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Washington State
Court of Appeals
Division Two

March 10, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICKY RAY SEXTON, Appellant.	No. 51919-4-II UNPUBLISHED OPINION

MAXA, C.J. – Ricky Ray Sexton appeals his conviction of unlawful possession of a controlled substance (methamphetamine) and the imposition of legal financial obligations (LFOs). The conviction arose from the execution of a search warrant at Sexton's residence in Spanaway.

We hold that (1) probable cause supported the search warrant related to Sexton's residence and the warrant was not stale when executed; (2) the trial court did not err in denying Sexton's motion to suppress because law enforcement did not violate the "knock and announce" rule when they entered Sexton's residence; (3) the court did not err in denying Sexton's request to represent himself because the request was equivocal and untimely; (4) the prosecutor misstated the law regarding actual possession, but Sexton waived this claim by not objecting at trial; (5) defense counsel did not render ineffective assistance by not objecting to the prosecutor's misstatement of the law because counsel may have had a strategic reason for not objecting; (6) the evidence supported a finding of constructive possession was sufficient to sustain Sexton's

conviction; and (7) the case must be remanded for the trial court to address the imposition of LFOs.

Accordingly, we affirm Sexton's conviction, but we remand for the trial court to address the imposition of LFOs under the current law.

FACTS

Search Warrant and Execution

On July 25, 2017, a Pierce County deputy sheriff applied for a search warrant for Sexton's mobile home. The search warrant affidavit stated that a confidential informant (CI) told the deputy that Sexton was selling methamphetamine from his mobile home. The CI also said that within the last 72 hours (1) he/she was inside the mobile home, (2) he/she observed Sexton holding "a large amount of methamphetamine packaged in a large Ziploc type baggie," and (3) he/she observed Sexton sell methamphetamine to another person. Clerk's Papers (CP) at 32. In addition, the search warrant affidavit stated that in March 2017 the deputy had executed another search warrant for Sexton's mobile home and had seized 1.25 pounds of methamphetamine, opiate and methamphetamine based pills, and related paraphernalia. A stolen handgun also was recovered.

The superior court issued a warrant on July 25 to search Sexton's residence for methamphetamine, items used in its distribution and packaging, and records related to the distribution of methamphetamine. Law enforcement categorized the warrant as a high risk warrant because Sexton possibly was dealing controlled substances out of his residence and was known to carry a firearm, requiring the use of the special weapons and tactics (SWAT) team.

On July 31, at approximately 5:00 AM, law enforcement officers executed the search warrant at Sexton's mobile home. After knocking and announcing their presence twice, officers broke down the door and entered the mobile home.

Upon entering, officers detained Sexton and several other people who were in the mobile home. Officers also seized over a pound of methamphetamine in addition to scales, packaging material, approximately $1,600 in cash, and other paraphernalia. In the master bedroom, officers found mail, a receipt, and a cashier's check bearing Sexton's name and the address of the residence where the search warrant was served as well as other documents bearing Sexton's name inside the closet. In the bedroom, officers also found methamphetamine in a cup on a desk, in a black nylon bag beneath some folded men's pants, and in the pocket of a jacket in the master closet, in addition to some residue on a digital scale in the bottom drawer of a filing cabinet.

The State charged Sexton with possession of a controlled substance (methamphetamine) with intent to deliver.

Motion to Suppress

Sexton moved to suppress the items seized from his residence under the warrant. He argued that probable cause did not support the warrant because there was an insufficient nexus between the methamphetamine and his residence and that the search warrant affidavit was stale. In addition, Sexton argued that officers violated the knock and announce rule when entering his mobile home. The trial court denied Sexton's motion to suppress.

The trial court reviewed the search warrant affidavit and the search warrant. The court concluded that probable cause supported the search warrant and that the warrant was not stale either at the time of issuance or at the time of execution.

Regarding the knock and announce rule, the trial court heard testimony from Deputy Jesse Hotz, who was involved in the execution of the search warrant, and four people who were inside the mobile home when the search warrant was executed. The court found Hotz to be credible and did not find the testimony of the other witnesses to be credible. The court entered findings of fact that (1) deputies knocked and announced their presence twice before entering; (2) deputies noted that people inside the mobile home appeared to be awake and active; (3) deputies received no response when they knocked, stated their identity and purpose, and demanded entry; and (4) deputies waited seven to 10 seconds after the initial knock and announce before forcing entry.

The trial court concluded that the deputies who entered Sexton's mobile home did not violate the knock and announce rule. The court determined that the seven to 10 second wait time before entering was reasonable after "considering the nature of the evidence being sought, and the ease with which controlled substances may be destroyed and/or disposed of, in addition to information known to Deputies that the defendant may be armed." CP at 181.

Request for Self-Representation

On the first day of trial, Sexton expressed a desire to discharge his defense counsel and represent himself. The trial court asked Sexton several questions about his knowledge of the law, the rules of evidence, and the rules of criminal procedure, and his understanding of the charges against him and his possible sentence. The court then attempted to determine whether Sexton actually wanted to represent himself or whether he simply wanted a different attorney. Sexton stated that he believed he had been represented negligently, that he wanted to be represented by someone who was competent, that an attorney could be helpful if he had an

attorney that would listen to him, and he would want to have any attorney represent him if he could get a competent one.

The trial court denied Sexton's request to discharge defense counsel and represent himself, entering written findings of fact and conclusions of law. The court entered a conclusion of law stating that Sexton's request to represent himself was neither unequivocal nor timely.

Trial and Conviction/Sentence

The trial court instructed the jury on the definition of possession. The instruction stated in part:

> Actual possession occurs when the item is in the actual physical custody of the person charged with the possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

CP at 146.

During closing argument, the prosecutor argued that Sexton had "actual possession" of a baggie of methamphetamine that was found hidden between folded pairs of men's pants. 6 Report of Proceedings (RP) at 126. He suggested that Sexton could be in actual possession of the methamphetamine even though it was not on his person. Sexton did not object to this argument. The prosecutor then argued that not only did Sexton have actual possession, but he had dominion and control over the methamphetamine because it was in his home and in his bedroom.

During his closing argument, Sexton argued that the prosecutor was wrong on what constituted actual possession. He pointed out that actual possession required physical custody of the item by the person charged and that there was no evidence that Sexton had anything on his person when detained.

The jury found Sexton guilty of the lesser included offense of unlawful possession of a controlled substance (methamphetamine). At sentencing, the court imposed LFOs, including a $200 criminal filing fee. The judgment and sentence stated that the LFOs would accrue interest until paid.

Sexton appeals his conviction and the imposition of the criminal filing fee.

ANALYSIS

A. VALIDITY OF SEARCH WARRANT

Sexton argues that the trial court erred when it denied the motion to suppress evidence found in his residence because (1) the search warrant affidavit failed to establish a nexus between the evidence sought and his residence and (2) the information supporting issuance of the search warrant was stale when the warrant was executed. We disagree.

1. Legal Principles

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. *See State v. Figeroa Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article I, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.' " *Ollivier*, 178 Wn.2d at 846-47 (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

There must be "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). A search warrant affidavit must identify specific facts and circumstances from which the

magistrate can infer that evidence of the crime will be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). The second nexus can be met "by showing *not only* that a drug dealer lives at a particular residence and that drug dealers commonly cache drugs where they live, *but also* 'additional facts' from which to reasonably infer that *this* drug dealer probably keeps drugs at *his or her* residence." *State v. McGovern*, 111 Wn. App. 495, 499-500, 45 P.3d 624 (2002) (quoting WAYNE R. LAFAVE, SEARCH & SEIZURE, § 3.7(d), at 378-79 (3d. ed. 1996)).

We review de novo a trial court's assessment of probable cause at a suppression hearing, giving deference to the magistrate's determination. *Neth*, 165 Wn.2d at 182; *see also State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 (2015). We consider only the information contained in the affidavit supporting probable cause. *Neth*, 165 Wn.2d at 182.

2. Nexus

Sexton first contends that that the search warrant was improper because the supporting affidavit did not establish a nexus between his residence and methamphetamine. We disagree.

According to the search warrant affidavit, the CI stated that Sexton sold methamphetamine from his residence. In addition, the CI was inside Sexton's mobile home within the previous 72 hours and observed Sexton holding a bag of methamphetamine and conducting a sale of methamphetamine. Finally, a search of Sexton's residence five months earlier had revealed a significant amount of methamphetamine, other drugs, and related paraphernalia. Therefore, the magistrate issuing the warrant had reasonable grounds for concluding that methamphetamine would be located in Sexton's home.

Sexton argues that the magistrate's probable cause determination was invalid because the CI failed to specify the person he or she observed buying methamphetamine from Sexton or the

specific amount in Sexton's possession. But he cites no authority for the proposition that this information was required to establish probable cause given the CI's observations.

We conclude that there was a sufficient nexus between Sexton's residence and methamphetamine. Therefore, we hold that probable cause supported the search warrant.

3. Staleness

Sexton next argues that the search warrant related to his residence was invalid because the information supporting issuance of the warrant was stale when officers executed the warrant. We disagree.

A search warrant that has become stale at the time of its issuance or execution is invalid. *See State v. Friedrich*, 4 Wn. App. 2d 945, 955, 425 P.3d 518 (2018). Whether information in a search warrant affidavit is stale depends on the circumstances of each case. *State v. Lyons*, 174 Wn.2d 354, 361-62, 275 P.3d 314 (2012). Some length of time naturally passes between observations of suspected criminal activity and the presentation of an affidavit to an issuing magistrate or judge. *Id.* at 360. But when the passage of time is so prolonged that it is no longer probable that a search will uncover evidence of criminal activity, the information underlying the affidavit is deemed stale. *Id.* at 360-61.

"[I]nformation is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). Whether a warrant is stale depends on a totality of the

circumstances. *Id.* Factors for assessing staleness include the nature and scope of the alleged criminal activity, the length of the activity, and the type of property to be seized. *Id.*[1]

Here, the CI observed Sexton's possession and sale of methamphetamine within three days of July 25, when the warrant was issued. Six days later, on July 31, officers executed the warrant at Sexton's residence. Significantly, there was evidence that Sexton's sale of methamphetamine from his mobile home was an ongoing operation. The CI stated that Sexton sold methamphetamine from his residence. And five months earlier officers had recovered a large amount of methamphetamine from the mobile home. It was reasonable for the officers serving the warrant to conclude that probable cause continued to exist that methamphetamine would be at Sexton's residence despite the passage of up to nine days since the CI's observations.

Therefore, we hold that the information supporting the search warrant was not stale when officers executed the warrant.

B. ALLEGED VIOLATION OF KNOCK AND ANNOUNCE RULE

Sexton argues that the trial court erred by denying his motion to suppress evidence based on his claim that officers forcibly entered his residence in violation of the knock and announce rule. We disagree.

1. Legal Principles

The knock and announce rule requires that law enforcement announce their identity and purpose before making a nonconsensual entry into a building. *State v. Ortiz*, 196 Wn. App. 301,

[1] In addition, CrR 2.3(c) provides that search warrants require officers to search the specific place "within a specified period of time not to exceed 10 days." The search warrant here was executed less than 10 days after its issuance.

307-08, 383 P.3d 586 (2016). This rule is grounded in both the Fourth Amendment and article I, section 7 of the Washington Constitution. *Id.*

RCW 10.31.040 codifies the knock and announce rule: "To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance." RCW 10.31.040. This statute applies to the execution of search warrants. *See Ortiz*, 196 Wn. App. at 304.

In order to comply with the knock and announce rule, before a nonconsensual entry officers must "(1) announce their identity, (2) announce their purpose, (3) demand admittance, (4) announce the purpose of their demand, and (5) be explicitly or implicitly denied admittance." *State v. Richards*, 136 Wn.2d 361, 369, 962 P.2d 118 (1998). The knock and announce rule has two parts: an announcement requirement and a waiting period. *Id.* at 371; *see also State v. Alldredge*, 73 Wn. App. 171, 174-75, 868 P.2d 183 (1994). After knocking and announcing their identity, officers must wait a reasonable time before entering if the occupant does not respond. *See Richards*, 136 Wn.2d at 371, 374; *Ortiz*, 197 Wn. App. at 308. When admittance is expressly denied, officers may enter immediately. *Ortiz*, 196 Wn. App. at 308.

"Whether an officer waited a reasonable time before entering a residence is a factual determination to be made by the trial court and depends upon the circumstances of the case." *Richards*, 136 Wn.2d at 374. The reasonableness of the waiting period is evaluated by considering the underlying purposes of the knock and announce rule, including " '(1) reduction of potential violence to both occupants and police arising from an unannounced entry, (2) prevention of unnecessary property damage, and (3) protection of an occupant's right to privacy.' " *Ortiz*, 196 Wn. App. at 308 (quoting *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256

(1980)). The "waiting period ends once the rule's purposes have been fulfilled and waiting would serve no purpose." *Ortiz*, 196 Wn. App. at 308.

In cases where the officers heard movement inside the residence, courts have upheld waiting periods between announcing and forcing entry of between five to ten seconds. *See State v. Johnson*, 94 Wn. App. 882, 890-91, 974 P.2d 855 (1999); *State v. Garcia-Hernandez*, 67 Wn. App. 492, 497, 837 P.2d 624 (1992); *State v. Jones*, 15 Wn. App. 165, 166, 168, 547 P.2d 906 (1976). In addition, a three second waiting period was deemed reasonable when officers had reason to believe that the occupant might be armed and dangerous. *State v. Schmidt*, 48 Wn. App. 639, 646, 740 P.2d 351 (1987).

The remedy for the failure to comply with the knock and announce rule is suppression of the evidence obtained after the entry. *Richards*, 136 Wn.2d at 371.

2. Analysis

Here, the trial court found that the officers received no response after twice knocking and announcing their presence. The court also found that the officers noted that people inside the mobile home appeared to be awake and active. Finally, the court found that officers waited seven to 10 seconds after the initial knock before forcing entry. The court concluded that this wait time was reasonable after considering the circumstances: "the nature of the evidence being sought, and the ease with which controlled substances may be destroyed and/or disposed of, in addition to information known to Deputies that the defendant may be armed." CP at 181.

Sexton relies on *Ortiz*, 196 Wn.2d 301. In that case, officers executed a search warrant for Ortiz's residence at 6:47 A.M. *Id*. at 304. Police knocked on Ortiz's door three times, announced "police search warrant," waited one or two seconds, and repeated that process twice more. *Id*. at 304-05. Although they did not hear anything inside the home, officers breached the

front door and entered the home. *Id*. at 305. Once inside, officers observed occupants that "appeared to be just waking up" or "still sleeping on the couch." *Id*. The court held that police violated the knock and announce rule, reasoning that six to nine seconds was not a reasonable amount of time to answer the door given the lack of noise inside the home and early hour of the search. *Id*. at 309. Under these circumstances, "the police could not reasonably infer a denial of admittance after such a short waiting period." *Id*. at 312.

Sexton emphasizes that as in *Ortiz*, officers here knocked on his door very early in the morning. He points out that all but one of the occupants testified that they were asleep when the officers entered. As a result, he argues that no denial of admittance could be inferred and that the waiting period was unreasonable.

However, the trial court found that the officers noted that people inside Sexton's residence "appeared to be awake and active" when they approached. CP at 179. Sexton assigns error to this finding, and argues that there was no sign of activity inside the mobile home when officers knocked. But the court's finding is supported by substantial evidence. Deputy Hotz testified that he heard a woman start screaming inside after knocking and announcing the first time. Hotz also testified that the occupants of the residence appeared to be awake and fully dressed when officers entered. The court expressly found that Hotz's testimony was credible and that the testimony of the occupants of the mobile home was not credible.

We conclude that under the circumstances, a seven to 10 second waiting time was reasonable and therefore officers did not violate the knock and announce rule. Accordingly, we hold that the trial court did not err by denying Sexton's motion to suppress evidence.

C. RIGHT TO SELF-REPRESENTATION

Sexton argues that the trial court erred in denying his constitutional right to represent himself. We disagree.

1. Legal Principles

The Sixth Amendment and article I, section 22 of Washington Constitution guarantee criminal defendants the right of self-representation. *See State v. Curry*, 191 Wn.2d 475, 482, 423 P.3d 179 (2018). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). For example, a trial court may not deny the defendant's right to represent himself "based on grounds that self-representation would be detrimental to the defendant's ability to present his case." *Id*. at 505.

But the right to self-representation is not self-executing or absolute. *Id*. at 504. To invoke the right of self-representation, a defendant must unequivocally state a request to proceed without counsel. *State v. Coley*, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). The request also must be timely. *Id*. If the request for self-representation is unequivocal and timely, the trial court must then determine whether the request is voluntary, knowing, and intelligent. *Curry*, 191 Wn.2d at 486. And the trial court must apply every reasonable presumption against a defendant's waiver of his right to counsel. *Id*.

The requirement that a request for self-representation be unequivocal serves two purposes. First, it prevents a defendant from "inadvertently waiving their right to counsel through spontaneous expressions of frustration or 'occasional musings on the benefits of self-representation.' " *Curry*, 191 Wn.2d at 487 (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989)). Second, it prevents a defendant from manipulating the mutual exclusivity of the

rights to counsel and self-representation. *Curry*, 191 Wn.2d at 487. If a defendant was permitted to vacillate between a desire to be represented by counsel and a desire to represent himself, then the defendant would have a colorable claim on appeal that a constitutional right was denied no matter who represented him at trial. *See State v. DeWeese*, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991) (stating that the requirement of an unequivocal request is necessary to "protect trial courts from manipulative vacillations by defendants regarding representation.")

"To determine if a request for self-representation was unequivocal, the court must in fact answer two questions: (1) Was a request made? If so, (2) was that request unequivocal?" *Curry*, 191 Wn.2d at 487. Here, the trial court found that Sexton made a request to represent himself, and neither party challenges that finding. The question is whether Sexton's request was unequivocal. "[A]n unequivocal request to proceed pro se requires a defendant to 'make an explicit choice between exercising the right to counsel and the right to self-representation so that a court may be reasonably certain that the defendant wishes to represent himself.' " *Id.* at 490 (quoting *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994)).

We review a trial court's ruling on a defendant's request for self-representation for an abuse of discretion. *Curry*, 191 Wn.2d at 483. An abuse of discretion occurs when the ruling is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Id.* at 483-84. We give great deference to the trial court, which has far more experience in considering requests for self-representation and has the benefit of observing the defendant and the circumstances and context of the request. *Id.* at 484-85.

2. Analysis

Here, the record shows that Sexton requested self-representation because he was dissatisfied with the performance of his attorney. The court in *Curry* made it clear that an

unequivocal request for self-representation is not rendered equivocal because it is motivated by frustration with an attorney's performance. 191 Wn.2d at 489. The equivocality issue "focus[es] on the nature of the request itself – if, when, and how the defendant made a requests for self-representation – not on the motivation or purpose behind the request." *Id.* at 486-87. However, a request for self-representation coupled with an alternative request for new counsel may indicate to the trial court that the request for self-representation was not unequivocal. *Id.* at 489.

The key here was that when the trial court pressed Sexton to ensure that he truly wanted to represent himself, Sexton wavered. Sexton admitted that "an attorney could be helpful." 3 RP at 28. And Sexton stated that he would want to have an attorney represent him in the case "if [he] had an attorney that would listen to [him]" or "if [he] could get a competent one." 3 RP at 28. Based on these responses, we conclude that the trial court did not err in finding Sexton's request to represent himself to be equivocal.

In addition, the trial court found that Sexton's request to represent himself was untimely. Sexton did not make his request to represent himself until the day of trial. A trial court need not grant an untimely request for self-representation. *See Madsen*, 168 Wn.2d at 504.

We hold that the trial court did not abuse its discretion by denying Sexton's request for self-representation.

D. PROSECUTORIAL MISCONDUCT

Sexton argues that the prosecutor committed misconduct in his closing argument when the prosecutor misstated the law on actual possession. We hold that Sexton waived this argument by failing to object at trial.

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both

improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). "A prosecuting attorney commits misconduct by misstating the law." *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

Here, Sexton did not object to the challenged statements. When the defendant fails to object to the challenged portions of the prosecutor's argument, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id*. at 375. "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Sexton argues, and the State concedes, that the prosecutor misstated the definition of "actual possession." Sexton clearly did not have actual possession of the methamphetamine found hidden in his bedroom. To suggest otherwise, as the prosecutor did here, was a misstatement of the law.

However, this misstatement easily could have been corrected with an instruction that would have cured any prejudice. The trial court properly instructed the jury on the difference between actual and constructive possession. If Sexton had objected, the trial court could have simply referred the jury to that instruction and reminded the jury that argument inconsistent with the instructions should be disregarded.

We conclude that Sexton waived his prosecutorial misconduct claim. Therefore, we decline to consider this claim.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Sexton argues that he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's misstatement of the law. We disagree.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). We review an ineffective assistance of counsel claim de novo. *Id*.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *Id*. at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id*. at 458. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id*. Reasonable probability in this context means a probability sufficient to undermine confidence in the outcome. *Id*.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. *Id.* To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.' " *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Whether and when to object typically is a strategic or tactical decision. *State v. Martinez*, 2 Wn. App. 2d 55, 78, 408 P.3d 721 (2018).

First, defense counsel here may have had a strategic reason for failing to object. Although he did not object to the prosecutor's misstatement, defense counsel emphasized during

his closing argument that the prosecutor was wrong on what constituted actual possession during the prosecutor's closing argument. Defense counsel may have welcomed the opportunity to demonstrate to the jury that the prosecutor's argument clearly was contrary to the trial court's instruction. Defense counsel was able to easily contradict the prosecutor's argument and thereby reduce the prosecutor's credibility with the jury. Sexton does not show that his counsel's decision not to object to the prosecutor's conduct was not strategic. Therefore, we conclude that defense counsel was not deficient in not objecting to the prosecutor's misstatement of the law.

Second, as discussed above, the jury was properly provided with an instruction that set out the differences between actual and constructive possession. The jurors also were properly instructed to disregard any statements by counsel not supported by the evidence or the law. It is presumed that the jury follows the court's instructions. *Emery*, 174 Wn.2d at 766. Therefore, we conclude that Sexton cannot establish prejudice.

Because Sexton cannot establish deficient performance or prejudice, we reject his ineffective assistance of counsel claim.

F. SUFFICIENCY OF THE EVIDENCE

Sexton argues that sufficient evidence does not establish the dominion and control necessary to prove constructive possession. Sexton argues that the State proved only that he had mere proximity to the methamphetamine. We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light

most favorable to the State. *Id*. at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id*. at 266. Circumstantial and direct evidence are equally reliable. *Id*.

A person can have actual possession or constructive possession of an item. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). Actual possession requires physical custody of the item. *Id*. Constructive possession occurs when a person has "dominion and control over an item." *Id*. A person can have possession without exclusive control; more than one person can be in possession of the same item. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

The trial court instructed the jury as follows:

> In deciding whether the defendant had dominion and control over an item you are to consider all the relevant circumstances in the case. Factors that you may consider among others include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. Dominion and control over the premises where drugs are found is insufficient as the sole factor to establish dominion and control over the drugs.

CP at 146; *see generally* WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.03 (4th ed. 2016).

During the search, law enforcement found mail, a receipt, and a cashier's check bearing Sexton's name and the address of the residence where the search warrant was served in the master bedroom. And other documents bearing Sexton's name were located inside the closet. Sexton also was taken into custody in the hallway just outside the bedroom. These facts are sufficient to show that Sexton had dominion and control over the master bedroom, where methamphetamine was found.

Sexton argues that the State could not show that he had dominion and control because he was not alone in the home at the time of the search; five other adults were present. But exclusive

control of the premises is not necessary to establish constructive possession. *State v. Enlow*, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

We hold that, based on the totality of the circumstances, the evidence was sufficient to prove that Sexton had constructive possession of the methamphetamine.

G. IMPOSITION OF LFOS

Sexton argues that under the 2018 amendments to the LFO statutes, we should remand for the trial court to strike the criminal filing fee imposed and the requirement that nonrestitution LFOs bear interest from his judgment and sentence. The State concedes that the criminal filing fee provision stating that interest will accrue on LFOs until paid in full should be stricken.

In 2018, the legislature amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on indigent defendants, and (2) RCW 10.82.090, which now states that no interest will accrue on nonrestitution LFOs after June 7, 2018 and that the trial court shall waive nonrestitution interest that had accrued before June 7, 2018. These amendments apply prospectively to cases pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018). We remand for the trial court to consider the imposition of LFOs under current law.

CONCLUSION

We affirm Sexton's conviction, but remand for the trial court to consider the imposition of LFOs under current law.

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.

MAXA, C.J.

We concur:

MELNICK, J.

SUTTON, J.