FILED

March 15, 2012

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29850-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
RACHEL ANNE WALKER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Siddoway, J. — Rachel Walker was convicted of possession of a controlled substance (methamphetamine). On appeal she contends her counsel was ineffective for failing to object at trial to police testimony (1) describing her demeanor as implying guilt, (2) allegedly implying her involvement with methamphetamine manufacture, and (3) that she was in "constructive possession" of methamphetamine found in the car in which she was a passenger. Because she is unable to demonstrate the required elements of ineffectiveness and prejudice, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On an afternoon in December 2010, Adams County Sheriff's Deputy Ryan Haring was on patrol when a blue Firebird backed out of a driveway into his lane of traffic,

requiring him to slow down. The deputy noticed that the car's windows were covered with frost, impairing the driver's visibility to an extent that was itself a traffic infraction. As Deputy Haring followed the car north, it left the roadway, driving onto a dirt embankment and then abruptly corrected, returning to the road. At that point, the deputy effected a traffic stop.

Upon reaching the driver's door, Deputy Haring recognized Jose Luis Cerna-Rodriguez, the driver and registered owner, and his passenger, Ms. Walker. When asked for his license and registration, Mr. Cerna-Rodriguez admitted that his driver's license was suspended. At that point the deputy arrested him, had Mr. Cerna-Rodriguez accompany him to the patrol car, and seated him in the back. The deputy then ran a warrant check on Ms. Walker. He received a report back that there was an outstanding warrant for her arrest.

Deputy Haring returned to the passenger's side of the Firebird and asked Ms. Walker to step out of the car. As she did, the deputy saw a can of beer on the floorboard between the passenger door and seat; it fell backwards as she stepped out. After informing her that she was under arrest, handcuffing her, and placing her in the back seat of the patrol car with Mr. Cerna-Rodriguez, the deputy returned to the Firebird to retrieve the beer can. The can was about three-quarters full and still cold to the touch. On picking it up, the deputy noticed a small glass pipe, which he recognized as a

methamphetamine pipe, directly underneath it. Sitting next to the pipe was a clear plastic bag containing a white crystal substance, which he suspected was methamphetamine. The deputy ran a field test that confirmed his suspicion.

The Washington State Patrol Crime Laboratory later determined that the substance in the plastic bag was 2.7 grams of methamphetamine and that the glass pipe had been used to smoke methamphetamine. The State charged Ms. Walker with possession of methamphetamine.

Deputy Haring testified at Ms. Walker's trial. He was asked by the prosecutor during his direct examination "what the passenger's demeanor was." Report of Proceedings (RP) at 60. He responded, "Her demeanor is she was quiet, didn't say much. Was more or less looking straight ahead or was kind of looking off to the right." *Id*. Asked by the prosecutor, "Did she make eye contact with you at all?" Deputy Haring responded, "Tried—*she basically tried not to make eye contact*." *Id*. (emphasis added). Defense counsel did not object.

During cross-examination, defense counsel asked the deputy, "Did you run any fingerprints on the pipe or the plastic baggie after retrieving them at a later date?" to which Deputy Haring answered that he had not. RP at 64. Asked, "Did anybody attempt to?" the deputy answered "[n]o." *Id.*

In rebuttal questioning, the prosecutor questioned Deputy Haring about his

practice when it came to testing evidence for fingerprints, eventually asking if there was "[a]ny reason you didn't take fingerprints off of that—the pipe and the baggie?" RP at 66. The deputy responded that it did not "cross [his] mind" to fingerprint the plastic bag and pipe, in part because they were so small and he did not know if the state crime lab could test them. *Id.* He then explained that he does not always request that evidence be tested for fingerprints, and offered the following further explanation:

> A. It depends on the—the occupancy of the vehicle and where we find the item. If it's in a location where there's more than one person that has—*what we'd consider constructive possession of that*. If it's in an area where more than one person would have access to that or be able to—retrieve that or touch it or handle it then we would probably send off for fingerprints to then try to link the—possession—who owns that basically.
> Q. And you didn't feel that was necessary in this case?
> A. Negative. I did not.
> Q. Okay. And the reason being?
> A. Because it was right next to the passenger between the door and the seat—which would have been right at her right side *and she was in constructive possession of that.*

RP at 67 (emphasis added). Defense counsel did not object to Deputy Haring's testimony.

Sergeant Brian Taylor, of the Adams County Sheriff's Office, also testified at trial. Among other background in drug enforcement, Sergeant Taylor described his experience in dismantling methamphetamine labs and how methamphetamine is commonly packaged. After foundational testimony qualifying him as an expert, he testified that in

Adams County, the street value of methamphetamine is approximately $100 per gram.

The jury found Ms. Walker guilty. She appeals, arguing she did not receive the effective assistance of counsel guaranteed by the federal and state constitutions in light of her lawyer's failure to object to (1) Deputy Haring's testimony that she was trying to avoid eye contact, (2) his testimony that she had constructive possession of the methamphetamine, and (3) testimony from Sergeant Taylor that she contends was unnecessary and prejudicial.

ANALYSIS

The Sixth Amendment and article I, section 22 of the Washington State Constitution guarantee the right to counsel. More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). The attorney must perform to the standards of the profession. *Id.* Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Appellate courts review an ineffective assistance of counsel claim de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006).

To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced

the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *McFarland*, 127 Wn.2d at 334-35. Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8. If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

In evaluating claims for ineffectiveness, courts are highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. *Strickland*, 466 U.S. at 689-91. Strategic and tactical decisions are not grounds for error, but where there is no conceivable legitimate tactic explaining counsel's performance, we will reverse. *Id.*; *Reichenbach*, 153 Wn.2d at 130. Here, the claimed deficiency is that counsel failed to object to certain of Deputy Haring's and Sergeant Taylor's testimony. To prove that a failure to object constitutes ineffective assistance of counsel, a defendant "must show that not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been

different if the evidence had not been admitted." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted).

We address the alleged failures to object in the order they arose.

A

In Deputy Haring's direct examination, the prosecutor posed questions eliciting the deputy's testimony that Ms. Walker, whom he knew, avoided eye contact with him when he arrived at the car and spoke to Mr. Cerna-Rodriguez. The State argues that the evidence was not objectionable. It contends it was relevant to Ms. Walker's proposed defense of unwitting possession of the methamphetamine.

Ms. Walker's proposed pattern instruction on unwitting possession stated, in part:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

Clerk's Papers at 22.

"Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. All relevant evidence is admissible, ER 402, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The trial judge has broad discretion in balancing the probative value of evidence against its prejudicial impact.

State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996).

Opinion testimony regarding a relevant reaction by a defendant is admissible if it is prefaced with a proper foundation: personal observations of the defendant's conduct, factually recounted by the witness that directly and logically support the conclusion. *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (citing *State v. Allen*, 50 Wn. App. 412, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988)), *review denied*, 111 Wn.2d 1016 (1988). Ms. Walker argues, however, that counsel should have objected to Deputy Haring's testimony because it implied she was either guilty or trying to hide something. She relies on *State v. Perrett*, 86 Wn. App. 312, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997) and *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999).

In *Perrett*, the defendant was charged with second degree assault with a deadly weapon for threatening a tenant with a shotgun; he claimed self-defense. Mr. Perrett argued that it was error for the court to admit his statement to a law enforcement officer upon arrest that "'the last time the sheriffs took his guns, he didn't get them back.'" 86 Wn. App. at 319. The State argued that the statement was important to show Mr. Perrett's uncooperative attitude on arrest; the court agreed and admitted the statement, explaining that "'[d]emeanor is always, totality of the circumstances is very important in judging the question of demeanor.'" *Id.* The Court of Appeals concluded that Mr. Perrett's demeanor on arrest was irrelevant to the charge or to any defense and was

prejudicial; for that and other reasons, it reversed his conviction.

In *Farr-Lenzini*, the court reversed a defendant's conviction for felony attempting to elude a police officer, based on a police officer's testimony, when asked for his opinion, that the defendant "'was attempting to get away from me and knew I was back there and [was] refusing to stop.'" 93 Wn. App. at 463. The court found that the officer's opinion was not admissible as expert opinion under ER 702 because he was not qualified as an expert on a driver's state of mind and because his testimony was not helpful, inasmuch as a lay jury is capable of deciding whether a driver was attempting to elude. *Farr-Lenzini*, 93 Wn. App. at 461-62. It found the testimony inadmissible as lay opinion under ER 701 because it was not rationally based on the officer's perception and helpful to a clear understanding of his testimony or the determination of a fact in issue. *Id.* at 462 (quoting ER 701).

Deputy Haring's observations about Ms. Walker are distinguishable from those at issue in *Perrett* and *Farr-Lenzini.* His testimony that Ms. Walker "was quiet, didn't say much," "Was more or less looking straight ahead or was kind of looking off to the right," and that she did not make eye contact, all described objective behavior. His inferential statement that "she *basically tried not* to make eye contact" did not purport to be based on special training or expertise. In context, it imparted no more than his conclusion that, because he and Ms. Walker knew one another, she would naturally have made eye

contact had she not been consciously trying not to. His rationally-based lay opinion that Ms. Walker appeared to be trying to avoid eye contact was helpful to an understanding of his otherwise objective testimony as to her behavior and was relevant to her defense of unwitting possession. *Cf. State v. Hager*, 171 Wn.2d 151, 154-55, 248 P.3d 512 (2011) (defense conceded that detectives could testify that Mr. Hager avoided eye contact and appeared to be under the influence of methamphetamine, but improper to opine that he was evasive); *State v. Morales*, 53 Wn. App. 681, 686, 769 P.2d 878, *review denied*, 112 Wn.2d 1028 (1989) (in deciding mistrial motion based on *Batson*[1] challenge, counsel and the court both viewed a prospective juror's avoiding eye contact as suggesting that she was nervous or uneasy; this court accepted that as a reasonable and neutral explanation for the challenge). Because the testimony was not objectionable, Ms. Walker's lawyer was not ineffective in failing to object to it.

B

In presenting Sergeant Taylor's testimony in its case-in-chief, the State established his training and work experience before eliciting his testimony that methamphetamine, if smoked, is usually smoked with a glass pipe, and his testimony as to the value of the methamphetamine found on the floorboard near where Ms. Walker was sitting. In previewing the State's case in opening statement, the prosecutor had told the jury that

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Sergeant Taylor would testify to the value of the methamphetamine. RP at 28-29 ("[Y]ou will also hear [from] Sergeant Taylor . . . . He will testify and tell you that the amount of methamphetamine found in the car had a street value of somewhere between $200.00 and $300.00.").

The State argues that this evidence, too, was not objectionable. It contends the evidence of value was relevant to Ms. Walker's constructive possession of the methamphetamine and her defense of unwitting possession: the high value of the methamphetamine made it less likely that it had been abandoned on the floorboard by someone else. Ms. Walker argues, however, that foundational testimony as to Sergeant Taylor's experience with methamphetamine manufacturing prejudicially implied that she was involved in manufacture of the drug.

The questions posed as to Sergeant Taylor's training and experience were standard questions for establishing his qualification to testify as an expert. The sergeant's experience and training in his 22-year employment in law enforcement for Adams County unsurprisingly involved drug enforcement work ranging beyond the narrow scope of his intended testimony. The prosecutor's questions establishing his wider training and experience did not create the impression that Ms. Walker's experience with drugs was co-extensive with the sergeant's. The foundational testimony consumes only four pages of the trial transcript; it was not excessive. Ms. Walker's lawyer was not ineffective in

failing to make an objection to the testimony that would almost certainly have been overruled.

C

The last allegation of ineffective assistance and the closest call is the "constructive possession" testimony complained of by Ms. Walker. Her lawyer did not object when Deputy Haring testified that he would ordinarily send drugs and paraphernalia for fingerprinting if they were found in an area of the car where there was more than one person who had "what we'd consider constructive possession of that," but he did not find it necessary to fingerprint the items in this case, because given their location, "[Ms. Walker] was in constructive possession of that." RP at 67.

Constructive possession of the methamphetamine was the only contested issue at what was a less than three-hour trial.[2] The defense moved for dismissal of the charge at the close of the State's case on the basis of the State's asserted failure to prove constructive possession. In its closing argument, the defense characterized the State's burden of proving constructive possession as "really the whole issue." RP at 105. Notwithstanding the central importance of the issue of constructive possession, Ms. Walker's lawyer did not object to Deputy Haring's testimony and ask the court to strike it

[2] The State gave a brief opening statement before lunch; it began its presentation of evidence at 1:15 p.m. and the jury was excused for its deliberations at 3:10 p.m.

and instruct the jury that constructive possession was an issue for it to decide. *Cf. State v. Haq*, ___ Wn. App. ___, 268 P.3d 997, 1018-19, (striking testimony and cautioning jury was proper procedure for testimony of detective and doctor that invaded province of the jury), *petition for review filed*, No. 64839-0-I (Wash. Ct. App. Feb. 27, 2012).

In this instance, we agree with Ms. Walker that the statements were objectionable and an objection would probably have been sustained. Generally, "'no witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" *State v. Yarbrough*, 151 Wn. App. 66, 93, 210 P.3d 1029 (2009) (internal quotation marks omitted) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994)). Such testimony prejudices the defendant because it "'invad[es] the exclusive province of the finder of fact.'" *Id.* (internal quotation marks omitted) (quoting *Heatley*, 70 Wn. App. at 577). These statements are usually directed specifically to the defendant. *Heatley*, 70 Wn. App. at 577. While opinion testimony is not objectionable simply because it embraces an ultimate issue that the trier of fact must decide, it must still be admissible opinion and not excludable under some other rule, such as ER 403. ER 704. And no witness is permitted to express an opinion that is a conclusion of law or that tells the jury what result to reach. *Carlton v. Vancouver Care, LLC*, 155 Wn. App. 151, 168, 231 P.3d 1241 (2010) (citing *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003),

review denied, 151 Wn.2d 1010 (2004)); *cf. State v. Reeds*, 197 N.J. 280, 299, 962 A.2d 1087 (2009) (detectives' testimony to constructive possession of heroin found in car usurped the jury's role as fact finder).

The State argues that Deputy Haring was not offering an opinion of guilt, but merely explaining how the close proximity of the contraband to Ms. Walker influenced his decision not to request fingerprint testing of the contraband. We recognize that the deputy's statements were not a part of the State's case-in-chief and came up only to rebut cross-examination establishing the absence of fingerprint evidence, intended to cast doubt on the quality of the State's evidence tying the contraband to Ms. Walker. But the gist of the officer's explanation, while perhaps unintended, was that he did not need fingerprint testing because the State had enough to convict with her constructive possession. The fingerprint issue tie-in does not eliminate the problem with his testimony.

The State also argues that in the area of trial objections, we must defer to the likelihood that Ms. Walker's lawyer did not want to draw attention to the deputy's testimony through an objection. We reject many Sixth Amendment challenges complaining of a lawyer's failure to object on this basis. But our deference is not infinite.

Because a claim of ineffective assistance requires that a defendant demonstrate both ineffective assistance and prejudice, we can and will resolve the claim on the basis

of the prejudice prong when we can, and we can do so here. The State did not rely on Deputy Haring's testimony (as it might have) in resisting Ms. Walker's motion to dismiss the charge at the close of the State's case or in closing argument. In each case, the prosecutor relied on other evidence: evidence that the plastic bag and pipe were found within her immediate and exclusive reach, and that because the beer can that concealed their presence depended on its tight placement between the seat and door to remain upright and was still cold, the jury could reasonably conclude that the beer can had been placed by Ms. Walker to conceal a pipe and drugs that were under her dominion and control. Ms. Walker has not shown a reasonable probability that, but for her lawyer's failure to object to the detective's testimony, the outcome of the proceeding would have been different.

We affirm.

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.

_____
Siddoway, J.

WE CONCUR:

_____
Sweeney, J.

_____
Brown, J.