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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 30492-2-III**
Respondent,	)	
v.	)	**Division Three**
DEBRA JANE TSUGAWA,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J. • Debra J. Tsugawa appeals her controlled substance conviction. She contends (1) the trial court erred in failing to suppress evidence found in her purse after a community caretaking search, (2) ineffective assistance of counsel for failing to object to that evidence at trial, and (3) prosecutorial misconduct in closing argument. We hold she waived her purse suppression claim, find no other error, and affirm.

FACTS

On June 21, 2008 about 10:15 pm, Washington State Park Ranger Brandon Erickson was working at Battle Ground Lake State Park in Clark County. He received a report from a park aide concerning a person (later identified as Ms. Tsugawa) who was

sleeping in a non park-registered vehicle in the day-use parking lot and would not wake up. After dusk, the park is closed except for registered campers. Ranger Erickson responded in his marked patrol vehicle. He found a small pickup with an "unresponsive female sitting in the driver's seat." Report of Proceedings (RP) (Aug. 9, 2010) at 6. He could see she was breathing regularly. For 15 minutes Ranger Erickson unsuccessfully tried to rouse the woman by tapping on the window with his hand and flashlight and shining the flashlight at her face, and then he left to check on noisy campers. He returned about 25 minutes later, finding her in the same position. Ranger Erikson then began pounding on the window with his flashlight until she finally woke up.

Ranger Erikson failed to get her to roll her window down. The woman repeatedly fell back to sleep. He finally managed to get her to open her door and asked her for identification. The woman responded by handing him a bottle of perfume she retrieved from her purse. Concerned for her welfare, the ranger asked the woman if he could look in her purse to find out who she was. The woman complied. He then asked if she had taken any medication and if she came to the park to harm herself. The woman told him she had taken some medicine for her back and stomach and she was not there to harm herself (at trial, Ms. Tsugawa did relate a suicide attempt). When the ranger asked what medicine she took, the woman was incomprehensible. The ranger asked for her vehicle registration. She handed him a spiral notebook with a blank page after actually looking at

the blank page, as though reading it.

Based on his experience, Ranger Erikson suspected a suicide attempt so he asked her if she had any weapons in the vehicle. She responded negatively. The ranger did not observe any weapons or medication within the woman's reach, so he told her to lie back in her seat and went to his patrol car to look for identification in her purse. In the purse, he found makeup, pens, letters, keys, a wallet, a mirror with white powder on it, a glass pipe with white substance in it, and, loose in the purse, a driver's license and a voter registration card identifying the woman as Debra Tsugawa. He learned from dispatch that her license was currently valid, she was not a wanted person, and the car was registered to Ms. Tsugawa and Lori Mays. Ranger Erickson called the Clark County Sheriff's Department for assistance and two deputies arrived about 20 minutes later. Ms. Tsugawa remained asleep in her vehicle during this time.

When Deputy Michael Cooney and Reserve Deputy Daryl Arndt arrived on the scene, they were able to obtain Ms. Mays' phone number from Ms. Tsugawa, but they were unable to reach her. Ms. Tsugawa told Deputy Cooney when he asked that it had been a couple of months since she had last used any methamphetamine. At that point, Ranger Erickson arrested Ms. Tsugawa for second degree criminal trespass. Deputy Cooney placed Ms. Tsugawa in handcuffs and put her in the back of his patrol vehicle. Although she appeared somewhat groggy, she was able to get out of her vehicle and walk

to the patrol car without assistance and placed there. Then, Deputy Arndt and Ranger Erickson searched her pickup and found methamphetamine and drug paraphernalia, including another pipe, as well as an unsheathed knife, all later suppressed and not at issue here. The deputies next booked Ms. Tsugawa in the Clark County Jail for criminal trespass and possessing methamphetamine.

On March 1, 2010, the State charged Ms. Tsugawa with possession of methamphetamine. In July 2010, Ms. Tsugawa moved to suppress "all evidence obtained by the [State] in its search of [Ms. Tsugawa]'s vehicle." Clerks Papers (CP) at 15. The above facts were elicited at the August 2010 combined CrR 3.5, CrR 3.6 hearing. Critical to Ms. Tsugawa's suppression claim on appeal, the court before argument said to defense counsel, "I have reviewed your brief and it didn't appear to me that you were contesting the search of the purse." RP (Aug. 9, 2010) at 72. Defense counsel responded:

> We are not, Your Honor, because that is a caretaker type function and Ms. Tsugawa and I have talked about that. And, obviously, the ranger was concerned about her personal safety. So, we're–we're not contesting that.

Id. When granting suppression of the other evidence, the court noted the purse search was not illegal because it was for the purpose of trying to help Ms. Tsugawa. Although the purse evidence was not before the court, its order partly provided, "Defendant's motion to suppress evidence obtained from her purse is denied." CP at 43. Similarly, the findings and conclusions prepared by the prosecutor who handled the case specified

below appear consistent with, but superfluous to, defense counsel's caretaking concession at the suppression hearing. Even so, the findings are relevant to Ms. Tsugawa's ineffective assistance and misconduct claims discussed in our analysis.

> 8. Ranger Erickson was concerned that the woman might have been attempting suicide, as her behavior and circumstances were similar to other incidents of attempted suicide in the park in the past. He believed she needed assistance and that in order to obtain assistance he needed to find out who she was and needed additional information to enable him to contact someone for her, or otherwise obtain assistance. His examination of her purse was done in good faith in furtherance of that goal.
> . . . .
> 10. Deputy Cooney spoke to Tsugawa with Deputy Arndt and Ranger Erickson present. He asked her for information about someone who could be contacted to come to get her. Through this process, the deputies were able to obtain a phone number for Lori Maze. They attempted to call Maze but got no answer. *Deputy Cooney asked Tsugawa how long it had been since she had smoked methamphetamine. Tsugawa said she had not smoked anything for a couple of months.*

CP at 39-40 (emphasis added). And, in the conclusions:

> 1. Ranger Erickson's search of Defendant's purse was a legitimate exercise of the police community caretaking function. Ranger Erickson's belief that the Defendant was in need of assistance was reasonable under the circumstances and his search of the purse was reasonably necessary and conducted in good faith in an effort to assist the Defendant. The items found in Defendant's purse are admissible as evidence.

CP at 41.

At trial, the jury heard Ranger Erickson describe finding in Ms. Tsugawa's purse a mirror with white residue on it and a pipe with white substance in it. The jury learned the

substance found in the pipe was methamphetamine.

The State asked Deputy Cooney a series of questions related to his concern about Ms. Tsugawa's physical state and possible substance intoxication when he contacted her. Considering the information he received from Ranger Erikson indicating Ms. Tsugawa might be under the influence of methamphetamine, Deputy Cooney related he wanted to find out if she was okay. Without objection, Deputy Cooney related he asked Ms. Tsugawa how long it had been since she used methamphetamine and she said it had been a couple of weeks. On cross-examination, defense counsel asked Deputy Cooney if it was true Ms. Tsugawa had in fact said it had been a couple of months since she used methamphetamine rather than a couple of weeks. Deputy Cooney conceded he didn't make note of it in his report but that it could have been a couple of months.

When the State asked Deputy Arndt whether he or Deputy Cooney had asked Ms. Tsugawa about her methamphetamine use, he responded, "Deputy Cooney asked her how long it had been since she smoked meth and she replied, 'It's been at least a couple of months.'" RP (Sept. 1, 2010) at 133. Ms. Tsugawa did not object to this testimony.

Ms. Tsugawa testified, partly relating she went to the park that day to commit suicide and had taken a large amount of Tylenol PM pills. She didn't remember much of what happened in the park. She didn't know the pipe was in her purse. It belonged to her sister who she had seen earlier that day as did much of the property found in her purse.

Her sister had borrowed her car the previous evening, but did not borrow her purse. She had seen the pipe in her barn where her sister was staying. She had used methamphetamine about a half dozen times in the past in her coffee, but she had never smoked it or used a pipe. During cross-examination, the prosecutor asked:

> So, you didn't tell Deputy Cooney and Deputy Arndt or for that matter, Ranger Erickson that night that – if there was methamphetamine it was somebody else's?

RP (Sept. 1, 2010) at 165. Defense counsel did not object. Ms. Tsugawa replied, "To be honest, I don't know what I told them." *Id.*

At the conclusion of Ms. Tsugawa's testimony, the defense rested and the court excused the jury. At that point, the court expressed its opinion that the prosecutor had asked an impermissible question of Ms. Tsugawa because she was not required to volunteer information to the police officers. The prosecutor disagreed with the court's analysis. The court told the prosecutor he was not permitted to return to the subject during closing argument; the prosecutor complied. Defense counsel did not move for a mistrial or ask for a curative instruction.

During closing, the prosecutor argued without defense objection:

> When Deputy Cooney asks her . . . . 'When was the last time you smoked methamphetamine?' She says, 'About' -- apparently, 'About two months ago' . . . which is an answer to the question, 'When was the last time you smoked methamphetamine?' 'A couple of months ago.' All right. So, there are some statements that she makes that suggest that she is not unfamiliar with a methamphetamine smoking device and that when she is

> answering the deputy she is fully -- well, not fully . . . aware but she is aware of what she is being asked and she is able to provide a . . . verbal response. And maybe that response is -- her -- her mental condition is not such that is a completely calculated response. More likely than not, it could be a limited but somewhat truthful response.

RP (Sept. 1, 2010) at 195-96.

The jury found Ms. Tsugawa guilty of possession of methamphetamine. The court sentenced Ms. Tsugawa within the standard range. She appealed.

ANALYSIS

A. Purse Suppression Issue Waived

Ms. Tsugawa's briefing presents the issue whether the trial court erred in denying her suppression motion regarding the search of her purse. We decline to address this issue because, as the State argues, the facts show waiver. First, Ms. Tsugawa did not present a motion to suppress the purse evidence. Rather, she solely, and successfully, moved to suppress the evidence gathered from her pickup under *Arizona v. Gant*, 556, U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (limiting vehicle searches). RAP 2.5(a) provides we "may refuse to review any claim of error which was not raised in the trial court." Second, at the suppression hearing, defense counsel specifically acknowledged Ms. Tsugawa's intent not to challenge the search of her purse.

While the court entered supportive findings of fact and conclusions of law and an order regarding the purse evidence, they were superfluous. The State was deprived of its

opportunity to develop the record on this issue because it was effectively conceded by Ms. Tsugawa. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009); (quoting State *v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995))).

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate the error is "truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). We will not assume an error is of constitutional magnitude. *Id*. at 98 (citing *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). Rather, the appellant must identify the constitutional error. *Id*. (citing *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Even if a claimed error is of constitutional magnitude, an appellate court must then determine whether the error was manifest. *Id*. at 99. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). "To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). Ms. Tsugawa does not suggest any manifest error affecting a constitutional right under our

facts.

B. Assistance of Counsel

The issue is whether trial counsel was ineffective for failing to object to certain trial testimony.

We review a challenge to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A defendant possesses the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel was effective. *McFarland*, 127 Wn.2d at 335. To prove ineffective assistance of counsel, Ms. Tsugawa must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced her. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

As to the first prong, a deficient performance claim cannot be based on matters of trial strategy or tactics. *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct." *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

Ms. Tsugawa argues her trial counsel should have objected to the prior drug use evidence because it invited the jury to convict based on propensity to possess drugs. She

asserts the deputies' testimony that she admitted prior methamphetamine use was inadmissible propensity evidence. ER 404(b) prohibits the use of evidence of other bad acts to prove a person has a propensity to commit such acts. *State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). But, such evidence may be admissible for other purposes such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); *Pogue*, 104 Wn. App. at 985.

The State responds the evidence was not for propensity, but was presented in the context of asking the deputies about Ms. Tsugawa's physical state and possible need for medical attention due to her unusual behavior. The State suggests the testimony may even have enhanced her credibility, allowing Ms. Tsugawa's self-serving denials about not recently using methamphetamine, and arguably aided her unwitting possession defense. As the State contends, without the deputies' testimony, Ms. Tsugawa would have been forced to testify that the pipe was not hers. Failing to object may thus be reasonably viewed as a matter of trial tactics.

Ms. Tsugawa next argues trial counsel should have objected when the State improperly commented on her exercise of her right to silence when inquiring if she had failed to mention in their initial encounter that her sister was more likely the source of any methamphetamine found in her purse. It is impermissible for the State to ask the jury to draw an inference of guilt based upon a defendant's exercise of his or her right to

remain silent. *State v. Easter*, 130 Wn.2d 228, 239-40, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *see also* Fifth Amendment, U.S. Const.; art. I, § 9, of the Washington State Constitution. However, pre-arrest silence is distinguishable from silence exercised after the issuance of *Miranda* warnings where no constitutional protection is afforded. *Burke*, 163 Wn.2d at 217; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Here, some incomprehensible conversation took place before Ms. Tsugawa was placed under arrest and given her *Miranda* warnings. The State argues the challenged line of questioning by the prosecutor went to impeachment and was not designed to comment on Ms. Tsugawa's silence at any point. A "comment" occurs when the State uses the silence "to suggest to the jury that the silence was an admission of guilt." *Lewis*, 130 Wn.2d at 707. Assuming the question was an impermissible comment on Ms. Tsugawa's exercise of her right to silence, a claim of deficient performance still cannot be based on matters of trial strategy or tactics, the case here.

This problem was raised sua sponte outside the presence of the jury by the trial court. Defense counsel did not object or seek a curative instruction at any point, before or after the court brought up the topic. "[D]efense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk

emphasizing the testimony with an objection." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The State argues a legitimate trial strategy existed in declining to object or seek a curative instruction. First, Ms. Tsugawa's answer to the question was consistent with the rest of her testimony. Her lack of memory was reasonable given her physical state and that testimony might help Ms. Tsugawa look credible. Second, it didn't matter who owned the pipe, but whether Ms. Tsugawa knew it was in her purse. Given all, defense counsel's decision not to object to the questioning or to ask for a curative instruction can be characterized as a legitimate trial strategy or tactic. Therefore, Ms. Tsugawa fails to show deficient performance.

If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong. *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). Accordingly, we do not address the prejudice prong.

C. Misconduct

The issue is whether the prosecutor committed misconduct. Ms. Tsugawa contends the prosecutor argued a fact not in evidence, denying her a fair trial.

A defendant claiming prosecutorial misconduct must establish both an improper comment and the resulting prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper." *State v. Stith*, 71

Wn. App. 14, 18, 856 P.2d 415, 418 (1993). We consider the alleged comment in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *McKenzie*, 157 Wn.2d at 52. Comments may be deemed prejudicial solely if "there is a substantial likelihood misconduct affected the jury's verdict." *Id.* In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on witness credibility and arguing inferences based on evidence in the record. *State v. Millante*, 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995).

Ms. Tsugawa argues the prosecutor improperly told the jury she had admitted to smoking methamphetamine even though no such evidence existed. She asserts the evidence was prejudicial because it was fatal to her defense. However, as the State points out, such testimony was in evidence. Although Deputy Cooney testified Ms. Tsugawa admitted to previously "using" methamphetamine, Deputy Arndt testified that the question posed to Ms. Tsugawa was how long it had been since she last "smoked" methamphetamine. Given all, the comment was not improper and therefore did not constitute misconduct.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

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Brown, J.

WE CONCUR:

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Siddoway, A.C.J.

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Kulik, J.