sufficient evidence that the accused, a backseat passenger, was in possession of cannabis, burned in a pipe found near his feet. Id. at 912-13. In so doing, it factually distinguished Mathews, noting that the "other circumstances linking" the accused to the contraband were not present, and that the prosecution's evidence boiled "down to mere proximity." Id. at 923.

Here, citing George and Mathews, the Court of Appeals determined that "the State here permissibly relied on "evidence of proximity coupled with 'other circumstances linking the defendant to the [fentanyl pills].'" Opinion at 7-8.

The other circumstances that "linked" Mr. Evans to the controlled substance in Mr. Sadia's cars were, according to the Court of Appeals (1) the items Mr. Evans had on his person, including a bottle of about fifteen pills, $200 in cash, brass knuckles and a holster, and (2) an officer's testimony that Mr.

Sadia had asked officers to search the car he lived in, rather than impound it. Id.

The "link" between these facts and the contents of Mr. Sadia's truck requires some speculation—they are not circumstances from which a rational jury could find that Mr. Evans possessed the contents of Mr. Sadia's truck beyond a reasonable doubt. While Mr. Evans's possession of cash, weapons, and pills may be evidence from which a rational jury could reasonably infer that he has some relationship to the drug trade—most likely as a buyer and user of drugs—it did not give rise to a reasonable inference that he owned the specific drugs and drug-dealing supplies at issue here.

Similarly, the conclusion that Mr. Sadia was not aware of the contents of his vehicle because he encouraged police to search the vehicle he lived in, rather than impound it, was not one a jury could reach without speculation. Mr. Sadia did not testify. There is no evidence as to why Mr. Sadia made this request, and there are many possibilities.

Indeed, the Court of Appeals did not hold that circumstances beyond proximity were sufficient evidence by which a rational juror could find beyond a reasonable doubt that Mr. Evans had dominion and control over the drugs and drug-dealing supplies in Mr. Sadia's truck. See Opinion at 6-7. Instead, it appeared to apply a less rigorous test requiring only a "link," adopted from Mathews. Id.

As it stands, appellate courts do not have adequate guidance as to how the due process requirement that the prosecution prove every element beyond a reasonable doubt applies to proof that a person has dominion and control over an object. This issue implicates both due process and a frequently recurring topic in criminal law—constructive possession. Review is thus warranted under RAP 13.4(b)(3)-(4).

E. CONCLUSION

For the reasons discussed, Mr. Evans respectfully asks that this Court grant review and reverse the Court of Appeals.

DATED this 29th day of October

I certify this document is in 14-point font and contains 3197 words, excluding those portion exempt under RAP 18.17.

Respectfully submitted,

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FILED
9/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DEVON SKYE EVANS, Appellant.	No. 85372-4-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Devon Skye Evans appeals his conviction for possession of a controlled substance with intent to manufacture or deliver. He argues (a) there was insufficient evidence to support his conviction, (b) the trial court abused its discretion when it admitted "untested blue pills" as evidence of guilt, (c) the prosecutor committed misconduct, and (d) his counsel provided ineffective assistance. Evans also requests that the case be remanded to the trial court to strike the Victim Penalty Assessment (VPA) imposed at sentencing. We remand to the trial court to strike the VPA, but in all other respects we affirm.

I

On November 15, 2022, Lynnwood Police Officer Tanner Hedlund drove to the apartment complex where Evans resided to apprehend Evans pursuant to a felony arrest warrant. From his patrol vehicle, Hedlund observed Evans exit the

passenger side of a pickup truck in the parking lot of the complex. Hedlund then approached Evans and told him to "stop" and "take your hand out of your pocket." Evans ran away, and Hedlund ran after him.

After Evans rounded the corner of the north end of the apartment building, Hedlund lost sight of him. During the time Hedlund could not see Evans, Hedlund heard a "thud." Hedlund eventually caught up to Evans, tackled him, and placed him under arrest. A handgun was found in a bush by the north side of the building near where Evans was running when Hedlund heard the "thud." After a search incident to arrest, Hedlund found a "holster, $200 in cash all in 20s, brass knuckles," and a jar of blue pills, marked "M30," on Evans' person.

After the search incident to arrest, the pickup truck was impounded and lawfully searched pursuant to a search warrant. During the search, Hedlund found a black Nike bag on the floor of the passenger side of the truck. Inside the bag, Hedlund found "a scale with some residue on it, a knife, some baggies, . . . and some rubber bands." Additionally, Hedlund found more blue pills marked "M30" inside the bag. The pills were sent to the Washington State Crime Laboratory, where one of the pills retrieved from the black Nike bag was tested and found to contain fentanyl.

Based on the forgoing facts, the State charged Evans with unlawful possession of a firearm in the first degree and possession of a controlled substance (fentanyl) with intent to manufacture or deliver with a special allegation

of a firearm enhancement.[1] Evans moved to suppress the blue pills found on his person, arguing "[w]ithout testing a pill from the sample found on Mr. Evans' person, the State cannot say that the pills found on Mr. Evans' person were fentanyl." The trial court denied the motion to suppress and found that possession of the pills was relevant to whether Evans may have possessed the other similarly-marked and similarly-shaped pills found in the pickup truck.

The jury convicted Evans of both counts. Following trial, Evans filed a motion for judgment notwithstanding the verdict with regard to the conviction of possession of a controlled substance with intent to deliver. The court denied the motion, reasoning that sufficient evidence supported the jury's verdict. Thereafter, Evans was sentenced to 108 months of confinement. Evans appeals.

II

A

Evans argues that the trial court erred in "[a]dmitting the untested blue pills," which he claims were inadmissible under ER 403. We disagree.

Under ER 403, relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice." "We review decisions to admit evidence using an abuse of discretion standard." *State v*. *Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *State v*. *Ferguson*, 25 Wn. App. 2d 727, 735, 524 P.3d 1080 (2023).

[1] The State also charged Evans with a separate count of possession of a controlled substance (methamphetamine) with intent to manufacture or deliver; however, the trial court dismissed this count on Evans' motion before opening statements due to "insufficient evidence to prove possession with intent solely on the methamphetamine."

There was no abuse of discretion here. The pills found on Evans' person were relevant to show that Evans also possessed the pills found in the black Nike bag, when considering that the pills were similar and that Evans was seen exiting the passenger side of the vehicle where the black Nike bag was found one minute before being arrested. Because the blue pills found on Evans' person were not tested for the presence of a controlled substance, the trial court instructed the jury that the blue pills found on Evans' person may be considered "only in determining whether or not Mr. Evans possessed [the black Nike bag] and the items that were found therein [(the fentanyl pills)] and for no other purpose." This instruction eliminated any unfair prejudice in admitting the untested pills. *State v. Jackson*, 145 Wn. App. 814, 824, 187 P.3d 321 (2008) ("Juries are presumed to follow instructions."). On this record, Evans has not shown that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

Relatedly, Evans argues that the trial court abused its discretion by failing to conduct an ER 403 analysis "on the record." Evans relies on *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995), to support this argument, but his reliance on *Powell* is misplaced. The trial court there admitted evidence of prior bad acts (threats and other misconduct) under ER 404(b). *Id.* at 264. Where, as here, a trial court admits evidence despite an ER 403 objection, our Supreme Court has held:

> Admissibility of evidence under ER 403, unlike ER 404(b) and ER 609, does not depend on the purpose for which it is offered. Thus, the rationale for requiring the trial court to weigh its decision on the record under ER 404(b) and ER 609 is not present in the case of an ER 403 objection.

Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Thus, the trial court did not abuse its discretion or otherwise err by failing to weigh on the record the probative value of this evidence against the danger of unfair prejudice. Nor did the trial court abuse its discretion in admitting the untested blue pills, particularly given its limiting instruction.

B

Evans argues there is insufficient evidence to support his conviction for possession of a controlled substance with intent to manufacture or deliver. We disagree.

To decide whether sufficient evidence supports a jury's verdict, the court must determine "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In determining this issue, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Additionally, "Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence." *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010).

Focusing solely on the first element of the charged offense—that "the defendant possessed Fentanyl"—Evans claims that the "prosecution failed to prove [he] possessed the fentanyl pills found in [the] vehicle." Regarding that element, the trial court instructed the jury as follows:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

Evans did not object to this instruction, so it is "law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Additionally, under controlling case law, "[w]hen a person has dominion and control over a premises, there is a rebuttable presumption that the person has dominion and control over items on the premises." *State v. Listoe*, 15 Wn. App. 2d 308, 327, 475 P.3d 534 (2020) (quoting *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010)).

Here, considering the relevant considerations, a rational juror could properly find that Evans was in constructive possession of the fentanyl found in the black Nike bag. Hedlund testified that he saw Evans exit the passenger side of the vehicle where the black Nike bag was found on the floor of the vehicle. Hedlund testified that the bag would have been situated by Evans' knees when he was sitting in the passenger seat. Thus, before exiting the vehicle, Evans had the

immediate ability to take actual possession of the controlled substance. Further, considering the close proximity of the bag to Evans, he had the ability to exclude others from possession of the fentanyl, including the driver. This evidence, viewed favorably to the prosecution, is sufficient to persuade a rational fact finder that Evans unlawfully possessed a controlled substance.

Notwithstanding the above evidence and analysis, Evans argues "no evidence beyond mere proximity connected Mr. Evans to the fentanyl pills found" in the vehicle. Evans relies on *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), to support this argument. In *George*, George was convicted of drug possession and drug paraphernalia possession when police found a marijuana pipe on the floor of the backseat of the car near his feet. *Id.* at 912-13. The court of appeals reversed, reasoning that there was nothing more than mere proximity to link George to the pipe because there was no evidence that George had a history of using marijuana, no drugs or paraphernalia were found on his person, no testimony ruled out the other occupants in the car as the owner of the pipe, and no fingerprint evidence linked George to the pipe. *Id.* at 922.

Here, in contrast, the State did not rely on mere proximity, but provided evidence of proximity *in addition* to other circumstances linking Evans to the fentanyl pills. Unlike George, Evans was found with blue pills on his person that were similarly marked and of a similar size, shape, and color as the fentanyl pills found in the black Nike bag, along with items that the trial court noted (based on Hedlund's testimony) could be indicative of drug dealing, such as brass knuckles, $200 in cash, and a holster. Additionally, the only other occupant in the pickup

truck, its owner Sadia Mazen, consented to the police searching the truck, which Hedlund testified would be unexpected for someone who knew there were drugs in the vehicle. Thus, unlike the State in *George*, the State here permissibly relied on "evidence of proximity coupled with 'other circumstances linking the defendant to the [fentanyl pills].'" *George*, 146 Wn. App. at 921 (quoting *State v. Mathews*, 4 Wn. App. 653, 658, 484 P.2d 942 (1971)).

In short, sufficient evidence supports the conviction for possession of a controlled substance with intent to manufacture and deliver.

C

Evans argues that the prosecutor committed misconduct by appealing to juror's emotions and inappropriately raising the specter of the war on drugs during voir dire and closing argument. We disagree.

To prevail on a prosecutorial misconduct claim, the defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Where, as here, the defendant did not object to the alleged instances of prosecutorial misconduct, the defendant must show on appeal that "the misconduct was so flagrant and ill-intentioned that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the resulting prejudice had a substantial likelihood of affecting the jury verdict." *State v. Mireles*, 16 Wn. App. 2d 641, 656, 482 P.3d 942 (2021). We review the prosecutor's conduct in the context of the whole argument, issues of the case, evidence addressed in the argument, and jury instructions. *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021).

In *State v. Loughbom*, 196 Wn.2d 64, 470 P.3d 499 (2020), our Supreme Court recognized that a prosecutor's repeated references to the war on drugs can rise to the level of flagrant and ill-intentioned misconduct. The prosecutor in *Loughbom* referred to the war on drugs in the State's opening argument, rebuttal, and closing argument and framed the case as "another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole." *Id.* at 68. Our Supreme Court held, "The prosecutor's repeated invocation of the war on drugs was a thematic narrative designed to appeal to a broader social cause that ultimately deprived Loughbom of a fair trial." *Id.* at 70. The court explained such "'[r]epetitive misconduct can have a cumulative effect'" and remanded the matter for a new trial. *Id.* at 77-78 (quoting *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (internal quotation marks omitted)).

Contrary to Evans' argument, the prosecutor's references in this case to enforcement of drug laws are not analogous to the prosecutorial misconduct in *Loughbom*. During voir dire, the prosecutor asked prospective jurors if they believed "the State should not be getting involved with fentanyl distribution?" The question appropriately probed the potential jurors' beliefs regarding an issue at the heart of the case: the role of law enforcement in addressing illegal drug use. Unlike the prosecutor in *Loughbom*, the prosecutor in this case did not frame the case as "another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole." 196 Wn.2d at 68. Nor did the prosecutor repeatedly emphasize this point throughout the trial, as the prosecutor did in *Loughbom*. Instead, the issue arose briefly during voir dire and not within the trial

itself. Lastly, even if the prosecutor's conduct was improper, a curative instruction would have obviated any prejudicial effect on the jury. On this record, Evans cannot establish misconduct or prejudice as required by *Mireles* (quoted above) and similar cases.

Evans attempts to show repeated misconduct, similar to *Loughbom*, by pointing to the prosecutor's references to voir dire during closing argument. During her closing argument, the prosecutor asked jurors to "go back to voir dire for a minute . . . . [T]here were comments made regarding the connection between guns and drugs and dangerous activities and that those two are often coupled together." This, Evans claims, rises to the level of repeated misconduct similar to that in *Loughbom*. But this argument mischaracterizes the prosecutor's comments during closing argument. The prosecutor was not invoking the war on drugs or recalling the dangers of fentanyl, but was instead suggesting that the fact that Evans had an empty holster on his person was circumstantial evidence that he was distributing drugs—a theme that had been introduced earlier in the case when both the prosecutor and defense counsel questioned the jury about the connection between guns and dangerous activities. Evans' argument that this case involves repeated misconduct and is in that sense analogous to *Loughbom* thus fails.

Because Evans has not shown that the conduct at issue was so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury or that any resulting prejudice had a substantial likelihood of affecting the jury verdict, his prosecutorial misconduct claim fails.

D

Evans argues that his defense counsel was ineffective for failing to object to (a) the prosecutor's questioning during voir dire regarding the role of law enforcement in addressing illegal drug use and (b) opinion testimony of Hedlund. We disagree.

A defendant alleging ineffective assistance of counsel must establish that (a) "counsel's performance was deficient" and (b) "the defendant was prejudiced by the deficient performance." *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984)). "Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" *State v. State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). There is a strong presumption of effective assistance, which "is not overcome if there is any 'conceivable legitimate tactic' that can explain counsel's performance." *In re Det. of Hatfield*, 191 Wn. App. 378, 402, 362 P.3d 997 (2015) (quoting *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). And although it is lower than a preponderance standard, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052).

Evans' first argument—that his defense counsel provided ineffective assistance of counsel by failing to object to the prosecutor's questioning regarding the impact of fentanyl in the community during voir dire—easily fails. Given the prosecutor's limited questioning on the topic (as in part II.C above recounts), Evans' defense counsel may have chosen to refrain from objecting to the questioning to avoid drawing additional attention to it. *See, e.g., State v. McDaniel*, 155 Wn. App. 829, 862, 230 P.3d 245 (2010) (counsel "may have had tactical reasons not to ask for a limiting instruction, namely, to not call attention to the incriminating stipulation"). Thus, the failure to object could have been a legitimate trial strategy or tactic, which is fatal to Evans' ineffective assistance of counsel claim. *See Hatfield*, 191 Wn. App. at 402 (cited and quoted above). Additionally, as discussed below, Evans fails to show prejudice.

Evans' second argument—that his defense counsel provided ineffective assistance of counsel by failing to object to Hedlund's opinion testimony—similarly fails. Relevant to this argument, Hedlund was asked, "based on your training and experience, what did the combination of the scale, the baggies, the pills, the weapons in their totality indicate to you?" He answered:

> That Mr. Evans was in possession of a controlled substance with packaging materials, things to weigh them, additional packaging materials, including rubber bands, ways to cut them that would be indicative that he was distributing them along with cash as well.

Evans contends that defense counsel should have objected to this answer because Hedlund improperly opined on the issue of guilt, which in turn violated Evans' constitutional right to a jury trial. *See, e.g., State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008) ("Opinions on guilt are improper whether

direct or by inference.").

Even if we assume, without deciding, that defense counsel's failure to object to this testimony was deficient performance, Evans has failed to establish prejudice. That is so because there is overwhelming evidence of guilt, including constructive possession of fentanyl pills moments before fleeing from law enforcement, drug paraphernalia found in the black Nike bag, and actual possession of pills that have the same appearance as the fentanyl pills found in the black Nike bag in the pickup truck. Thus, it is not reasonably probable that the outcome of the proceedings would have been different had defense counsel objected to the testimony at issue.

Evans claims that this case is analogous to *State v. Vazquez,* 198 Wn.2d 239, 494 P.3d 424 (2021), but *Vazquez* is distinguishable. In *Vazquez*, defense counsel repeatedly failed to object to evidence of Vazquez's prior convictions, testimony implying Vazquez threatened two witnesses, hearsay statements regarding Vazquez's alleged drug sales, and police testimony linking the ownership of a tactical vest to selling drugs. *Id.* at 250. The court concluded that this evidence was inadmissible and "highly prejudicial" and that Vazquez had satisfied *Strickland*'s prejudice prong because "the cumulative effect of counsel's subpar performance likely affected the outcome of the case." *Id.* at 245, 268-69. Here, in contrast, Evans focuses narrowly on defense counsel's failure to object to an isolated answer in a trial that included overwhelming evidence of guilt. Whereas Vazquez was able to establish prejudice, Evans has not. His ineffective assistance

of counsel based on defense counsel's failure to object to Hedlund's purported opinion testimony thus fails.

VI

Finally, Evans argues, and the State agrees, that we should remand his case to the trial court to strike the $500 VPA imposed during sentencing. Under the recently amended RCW 7.68.035, no VPA may be imposed upon an indigent defendant. Although the amended statutes took effect after Evans' sentencing, they apply here because Evans' case is on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023). At sentencing, Evans was found to be indigent. We therefore remand for the trial court to strike the VPA from Evans' judgment and sentence.

In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Hazelrigg, ACJ

Bowman, J

NIELSEN KOCH & GRANNIS PLLC

October 29, 2024 - 10:56 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85372-4
Appellate Court Case Title:	State of Washington, Respondent v. Devon Skye Evans, Appellant
Superior Court Case Number:	22-1-01478-9

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