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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RONALD CHARLES CRITCHFIELD, Appellant.	No. 50760-9-II UNPUBLISHED OPINION

BJORGEN, J. — Ronald Charles Critchfield appeals from his conviction for possession of a controlled substance.

Critchfield argues that (1) the trial court improperly commented on the evidence and (2) because the trial court improperly commented on the evidence, it erred when it denied his motion for a mistrial.

Assuming without deciding that the trial court improperly commented on the evidence, the untainted evidence overwhelmingly supports his conviction, and we hold that the trial court did not err when it denied Critchfield's motion for a mistrial.

We affirm.

FACTS

On April 22, 2017, Officers Bruce Fernie and Zachary Moore responded to a 911 call concerning a complaint of a possible theft in progress. According to Fernie, when he and Moore arrived on the scene, two males had detained Critchfield by holding him on the ground. Fernie testified that after they arrived,

> [t]he two males got off of Mr. Critchfield and said that Mr. Critchfield was trying to steal a battery from one of their trailers . . . so when we were approaching they got off of him and he started to reach in his pockets pretty frantically and we ordered him to take his hands out of his pockets and he did not want to comply with that. Then I observed him take something out of his right front pocket with his right hand, of his pant's [sic] pocket, and conceal it under his chest, that he was laying on his stomach face down and then after he was able to conceal that object he put his hands out.

Verbatim Report of Proceedings (VRP) (July 20, 2017) at 8-9. Timothy Fry, the property owner who accused Critchfield of the attempted theft, testified that after the police arrived on scene he "saw what appeared to be a small plastic baggy fall out of [Critchfield's] pocket." VRP (July 20, 2017) at 59. The officers detained Critchfield and subsequently arrested him.

The State charged Critchfield by information with one count of possession of a controlled substance (methamphetamine) under RCW 69.50.4013 and one count of attempted third degree theft under RCW 9A.56.050.

The case proceeded to jury trial. Moore testified that during the search incident to arrest he and Fernie found "a couple knives, a marijuana pipe, a syringe, a meth pipe and a bag of marijuana" on Critchfield's person, among other things. VRP (July 20, 2017) at 67-68. He testified that they also found a small plastic bag containing an unknown substance lying underneath Critchfield. Both Fernie and Moore identified the bag that was recovered from underneath Critchfield as State's Exhibit No. 1. Fernie testified that, based on his prior experience, he believed the bag contained methamphetamine. Fernie also testified that he field tested the substance and it tested positive for methamphetamine.

Daniel Van Wyk, a forensic scientist at the Washington State Patrol Crime Laboratory, testified that he performed laboratory tests on the contents of the bag and based on his education, training, and experience, it was his opinion that the bag contained methamphetamine.

During the trial, the State requested that Fernie and Van Wyk wear latex gloves while examining the contents of State Exhibit No. 1.

The State moved to admit Exhibit No. 1 into evidence, and the following colloquy occurred:

> MR. ESPINOZA: And finally, Your Honor, the State moves to admit Exhibit No. 1.
>
> COURT: All right, any objection to Exhibit No. 1?
>
> MR. WEIR: I don't believe so but just a moment, Your Honor, while I review my notes. No objection, Your Honor.
>
> COURT: All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

VRP (July 20, 2017) at 113.

Following a brief recess, defense counsel moved for a mistrial arguing that the court's remark—"we're all afraid to touch it"—was an improper comment on the evidence. Defense counsel argued that it gave the impression that the trial court believed the substance was dangerous and that the court's opinion could lead the jury to infer that the trial court believed the substance was, in fact, methamphetamine. The trial court disagreed and concluded,

> I don't see that as a comment on the evidence. It's a comment on things that we all saw together that every time we touch the exhibit there were protective gloves used. I don't know what the inference is to that but it wasn't meant as a comment on the evidence, I don't see how it can be perceived as a comment on the evidence. It's something that is simply a true statement. The exhibit was admitted without any objection so I don't know what else to do with that. I'm going to deny the motion, that's a Motion for a Mistrial, it's denied.

VRP (July 20, 2017) at 118.

Critchfield testified on his own behalf and denied ever possessing the bag and denied knowledge of its contents.

After the close of evidence, the trial court provided the jury with instructions, including the following jury instruction 1:

> Our state constitution prohibits a trial judge from making a comment on the evidence. 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.

Clerk's Papers at 27-28.

The jury convicted Critchfield of one count of unlawful possession of a controlled substance and one count of attempted third degree theft.

Critchfield appeals his conviction for unlawful possession of a controlled substance.

ANALYSIS

I. MOTION FOR MISTRIAL

Critchfield argues that (1) the trial court improperly commented on the evidence and (2) because the trial court improperly commented on the evidence, it erred when it denied his motion for a mistrial. Assuming without deciding the trial court improperly commented on the evidence, we hold the trial court did not err when it denied Critchfield's motion for a mistrial. The untainted evidence overwhelmingly supports his conviction and, thus, Critchfield cannot demonstrate that any prejudice resulted.

A. Standard of Review and Legal Principles

The right to a trial by an impartial jury is guaranteed by article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. *State v. Fire*, 145 Wn.2d 152, 167, 34 P.3d 1218 (2001). The trial court should grant a mistrial only

when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

The trial court's decision to deny a request for a mistrial is within the trial court's sound discretion, and we will not disturb that decision unless it was an abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons, or if no reasonable judge would have reached the same conclusion. *Emery*, 174 Wn.2d at 765.

Judicial comments on the evidence are presumed to be prejudicial. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Id.* An improper comment does not prejudice a defendant where the untainted evidence overwhelmingly supports the conviction. *State v. Lane*, 125 Wn.2d 825, 839-40, 889 P.2d 929 (1995).

B. No Prejudice

Critchfield argues that because the issue of whether he possessed a controlled substance was an important and disputed issue at trial, the State cannot demonstrate that he was not prejudiced. The State maintains that the record affirmatively shows that the court's statement was not prejudicial and any potential prejudice was overcome by overwhelming, untainted evidence of guilt.

Critchfield's argument that the trial court's comment prejudiced him is unpersuasive. Although prejudice is presumed when a trial court improperly comments on the evidence, that presumption is overcome by the untainted evidence supporting Critchfield's conviction of

possession of a controlled substance. To summarize, (1) Fry testified that he saw a plastic bag fall out of Critchfield's pocket, (2) Officers Fernie and Moore testified that they observed Critchfield frantically trying to conceal something and that after they detained Critchfield, they found the bag underneath his person, (3) Officers Fernie and Moore also testified that they found a pipe used for smoking methamphetamine on Critchfield's person, (4) Officer Fernie testified that he field tested the contents of the bag, which came back positive for methamphetamine, and (5) Van Wyk testified that he tested the contents of the bag in a laboratory, which also came back positive for methamphetamine.

The trial court's assumed improper comment did not strip Critchfield of his ability to challenge the State's test results. In fact, defense counsel did not present any evidence to counter the State's position that the bag contained methamphetamine. The trial court's comment did not undermine Critchfield's defense strategy, because defense counsel never argued that the bag did not, in fact, contain methamphetamine. Critchfield's only argument consisted of his own testimony that he did not possess the bag and that he did not know what it contained. Thus, the untainted evidence overwhelmingly supports Critchfield's conviction for possession of a controlled substance.

Because the untainted evidence overwhelmingly supports the conviction, and the judge's comment did not call that evidence into question, Critchfield has not shown he was prejudiced by the comment under *Lane*, 125 Wn.2d at 839-40. In the absence of prejudice, he cannot meet the standard for granting a mistrial: that the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. *Emery*, 174 Wn.2d at 765. Therefore, the trial court did not err when it denied Critchfield's motion for a mistrial.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Maxa, C.J.

Lee, J.