No. 44492-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NAAMAN JAMAL WASHINGTON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Mr. Washington's conviction for possession of marijuana must be vacated because he suffered ineffective assistance of counsel when his trial attorney failed to properly conduct the CrR 3.6 hearing and to propose a jury instruction that was necessary to implement his lawful-possession affirmative defense.

The conviction for unlawful possession of a firearm is also erroneous. The jury was instructed to use the evidence of Mr. Washington's criminal history only to evaluate his credibility as a witness, and for no other purpose. This instruction, given without objection, became the law of the case and prohibited the jurors from using evidence of Mr. Washington's prior conviction as substantive evidence. The jury therefore had no substantive evidence before it to establish that Mr. Washington had been convicted of a serious offense. Because that is a required element of unlawful possession of a firearm, the conviction must be reversed for insufficient evidence.

Finally, insufficient evidence supported the court's finding that Mr. Washington had the current or likely future ability to pay any discretionary legal financial obligations (LFOs). The finding was

therefore erroneous. And because the order for the LFOs cannot stand without a valid finding of ability to pay, the order must be vacated.

B. ASSIGNMENTS OF ERROR

1. Mr. Washington received ineffective assistance of counsel at his CrR 3.6 hearing.

2. Mr. Washington received ineffective assistance of counsel at his trial.

3. The jury's guilty verdict on the firearm charge was not supported by sufficient evidence in the record.

4. The court erred in finding that Mr. Washington had the current or likely future ability to pay LFOs without sufficient evidence to support the finding.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal defendants are constitutionally entitled to the effective assistance of counsel. Where Mr. Washington's trial attorney failed to introduce evidence at his CrR 3.6 hearing that was available and highly favorable to his claims, and failed at trial to propose a jury instruction that would allow the jury to find in Mr. Washington's favor on the affirmative defense to the marijuana-possession charge that he

had presented and supported, did he receive ineffective assistance of counsel? (Assignments of Error 1, 2.)

2. Jury instructions delivered without objection become the law of the case and bind the jury and the parties. The jury here was instructed only to consider evidence of Mr. Washington's criminal history to evaluate his credibility as a witness, and for no other purpose. Where the jury delivered a guilty verdict that required it to substantively find that Mr. Washington had been previously convicted of a serious offense, was its verdict based on insufficient evidence? (Assignment of Error 3.)

3. If a trial court during sentencing enters an explicit finding that a defendant has the current or likely future ability to pay LFOs, that finding must be supported by evidence in the record. Did the trial court err by finding that Mr. Washington had the current or likely future ability to pay without inquiring into his financial circumstances and without other evidence in the record on which to base its finding? (Assignment of Error 4.)

D. STATEMENT OF THE CASE

On May 22, 2011, Naaman Washington was riding as a passenger in a car that belonged to California Smith-Usher. Supp. CP

___ at 1-2 (Findings and Conclusions on Admissibility of Evidence CrR 3.6 / Motion to Dismiss re: *Knapstad*, filed Mar. 22, 2013) (3.6 Ruling). Mr. Usher was driving. *Id.* Shortly before 10:00 p.m., Washington State Patrol Trooper James Meldrum ran a random check of Mr. Usher's license plate as they drove through Tacoma on I-5. *Id.*; RP 14-15.[1] The plate check revealed that Mr. Usher's license was suspended. RP 15-16. After verifying that the driver's appearance matched Usher's description, Meldrum pulled the car over. *Id.*

Upon approaching the driver's side window to conduct the traffic stop, Meldrum noticed a bag on the passenger-side floor containing a substance that he suspected, based on its appearance and odor, to be marijuana. RP 20-21. He asked Mr. Washington what was in the bag. RP 21. Washington acknowledged that the bag contained marijuana. RP 23. He explained that he was a designated provider for a medical-marijuana patient named Latoya Cole, and only had the marijuana with him because he had been trying to deliver it to her. RP 34-36. Washington gave Meldrum copies of two documents to support this claim: a form from a provider called CannaPath indicating that Ms. Cole was an authorized patient, and a contract signed by Ms. Cole and

[1] The Verbatim Report of Proceedings for the CrR 3.6 hearing and trial is contained in seven consecutively paginated volumes. These are cited collectively as "RP."

Mr. Washington designating him as her provider and authorizing him to obtain and transport her medicinal marijuana. *Id.*; CP 87-88.

Despite being shown these documents, Trooper Meldrum arrested Mr. Washington for possession of the marijuana. 3.6 Ruling at 2. During a search incident to arrest, Meldrum located an unlabeled pill bottle in Washington's pocket that contained 22 hydrocodone pills. *Id.* Meldrum also arrested Usher for driving on a suspended license. *Id.*

After Meldrum had arrested both men, other troopers arrived on the scene. Ex. 7,[2] "631@20110522215221.mpg," at 6:30-7:00.[3] Meldrum's in-car camera recorded Meldrum discussing with other troopers whether he needed a warrant to seize the suspected marijuana from the car, including comments about which particular warrant exceptions might apply. *Id.* at 12:17-14:01. Meldrum expressed his opinion that he did not need a warrant, though he also noted that he could always ask for consent to enter the vehicle to avoid the warrant requirement. *Id.* He took several pictures of the bag from the outside of the car and then, without asking for consent from either Washington or

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[2] The trial exhibits cited herein are included in the supplemental designation being filed simultaneously with this brief.

[3] This DVD was marked as Exhibit 7 both for the CrR 3.6 hearing and for trial. Supp. CP ___ (Exhibit Record (trial), filed Jan. 23, 2013); Supp. CP ___ (Exhibit Record Pretrial Hearing, filed Jan. 17, 2013.) The DVD contained recordings of the stop from two cameras in Trooper Meldrum's car, one facing forward and one facing rearward.

Usher, he opened the front passenger door and removed the bag, along with a wallet, cell phone, and set of keys. *Id.* at 12:58-15:05. He did not open any of the other car doors, remove any other items, or appear to inspect the rest of the car during the stop. *Id.* He later asked another trooper to begin the process of impounding the car. *Id.* at 16:17-16:24; RP 38-39.

After transporting Washington and Usher to the Pierce County Jail, Meldrum received a request from the tow operator to come to the tow yard where he had brought the car. RP 40. The tow operator had conducted an inventory search of the car and discovered two guns, one in the locked glove compartment and one in the pocket of a jacket in the back seat. 3.6 Ruling at 3. Meldrum obtained a telephonic seizure warrant, retrieved the guns, and entered them into evidence. *Id.*; RP 44-46.

The State charged Mr. Washington with one count of unlawful possession of a controlled substance with intent to deliver for the marijuana, one count of possession of a controlled substance for the hydrocodone, and two counts of unlawful possession of a firearm, one for each gun. CP 5-7.

Before trial, Mr. Washington's counsel moved to suppress the marijuana that Trooper Meldrum seized from the car. CP 69-77. The written motion argued that under *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), the seizure could not be justified as a search incident to arrest. CP 74-75. The State responded by arguing that Trooper Meldrum seized the marijuana during a lawful inventory search prior to impounding the car. CP 54-56. At the suppression hearing, Trooper Meldrum and the tow-truck driver testified about the events of that evening. RP 13-91. While examining these witnesses, both parties referred repeatedly to the contents of the audio/video recording from Trooper Meldrum's rear-facing in-car camera. *E.g.*, RP 49-53, 70-75. The State played several portions of this video for the court. RP 51-53.

After presenting the evidence, the parties argued whether the seizure of the marijuana was valid under the warrant exceptions for a search incident to arrest or an inventory search. RP 96-105, 107. The court found that Trooper Meldrum seized the marijuana during a lawful inventory search and denied the motion to suppress. RP 110-11; 3.6 Ruling at 2, 4.

The case proceeded to a jury trial. Mr. Washington presented the defense of lawful possession for both of the drug charges: as Latoya

Cole's designated provider for the marijuana, and pursuant to a legitimate prescription for the hydrocodone. RP 237-58, 355-69. He denied that either of the guns in the car belonged to him. *Id.* At the close of the State's case in chief, Mr. Washington moved to dismiss all four counts against him. RP 231-32. The court denied the motion as to three of the charges, but dismissed one count of unlawful possession of a firearm, finding the evidence insufficient to establish that Mr. Washington had dominion and control over the gun in the locked glove box. RP 234-35.

Mr. Washington testified in his own defense. RP 237-58, 270-85. His testimony did not include any references to prior criminal convictions, nor did the State attempt to impeach his credibility by questioning him about prior convictions. *See id.* The court later read a stipulation to the jury that Mr. Washington had previously been convicted of a "felony, which is a serious offense." RP 320. No other evidence of Mr. Washington's prior convictions was introduced.

The court instructed the jury on the three remaining charges. The instructions describing criminal liability for possession of a controlled substance stated that "[i]t is a crime for any person to possess a controlled substance," and "[i]t is a crime for any person to

possess with intent to deliver a controlled substance." CP 112, 127. Neither instruction included the clause "except as authorized by law," which the Pattern Jury Instructions provide for use in appropriate cases. 11 Washington Practice, *Pattern Jury Instructions—Criminal* (WPIC) 50.01, 50.13. The jury was also given an instruction describing when a person may lawfully deliver a controlled substance, CP 123, but no instruction describing when a person may lawfully possess a controlled substance with intent to deliver, with which Mr. Washington was charged. Finally, the jury was given an instruction declaring that evidence of Mr. Washington's prior convictions could be used to evaluate his credibility as a witness but for no other purpose. CP 125. Neither side objected to any of these instructions.

The jury convicted Mr. Washington on all three counts. CP 159-62. The court sentenced him to the bottom of the standard range. CP 168-77. The court ordered mandatory LFOs and, without inquiring into Mr. Washington's current or future ability to pay, also imposed discretionary LFOs of $250. CP 170-71; RP 410-11. Mr. Washington now appeals (1) his conviction for possession of marijuana with intent to deliver, (2) his conviction for unlawful possession of a firearm, and (3) the imposition of discretionary LFOs at sentencing.

E. ARGUMENT

1. Mr. Washington received ineffective assistance of counsel at his CrR 3.6 hearing and at trial.

Both the federal and state constitutions guarantee criminal defendants the right to effective assistance of counsel. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); U.S. Const. amend. VI; Const. art. I, § 22. "In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately." *Hawkins*, 157 Wn. App. at 747. But for counsel to be constitutionally adequate, "[m]ore than the mere presence of an attorney is required. The attorney must perform to the standards of the profession." *Id.* An attorney who does not provide "professionally competent assistance" is constitutionally ineffective if the deficient performance prejudices the defendant. *Strickland*, 466 U.S. at 690, 693.

To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The defendant does not, however, need to "show

that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Where a defendant establishes that he has received ineffective assistance of counsel, the proper remedy is reversal of the conviction and remand for retrial. *State v. Kyllo*, 166 Wn.2d 856, 871, 215 P.3d 177 (2009).

a. Mr. Washington's attorney failed to introduce available evidence at the CrR 3.6 hearing that would have established the illegality of the marijuana seizure.

At the time of the suppression hearing, Mr. Washington's trial counsel had information that likely would have caused the court to suppress the marijuana as the fruit of an illegal seizure. But he failed to introduce that evidence at the hearing. This failure cannot be explained by any reasonable strategic or tactical decision, rendering his performance deficient. And because presenting the evidence could well have changed the outcome of both the hearing and the trial on the marijuana charge, Mr. Washington suffered prejudice. The ineffective assistance Mr. Washington received from his attorney therefore requires the resulting conviction to be vacated.

i. The available evidence showed that Trooper Meldrum did not seize the marijuana during a lawful inventory search.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. "Private affairs" under article I, section 7 are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). The protections of article I, section 7 are both broader and qualitatively different than those under the Fourth Amendment, because article I, section 7 explicitly protects personal privacy, while the Fourth Amendment prohibits only unreasonable government conduct. *State v. Gunwall*, 106 Wn.2d 54, 65, 720 P.2d 808 (1986). Thus, article I, section 7 proscribes any search or seizure conducted without authority of law, regardless of whether the search or seizure itself was reasonable. *State v. Williams*, 171 Wn.2d 474, 484-85, 251 P.3d 877 (2011).

As used in article I, section 7, "authority of law" means a valid warrant, or one of a "few jealously guarded exceptions" to the warrant requirement. *State v. Afana*, 169 Wn.2d at 169, 176-77, 233 P.3d 879

(2010) (citing *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009)). These exceptions include "consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)). A warrantless search or seizure is presumed to violate article I, section 7, and the burden is always on the State to prove that such a search or seizure is valid under a recognized warrant exception. *Patton*, 167 Wn.2d at 386; *Ladson*, 138 Wn.2d at 350. A trial court's findings of fact on a motion to suppress will be upheld if supported by substantial evidence, and its conclusions of law are reviewed de novo. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

Trooper Meldrum did not conduct a constitutionally cognizable search when he saw and smelled the marijuana from his lawful vantage point outside the car. *See, e.g.*, *State v. Swetz*, 160 Wn. App. 122, 134, 247 P.3d 802 (2011) (citing *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). But Meldrum's observation did not give him the right to enter the car and seize the marijuana:

> If an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article 1, section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article 1, section 7 is implicated and the intrusion must be justified if it is made without a warrant.

Id. (quoting *Kennedy*, 107 Wn.2d at 10, and citing *State v. Myrick*, 102 Wn.2d 506, 514-15, 688 P.2d 151 (1984) ("[P]lain view alone is never enough to justify the warrantless seizure of evidence. . . . [E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.") (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971))). Thus, Meldrum's entry into the car and seizure of the marijuana was unconstitutional unless it was "justified by a warrant or valid exception" under article I, section 7. *Id.* at 134.

The trial court held that Meldrum seized the marijuana while conducting a lawful inventory search. RP 110-11; 3.6 Ruling at 4. Inventory searches are a recognized warrant exception under article I, section 7. *Ladson*, 138 Wn.2d at 349. When police impound a vehicle, they have legitimate interests in safeguarding the vehicle owner's property, protecting themselves against claims of loss, and protecting

themselves and the public from potentially dangerous items contained in the vehicle. *State v. Tyler*, ___ Wn.2d ___, 302 P.3d 165, 171 (2013). In order to protect these interests, police may conduct a warrantless search of a vehicle to inventory its contents prior to a lawful impound. *Id.*

Inventory searches may not be used, however, to justify an officer's entry into a vehicle where the officer's true purpose is merely to search for or seize evidence, rather than actually to compile an inventory. *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980); *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968)). Thus, our Supreme Court has held that where officers asserted at trial that they had conducted an inventory search but the record did not indicate that they had continued their search after discovering incriminating evidence or made a complete list of items in the vehicle, their actions could not "fairly be characterized as an inventory search." *State v. Gluck*, 83 Wn.2d 424, 428-29, 518 P.2d 703 (1974).

The video from Trooper Meldrum's front-facing camera convincingly demonstrates that he, like the officers in *Gluck*, used the inventory-search exception simply as a post-hoc rationalization for an intrusion whose true purpose was to investigate a suspected crime.

After Meldrum arrested both men in the car, more troopers arrived on the scene. Ex. 7, "631@20110522215221.mpg," at 6:30-7:00. A few minutes later, Meldrum said to one of them, "I want to take a picture of it first, then I'll take it out." *Id.* at 12:17-12:20. Meldrum then expressed his belief that he had observed the marijuana in "open view," because when he "made the driver's side contact, [he] looked right at it." *Id.* at 12:25-12:31. A female trooper responded, "Well couldn't there be consent needed, though, right?" *Id.* at 12:42-12:46.[4] The troopers then commenced a discussion regarding the difference between "open view" and "plain view," and the female trooper expressed her view that "plain view is when you can take it" and only applies "when you're already inside a protected area." *Id.* at 12:46-12:54. Meldrum, approaching the car to take pictures, responded, "We can always get a consent." *Id.* at 12:58-13:01.

Shortly thereafter, another trooper said something to Meldrum as Meldrum was taking the pictures. This comment is not audible on the recording, but Meldrum responded to it by saying, "Well that depends. If I have to get a warrant, yeah then we'll just take it to the bullpen. If he gives me consent, I'll just take it out." *Id.* at 13:29-13:37.

[4] This segment of the audio is somewhat difficult to understand, but the female trooper's statement is at least close to the transcription provided here.

The conversation continued, still with the other trooper's statements inaudible. Trooper Meldrum, however, next stated, "What's that? I shouldn't—I shouldn't need one," again apparently referring to a warrant. *Id.* at 13:41-13:46. In the next intelligible portion of the recording, Meldrum tells the other trooper, "We could always ask him. You got a camera in your car?" *Id.* at 13:56-14:01. In context, this statement clearly implied that the troopers were considering asking Usher, who was then handcuffed in the back seat of the second trooper's vehicle, for permission to enter his car and seize the marijuana.

Meldrum then walked back to his car, repositioned the camera so that its view included the passenger side of Usher's car, returned to Usher's car, opened the front passenger door, removed the marijuana as well as Mr. Washington's keys, wallet, and cell phone from the front seat area, and brought the items to the hood of his car to examine them in view of the dashboard camera. *Id.* at 14:00-15:05. Meldrum did not appear to inspect any other area of the car's interior, nor did he conduct a walkaround to inspect the exterior condition of the car. *Id.* After he had removed the items from the front seat, Meldrum turned to another trooper and said, "Yeah, you want to start a tow?" *Id.* at 16:17-16:24.

Several minutes later, that trooper returned to Usher's car and spent several minutes examining it, repeatedly peering through the windows, opening the rear passenger door to inspect the rear seat, and performing an external walkaround, all while taking notes on a clipboard. *Id.* at 25:42-28:48. Trooper Meldrum did not participate in this inspection. *See id.*

When Trooper Meldrum was questioned during the CrR 3.6 hearing, he acknowledged that the other trooper, Trooper Pearson, did the inventory and impound procedure. The identifying information on the impound inventory and authorization form indicates that somebody other than Meldrum completed and signed it.[5] Thus, there is no indication that Trooper Meldrum assisted Trooper Pearson in conducting the impound or inventory search or filling out the paperwork.

Taken together, this evidence establishes that Trooper Meldrum seized the marijuana from inside the car only because he had already identified it as potential evidence, and not as any part of an inventory search. Before Meldrum entered the car, he expressed his intention to

[5] The completed form does not include the printed name of the trooper who filled it out, but it is signed by a trooper who indicated that his badge number was 632. Ex. 21 at 2. The investigation report that Trooper Meldrum filed in this case shows that his badge number is 631, and his signature on that report does not match the signature on the impound and inventory form. CP 25.

"take a picture of it first, then . . . take it out," apparently referring to the marijuana. In his subsequent conversation with the other troopers, he repeatedly stated his belief that he did not need a warrant to seize the marijuana. He indicated that he thought he could seize the marijuana without a warrant because he had seen it from outside the car, but he also discussed the possibility of obtaining consent. He then entered the car and seized the marijuana, without inspecting the rest of the car. He never mentioned impounding the car or conducting an inventory search until after he had seized the marijuana. And even then, he asked another trooper to conduct the procedure and did not participate himself.

The only plausible interpretation of this evidence is that Trooper Meldrum's seizure of the marijuana had everything to do with retrieving evidence and nothing to do with inventorying the contents of the car. Had these facts been brought to the trial court's attention, it may well have found that Trooper Meldrum was not conducting an inventory search when he seized the marijuana, and suppressed the evidence.

ii. Mr. Washington's counsel inexplicably failed to present the evidence during the hearing that would have refuted the court's finding.

Despite the compelling evidence contained in this recording, Mr. Washington's attorney did not present any of it for the court's consideration, either in the written motion or during the hearing. The record establishes that the State had provided a copy of the recording to counsel more than two months before the hearing. Supp. CP ___ (Discovery Distribution Receipt, filed Nov. 14, 2012). The State cited to the recording in its response to Mr. Washington's motion to suppress. CP 49. And counsel demonstrated that he was familiar with at least part of the recording by referring to its contents while cross-examining Trooper Meldrum during the suppression hearing. RP 70-71, 74-75.

There is therefore no reason why Mr. Washington's counsel should not have been aware of the full contents of the two recordings contained on the DVD. The importance of fully reviewing those recordings before the hearing on the motion to suppress would have been obvious to competent counsel. And Mr. Washington could not conceivably stand to gain from declining to present that evidence at the hearing. Yet counsel failed to use any of the video evidence—which shows Trooper Meldrum taking actions clearly inconsistent with an

inventory search—to support his argument that the seizure did not occur during a valid inventory search. That failure rendered his performance objectively deficient. And because the evidence that he should have introduced was so strong, his failure to present it undermines confidence in the outcome of the hearing and the trial on this charge. The objective unreasonableness and prejudicial effect of counsel's performance therefore rendered his assistance constitutionally defective.

b. Mr. Washington was deprived of his sole defense against the marijuana-possession charge by his attorney's failure to offer an appropriate jury instruction.

A defendant also receives ineffective assistance of counsel if (1) his attorney deficiently fails to propose a jury instruction (2) to which he is entitled, and (3) that failure prejudices him. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007) (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). The record below shows that Mr. Washington's counsel failed to propose an instruction that was required in order for the jury to find that he had successfully proved his affirmative defense to the marijuana charge. Mr. Washington was entitled to receive that instruction, and its absence deprived him of the only defense he had presented to that charge. His attorney therefore

performed deficiently and caused him prejudice by failing to propose the necessary instruction, thereby providing ineffective assistance of counsel.

Mr. Washington's sole defense to the marijuana-possession charge was that he lawfully possessed the marijuana as a designated provider for Latoya Cole. This is a valid affirmative defense to that charge under Washington law. *State v. Brown*, 166 Wn. App. 99, 102-03, 269 P.3d 359 (2012) (citing former RCW 69.51A.040(2) (2007)). A defendant is entitled to present the affirmative defense where sufficient evidence exists in the record to allow a reasonable finder of fact to determine that the defendant has proved the defense. *Id.* at 106. Thus, if Mr. Washington presented sufficient evidence to support his affirmative defense, he was entitled to a corresponding jury instruction.

Mr. Washington presented evidence sufficient to allow the jury to find in his favor on the defense. Under the medical-marijuana statute,

> A designated provider is a person who is (1) 18 years of age or older; (2) has been designated in writing by a patient to serve as a designated provider under chapter 69.51A RCW; (3) is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as a designated provider; and (4) is the designated provider to only one patient at any one time.

Id. at 102-03 (citing RCW 69.51A.010(1)). As noted in *Brown*, the 2007 amendments to the statute, which were in effect when Mr. Washington was arrested, "provided an affirmative defense for designated providers against Washington laws criminalizing marijuana." *Id.* at 103 (citing former RCW 69.51A.040(2) (2007)).

To support this defense, Mr. Washington presented a copy of Ms. Cole's medical-marijuana authorization, as well as a copy of the contract he signed with Ms. Cole identifying him as her designated provider. RP 240; Exs. 14-15. He also testified that he was Ms. Cole's designated provider, that he had obtained the marijuana for her, and that he was returning from an attempt to deliver the marijuana to her when he was arrested. RP 242-45. Based on this evidence, a reasonable jury could have found that he did, in fact, possess the marijuana lawfully as her designated provider and acquitted him on that charge. He was therefore entitled to an accurate jury instruction presenting the defense.

Mr. Washington's counsel, however, never proposed an instruction that would have allowed the jury to acquit based on this defense. Instruction 11 described an affirmative defense for delivery of marijuana. CP 117. Instruction 15 described an affirmative defense for

simple possession of a controlled substance. CP 121. But Mr. Washington was not charged with delivery or simple possession of marijuana—he was charged with possession with intent to deliver. Yet his attorney failed to propose an instruction explaining the affirmative defense for that charge. *See* CP 144-56. Thus, the jurors had no way to acquit Mr. Washington of possession of marijuana with intent to deliver, even if he proved to their satisfaction that he was Latoya Cole's lawfully designated provider.

Mr. Washington's trial counsel was deficient in failing to offer such an instruction. As noted above, Mr. Washington's sole defense to this charge was lawful possession. There is no conceivable strategic or tactical reason why his attorney would present this defense at trial and then fail to offer an instruction that was necessary for the jury to acquit based on that defense. *See State v. Johnson*, 172 Wn. App. 112, 135, 297 P.3d 710 (2012) (noting that "pattern instructions must be 'individually tailored for a particular case'") (quoting WPIC 0.10).

Moreover, Mr. Washington was unquestionably prejudiced by this failure. Prejudice is established when there is a reasonable probability that, but for the error, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694. That standard is met here.

Mr. Washington presented significant evidence that he possessed the marijuana legally. Indeed, at least one of the jurors was curious enough about the issue that immediately after delivering the verdict, she used her cell phone to see whether Ms. Cole's authorization was legitimate. *See* RP 399-403. Had the jurors been properly instructed on the affirmative defense, they might well have found that Mr. Washington possessed the marijuana legally and acquitted him. Thus, there is at least a reasonable probability that counsel's failure to offer the instruction changed the outcome of the trial.

Mr. Washington was entitled to a jury instruction on his affirmative defense against the marijuana charge. His counsel deficiently failed to offer that instruction, and that failure prejudiced Mr. Washington. This Court should therefore vacate his conviction for possession of marijuana with intent to deliver.

2. The evidence was not sufficient to support a conviction for unlawful possession of a firearm.

In order to uphold a jury's verdict on appeal, the evidence presented in a criminal case must be sufficient to allow a reasonable person to find that the State proved every essential element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A conviction for first-degree unlawful

possession of a firearm requires the State to prove that the defendant has a prior conviction for a "serious offense." RCW 9.41.040(1)(a). The only evidence presented to the jury relevant to this element in this case was the stipulation that the court read to the jury.

Jury instruction 19, however, directed the jury to use the evidence of Mr. Washington's prior convictions only to assess his credibility as a witness, "and for no other purpose." CP 125. This instruction was proposed by the defense, CP 156, but the State did not object to the use of the instruction. RP 312-317. Jury instructions that are introduced without objection become the law of the case and are binding on the parties and the jury. *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998). If, for example, the to-convict instruction incorrectly includes an extraneous element, the State must prove that element beyond a reasonable doubt even if it would not otherwise be required to do so. *Id.* at 105.

Because instruction 19 was presented to the jury without objection, it became the law of the case. Thus, the jury could not properly consider the stipulation presented to it for any purpose other than evaluating Mr. Washington's credibility on the stand. The jury therefore had no substantive evidence before it to prove that Mr.

Washington had ever been convicted of a serious offense. And without such evidence, the State failed to prove every essential element of the charge. The conviction therefore must be reversed and dismissed with prejudice.

It is true that under this argument, the State was left effectively without any way to prove the charge of unlawful possession of a firearm in this case. But that is the correct result under these circumstances, for several reasons.

First, this is a straightforward application of the law-of-the-case doctrine. That doctrine exists at least in part to encourage trial counsel to carefully examine proposed jury instructions before they are submitted, in order to present the relevant questions as clearly as possible to the jury. *Hickman*, 135 Wn.2d at 105. The State failed to notice that instruction 19 would undermine a conviction on the firearm charge. Reversing the conviction due to this failure maintains the State's proper incentive to ensure that future juries are accurately instructed.

Second, the law-of-the-case doctrine ultimately rests on the presumption that jurors follow the court's instructions. Yet the jury here could not possibly have followed all of the court's instructions.

Instruction 19 directed the jury to use evidence of Mr. Washington's criminal history only for evaluating his credibility on the stand. CP 125. Instruction 31 told the jury that it could convict on the firearm charge only if it found, as a substantive fact, that Mr. Washington had previously committed a serious offense. CP 137. The jury could not possibly have followed both of these instructions and still convicted Mr. Washington of the firearm charge. The jury thus must have ignored one of these instructions. To sustain a conviction that logically must have resulted from a jury's decision to ignore the trial court's instructions would undermine the fundamental assumption that jurors follow the court's instructions—an assumption on which Washington courts have long relied. *See State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Cerny*, 78 Wn.2d 845, 850, 480 P.2d 199 (1971), *vacated on other grounds*, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972)).

Third, this issue is not novel. Indeed, the WPIC committee predicted this very problem and cautioned that this instruction must be carefully tailored in each case to the match the purposes for which evidence of a defendant's prior conviction has been admitted. *Note on*

Use, WPIC 5.05 ("Use this instruction only when a defendant is a witness and a prior conviction has been admitted solely for impeachment purposes. It should not be given if the prior conviction was admitted for substantive purposes."); *Comment*, WPIC 5.05 ("Special care needs to be taken in drafting the proper instruction for cases involving multiple prior convictions when some of the convictions are subject to this instruction and others are not."). The State therefore cannot reasonably claim to have been unaware of the potential consequences of its failure to object to the instruction. Nor can it claim that the instruction was needed, because Mr. Washington was never even impeached under ER 609, rendering the limiting instruction entirely unnecessary.

Although this Court has previously rejected the argument offered here, that decision should not control, both because it is factually distinguishable and because its holding was logically infirm. In *State v. Ortega*, 134 Wn. App. 617, 142 P.3d 175 (2006), the defendant was convicted of felony violation of a no-contact order, which required the State to prove that he had two prior convictions for violating protection orders. *Id.* at 620. He stipulated to having two prior convictions, and the stipulation was presented to the jury. *Id.* at 621.

However, during his trial testimony, a third conviction, for an assault, was introduced to impeach his credibility. *Id.* at 620. "By agreement of the parties, the court gave the jury a limiting instruction. The instruction directed them to consider evidence that Ortega had previously been convicted of a crime only for its bearing on the weight or credibility of Ortega's testimony and not as evidence of his guilt." *Id.* at 620. The instruction did not distinguish between the assault conviction and the two convictions addressed in the stipulation. *Id.* at 621.

The *Ortega* court held that the limiting instruction did not preclude the jury from finding, based on the stipulation, that he had two prior convictions for violating protection orders. *Id.* at 622. But in *Ortega*, the defendant was properly impeached with a conviction unrelated to the convictions that proved the elements of the charge. Thus, a limiting instruction was necessary and the error was merely the failure to clarify that the instruction applied to the assault conviction, which was admitted only for impeachment, but not to the two prior violations of a no-contact order, which were admitted as substantive evidence and were never the intended targets of the instruction. *Id.* at 621.

Here, on the other hand, none of Mr. Washington's prior convictions were admitted to impeach his credibility. Nor was any evidence of any prior conviction admitted other than the stipulation. Thus, unlike *Ortega*, the limiting instruction here was not an otherwise-proper instruction that was erroneous only because it failed to specify the convictions to which it did and did not apply. Rather, evidence was introduced here as to only one conviction, and the limiting instruction therefore cannot be interpreted to apply to anything but the evidence of that one conviction. *Ortega* therefore does not control the outcome here.

Moreover, even if this case were identical to *Ortega*, the broadly stated holding in that case was unsound and should be discarded. The *Ortega* court, apparently assuming without deciding that the limiting instruction became the law of the case as to all three prior convictions, held that the evidence was still sufficient to uphold the guilty verdicts:

> The limiting instruction required the jury to consider "evidence of a prior conviction" for no purpose other than evaluating the weight and credibility of Ortega's testimony. To use the prior convictions for the purpose of evaluating Ortega's testimony, the jury would first have to find that those prior convictions existed. The jury could properly consider the stipulation as evidence of the existence of the two prior convictions. . . . Having found that [those] convictions did exist, the jury would then follow the limiting instruction and not consider [those]

> convictions as evidence of Ortega's guilt on the three charges for which he was on trial.

Id. at 622.

The *Ortega* court's logic is faulty because the premise contained in sentence two above does not support the conclusion contained in sentence three. In order to use evidence of a prior conviction to evaluate a defendant's credibility, the jury would indeed have to find that the conviction existed, as suggested in *Ortega*. But in a case where (as here and in *Ortega*) the jury has been specifically instructed to use that evidence "for no other purpose" besides evaluating the defendant's credibility, the jury most certainly may not then "properly consider [a] stipulation as evidence of the existence of the . . . prior conviction[]" in order to find that a substantive element of a current charge has been proved. Using a stipulation as substantive evidence is unquestionably a different "purpose" than using it as evidence of the defendant's credibility on the stand. The *Ortega* court's holding to the contrary is illogical and should not be followed here.

In sum, applying the law-of-the-case doctrine in this case is logically sound, encourages appropriate diligence by trial attorneys, promotes clear presentation of the issues to juries, validates the assumption that juries follow courts' instructions, and applies the

limiting instruction as intended by the WPIC committee. By failing to object to the limiting instruction, the State allowed it to become the law of the case. That instruction prohibited the jury from using the evidence of Mr. Washington's prior conviction to prove an essential element of the firearm charge. The resulting conviction therefore was not supported by sufficient evidence and must be reversed.

3. The evidence was not sufficient to support the court's finding that Mr. Washington had the ability to pay discretionary legal financial obligations.

At sentencing, the trial court ordered Mr. Washington to pay $800 in mandatory penalties, as well as a discretionary $250 "Crime Lab Fee." CP 170-71. The court entered a boilerplate written finding that Mr. Washington had the current or likely future ability to pay these legal financial obligations. CP 170. The court determined that Mr. Washington was not represented at trial by a public defender, but it had before it no evidence to indicate who had paid for Mr. Washington's attorney,[6] nor did it make any other inquiry into his current or likely future ability to pay legal financial obligations. RP 410-11.

Faced with a nearly identical situation, this Court recently held that where a court enters a finding that a defendant has the current or

[6] Mr. Washington was apparently unable to pay for an attorney himself, because he was represented by a public defender for the first ten months of this proceeding.

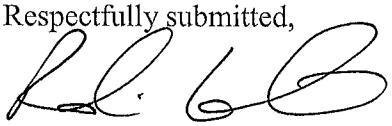
likely future ability to pay legal financial obligations, that finding must be supported by evidence in the record. *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521 (2013); *see also State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). As here, the defendant in *Calvin* had a private attorney, but the record did not establish who had paid for the attorney, and "the record [did] not show that the trial court took [the defendant's] financial resources and ability to pay into account." *Id.* at 521-22. Thus, as in *Calvin*, this Court should order the trial court to strike the finding that Mr. Washington had the ability to pay discretionary penalties and the order that he do so. *Id.* at 522.

F. CONCLUSION

For the reasons stated above, Mr. Washington asks this Court to vacate his conviction for possession of marijuana with intent to distribute, to reverse his conviction for unlawful possession of a firearm and remand for dismissal with prejudice, and to reverse the trial court's unsupported finding that he has the present or future ability to pay discretionary legal financial obligations.

DATED this 30th day of August, 2013.

Respectfully submitted,



Rabi Lahiri, WSBA No. 44214
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44492-5-II
v.	)	
	)	
NAAMAN WASHINGTON,	)	
	)	
APPELLANT.	)	

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