IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIFFANY NICOLE HARRISON, Appellant.	)	No. 64954-0-I DIVISION ONE UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. LANCE THOMAS ALEXANDER, Appellant.	)	FILED: May 10, 2010

Grosse, J. — Where a jury is properly instructed that they are the sole judges of the credibility of witnesses, the admission of improper opinion testimony does not constitute manifest constitutional error because there was not sufficient prejudice. And because there is insufficient prejudice, defense counsel's failure to object to such testimony does not constitute ineffective assistance of counsel. We affirm the judgments and convictions.

FACTS

On July 25, 2007, sheriff's deputies executed a search warrant on an apartment where they found evidence of marijuana, Ecstasy,[1] various drug paraphernalia, stolen

[1] Methylenedioxymethamphetamine (MDMA a/k/a "Ecstasy").

credit cards, and a loaded firearm. To gain entry to the apartment the police had to force open the front door which was barricaded by a couch and table. As police entered, Tiffany Harrison ran into her bedroom. She closed the door behind her and attempted to hold it shut against the onslaught of two deputies. The police knocked the door in and arrested Harrison. Lance Alexander fled to the bathroom and held its door against the onslaught of two other deputies. After gaining entry to the bathroom, the deputies struggled to bring Alexander under control. He was finally subdued and arrested. The police removed a bag containing six smaller bags, four of which contained 100 Ecstasy pills each, while two contained a wet paste.

A search of the entire apartment revealed several containers with marijuana residue, three digital scales and a grinder that had been used for marijuana. In the living room the police found more Ecstasy pills in Harrison's purse and $1,000 cash in Alexander's pants. In the bedroom, the police discovered a second purse belonging to Harrison that contained stolen credit cards, checkbooks, and passports not belonging to either defendant. Additionally, the police found a loaded Glock 9 mm firearm on the floor near the head of the bed.

Deputy Shaun Darby spoke separately to Harrison and Alexander who both waived their Miranda rights.[2] Harrison told him that she had been residing at the apartment for approximately seven to eight months and had been dating Alexander for approximately a year. She also told him that she had no source of income and denied any knowledge of drugs being sold from the apartment. Alexander said Harrison was his girl friend and that he had been staying at the apartment for several months. He

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

told Deputy Darby that he had a key to the apartment. He also told the deputy that he rarely sells Ecstasy. Alexander told Deputy Darby that the police would discover a blue box next to the bed with approximately 500 Ecstasy pills. He also told the deputy that he had purchased a firearm because someone had broken into the residence and pistol whipped Harrison. Alexander suspected that the firearm was stolen because he had purchased it on the street for about $50. The gun has a value of $500.

Harrison testified on her own behalf. Harrison testified that she had rented the apartment that the police raided. Alexander would spend the night with her at the apartment approximately three times a week. Harrison further testified that Alexander had access to the apartment when she was not there. She admitted to using both Ecstasy and marijuana. Harrison averred that she smoked all day, every day, and that together, she and Alexander smoked approximately 20 grams a day. She testified that she used the scales to make sure she had received the right amount or to get the appropriate amount to make blunts. She testified to taking approximately 10 to 15 Ecstasy pills a week. She admitted that the 36 Ecstasy pills found in her purse were left over from her original purchase of 60 pills for her personal use. She denied having any knowledge of 600 pills found in the toilet. However, she testified that someone might purchase 600 pills for personal use. Harrison also testified that the items belonging to other people were taken from a backpack that Alexander's cousin had left in the apartment. Harrison denied selling any drugs.

The jury found Alexander guilty of the lesser included crime of possession of Ecstasy, unlawful possession of marijuana with intent to deliver, and possession of a

stolen firearm. The jury also found that Alexander was armed with a firearm for the Ecstasy conviction and that the unlawful possession occurred within 1,000 feet of a school bus stop.

Harrison was found guilty of the lesser included crime of unlawful possession of Ecstasy, unlawful possession of marijuana with the intent to deliver; two counts of second degree possession of stolen property, second degree identify theft, and unlawful possession of payment instruments.

Harrison and Alexander appeal their judgments and convictions.

ANALYSIS

Opinion Testimony

Harrison and Alexander argue that the testimony of two of the deputies constituted improper opinion testimony but did not object to it at trial. Generally, appellate courts do not consider issues raised for the first time on appeal.[3] However, if an error is manifest, affecting a constitutional right, it may be raised for the first time on appeal.[4] Manifest error requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial.[5] Even if a court determines that the opinion testimony raises a manifest constitutional error, however, it is still subject to harmless error analysis.[6]

"To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, '(1) "the type of witness involved,"

[3] State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a).
[4] Kirkman, 159 Wn.2d at 926; RAP 2.5(a)(3).
[5] State v. King, 167 Wn.2d 324, 329, 219 P.3d 642 (2009).
[6] King, 167 Wn.2d at 329.

(2) "the specific nature of the testimony," (3) "the nature of the charges," (4) "the type of defense," and (5) "the other evidence before the trier of fact."'"[7]

Harrison and Alexander contend that Deputy Darby opined that the presence of the various drug accoutrements, including plastic packaging items, were consistent with the theory that narcotics were being repackaged and sold. On cross-examination, Deputy Darby confirmed that buyers often received drugs in multiple bags of different sizes and that also could be a reasonable explanation for the presence of many of the items found in the apartment.

Harrison and Alexander also object to Deputy Tom Olesen's testimony regarding how officers generally obtain a search warrant. Alexander argues that the jury could extrapolate that he was guilty from the testimony. Deputy Olesen merely testified that once a person becomes a suspect, "[y]ou either buy from them or, through investigation, you figure out what is going on."

Additionally, Alexander contends that Deputy Mark Fry's testimony in which he stated that the apartment was Alexander's was an improper opinion. Alexander argues that the issue of whether or not he lived at the apartment was central to his defense. Police had Alexander under surveillance, which resulted in their obtaining a search warrant listing him as the apartment's tenant. Only after executing the warrant did the police discover that the apartment was rented in Harrison's name. But Alexander told Officer Darby that he had been staying in the apartment for several months. Additionally, police testimony indicated that Alexander had been under surveillance

[7] King, 167 Wn.2d at 332-33 (quoting Kirkman, 159 Wn.2d at 928 (quoting State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001))).

and was seen both entering and exiting the apartment using a key. Alexander's car was also observed overnight in the parking lot of the apartment complex. Further, Alexander was discovered nude in the bathroom of the apartment where a plastic bag containing approximately 600 Ecstasy pills had been thrown in the toilet. Harrison testified that Alexander was her boyfriend and stayed overnight three times a week. Alexander stated that he had purchased the gun found in the bedroom. When viewed in the context of the record, the deputy's statements did not constitute an improper comment on the defendant's guilt or invade the factual province of the jury. There were multiple facts from which the jury could draw its own conclusion regarding Alexander's living circumstances.

Assuming arguendo that all of the above testimony was improper opinion testimony, any error in its admission was harmless because the trial court properly instructed the jury that it was the sole judge of witnesses' credibility and was not bound by the opinions of others.[8] This is in accord with our Supreme Court's decision in State v. Montgomery in which the defendants were charged and convicted for possessing pseudoephedrine with intent to manufacture methamphetamine.[9] Before arresting the defendants, the detectives had followed them from store to store where they purchased various ingredients that could be used to manufacture methamphetamine. Several of the prosecution witnesses testified that the defendants had purchased items to use for manufacturing and that the pseudoephedrine was "possessed with intent" to manufacture.[10] Because the jury was properly instructed, our Supreme Court found

[8] State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008).
[9] 163 Wn.2d 577, 183 P.3d 267 (2008).
[10] Montgomery, 163 Wn.2d at 588.

that such improper opinion testimony was not manifest or prejudicial.[11] Here, the jury was properly instructed that it was the sole judge of witness credibility and was not bound by any witness opinions. As noted in Montgomery, we presume that the jury followed the court's instructions, absent any written inquiry from the jury or other evidence that it was unfairly influenced.[12] As in Montgomery, we have no suggestion of any unfair influence.

Because there is an insufficient showing of prejudice, we likewise reject the claim of ineffective assistance of counsel. "Effective assistance of counsel is guaranteed by both the federal and the state constitutions."[13] To sustain a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and that the deficient performance was prejudicial.[14] Because the jury was properly instructed it was the sole arbiter of credibility, the defendants can not demonstrate any prejudice from counsel's failure to object to this testimony. Accordingly, the claim of ineffective assistance of counsel fails.

Unanimity Instruction

Alexander assigns error to the trial court's jury instruction regarding the special verdict for a sentence enhancement because it required that "all twelve [jurors] must agree on the answer to the special verdict." The challenge to this instruction is based upon State v. Goldberg.[15] Alexander cites to this case for the proposition that the jurors

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[11] Montgomery, 163 Wn.2d at 595-96.
[12] Montgomery, 163 Wn.2d at 596.
[13] In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Const. amend VI; Wash. Const. art. I, § 22.
[14] Woods, 154 Wn.2d at 420-21; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

must be unanimous only to answer yes to the special verdict, but not to answer no. In Goldberg, upon discovering that the jurors were not unanimous in answering "no" to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity.[16] The Goldberg court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer "no" to a special verdict.[17]

However, even if the jury was erroneously instructed here, there is no prejudice. The special verdict form shows that the jury was unanimously satisfied beyond a reasonable doubt that the offenses occurred. Unlike in Goldberg, Alexander does not contend that the jury was deadlocked or improperly directed or coerced to reach a unanimous jury verdict. Here, all twelve jurors were polled and unanimity was confirmed. Alexander can show no actual harm from the giving of this instruction because he received a unanimous verdict as guaranteed by article I, section 21 of the Washington State Constitution.

Indeterminate Sentence

Finally, Harrison argues that her sentence is indeterminate because it leaves the discretion of when a sentence is completed to the Department of Corrections. Harrison was sentenced to 60 months confinement, plus 9 to 12 months community custody. Harrison asserts that the sentence imposed was invalid because the combined term of confinement and community custody could exceed the applicable 60 months statutory maximum in violation of RCW 9.94A.505(5). In re Personal Restraint of Brooks,[18] our

[15] 149 Wn.2d 888, 72 P.3d 1083 (2003).
[16] Goldberg, 149 Wn.2d at 891.
[17] Goldberg, 149 Wn.2d at 894.
[18] 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

Supreme Court held:

> [W]hen a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

When clarified in this manner, a sentence does not exceed the statutory maximum and is not indeterminate or otherwise invalid.[19] In handing down its sentence, the trial court specifically clarified the sentence in paragraph 4.6 of the judgment and sentence.[20] Furthermore, the judgment and sentence specifically directed that Harrison was not "to serve, including community custody, [a sentence] that exceeds the five years."

The judgments and convictions are affirmed.

Grosse, J

WE CONCUR:

[19] Brooks, 166 Wn.2d at 673-74.

[20] Paragraph 4.6 of the judgment and sentence states: "That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense."