

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

NO. 35640-6-II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY W. FELLAS,

Appellant.

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STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 06-1-00403-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On August 25, 2006, Corporal Jason Viada of the Port Angeles Police Department was on patrol, working the graveyard shift which began at 11:00 p.m., on August 24. (RP 10/31/06: 20-21)

At about 12:20 a.m. on August 25, he was driving in town when he saw an individual he recognized as Michael Patrick Lynch in the vicinity of a late-night deli (RP 10/31/06: 23).

On seeing Lynch, Corporal Viada requested information from Dispatch as to any outstanding warrants and was told there was a warrant for Lynch's arrest. (RP 10/31/06: 23).

After parking his patrol car, Corporal Viada entered the deli with another officer and arrested him. (RP 10/31/06: 23).

After the arrest there was conversation as to how he had gotten to that area of town and thereafter what he wished to have happen with his vehicle, parked outside the establishment near where Corporal Viada had parked his marked patrol car. (RP 10/31/06: 24).

Lynch told the officers he wished to have it locked up and left at that location. (RP 10/31/06: 24).

On approaching Lynch's vehicle to lock it as requested, Corporal Viada saw that there was a person sitting in the passenger seat. He recognized this person as Anthony Wayne Fellas. (RP 10/31/06: 25).

Immediately, the officer noticed that there was a backpack placed at Fellas' feet and as Fellas was getting out of the truck in compliance with the officer's and Lynch's request, the officer noticed a very large

knife on the seat where Fellas had been sitting. (RP 10/31/06: 26).

Fellas was asked to wait nearby, in front of the deli, and Corporal Viada, as he had done with Lynch, radioed to ascertain if there were any outstanding warrants. On finding out that there were, he arrested Fellas and placed him in the rear of his patrol car with Lynch. (RP 10/31/06: 27).

Following the arrest of both individuals, officers conducted a search incident to the arrests, searching the cab of the truck and the backpack that had been at Fellas' feet. (RP 10/31/06: 28-29).

Inside the backpack, the officer found a black container within which he found two baggies that contained what appeared to be methamphetamine. (RP 10/31/06: 31-33).

Later analysis at the State Laboratory found the contents to be methamphetamine. (RP 10/31/06: 33-36).

At the jail, one of the items found on Fellas, turned out to be a switchblade (CP 1) and he was booked into jail on these two charges, Possession of a Controlled Substance and Unlawful Possession of a Weapon.

On August 25, 2006, Fellas was charged with Possession of a Controlled Substance: Methamphetamine and Unlawful Possession of a Dangerous Weapon. (CP 3)

Immediately following his arrest, Fellas refused to leave his jail cell to appear in court. (CP 4, 5, 7) The Public Defender was appointed to represent him. (CP 6)

On August 30, 2006, Defendant was found in contempt and sentenced to thirty (30) days for his outbursts. (CP 8). The Court suggested that the Defendant be evaluated at Western State due to his behavior. (CP 10) It does not appear that this was ever completed.

Jury trial began on October 31, 2006. On the same day, the State requested and was granted a Material Witness Warrant for Michael Lynch (CP 27, 28, 29) who had been served but failed to appear. He was not found until after the trial was completed.

On November 1, 2006, the Defendant pled guilty to Count II, the weapon charge. (CP 32)

On November 1, 2006, the jury returned a verdict of guilty on Count I, the controlled substance charge. (CP 40) On the same day the Court ordered a DOSA evaluation for the Defendant, setting sentencing over to December 1, 2006. (CP 41)

Defendant was sentenced to a DOSA sentence on December 1, 2006. (CP 48)

Notice of Appeal was filed December 8, 2006. (CP 54)

II. STANDARD OF REVIEW

Constitutional matters are reviewed *de novo*.

III. ARGUMENT

A. COMMENTS UPON THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IS CONCEDED TO BE ERROR.

The State concedes that the prosecutor committed error in asking its main witness, Corporal Viada, on redirect, whether or not the Appellant had denied that the backpack taken from the truck in which he had been sitting belonged to him (RP 10/31/06: 76). In addition, though the subject of *Miranda* and exercising the right to remain silent had been brought up by defense counsel, the State should not have again elicited that the Defendant did not make any statements to the officer. (RP 10/31/06: 86)

Review of case law reveals that the matter of commenting on a defendant's right to remain silent can be analyzed as either direct or indirect references. See, *State v. Romero*, 113 Wn.App. 779, 54 P.3d 1255 (2002).

The *Romero* court set out a two-part analytical framework to deal with the issue of direct and indirect comments¹ from state agents about a suspect's constitutional right of silence. Under either line of analysis, the State concedes that the questions asked fall into the category of an improper comment or implication, and therefore the case is to be

¹ It is assumed that a direct comment occurs when the State in its case in chief asks a question that elicits a response that reflects upon the exercise of the right to silence, and an indirect comment is made when a State actor makes such a comment ostensibly not directly in response to such a question.

analyzed under the constitutional error standard.

**B. THE COMMENT IN THIS CONTEXT
AMOUNTED TO HARMLESS ERROR IN THAT
THE EVIDENCE AGAINST APPELLANT WAS
OVERWHELMING**

The existence of constitutional error notwithstanding, the matter does not end there. The State bears the burden of showing that the error, though constitutional, was in fact harmless.

Case law also provides a second-tier analysis once it is established that error of a constitutional magnitude has taken place. In *State v. Easter*, 130 Wn.2d 288, 922 P.2d 1285 (1996), the Washington Supreme Court held that “constitutional error [is] harmless only if [the reviewing court is] convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1326 (1995) and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)”; *State v. Easter*, 130 Wn.2d 228, 242.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence *in the light most favorable to the State*, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, . . . 616 P.2d 628 (1980)”, *State v. Romero*, 113 Wn.App. 779, 54 P.3d 1255 (2002). *Emphasis added*.

The State asserts that the admitted error amounted to fleeting

references to the Appellant's lack of denial of ownership of the backpack in which the drugs were found, touched upon twice only and not dwelt upon nor used in closing.

Furthermore, the trial judge's curative instruction (RP 11/1/06-21), alleviated the possibility of any tainted inferences on the part of the jury. But even more telling and conclusive here is the amount of evidence brought before the jury, evidence that led directly to a verdict of guilt.

Officer Viada was quite clear as to the close proximity to the Appellant of the bag in question. He made a number of references to where he saw the backpack when he looked inside the cab of the vehicle after arresting the driver and owner, Michael Lynch, on direct, cross-examination, redirect and recross (RP 10/31/06 - 26² - 52³ - 56⁴ - 77⁵ -

² Prosecutor: Did you notice anything about the defendant at that time?

Viada: Well, I noticed that he was seated extremely near to a backpack. (RP 10/31/06: 26)

³ Viada: (referring to the backpack) . . . I found it in the passenger sides of the truck. (sic) (RP 10/31/06:52)

⁴ Defense: What made you . . . discount the significance of vehicle ownership (re: probable cause for meth)

Viada: For one thing, proximity of the backpack to the defendant.

Defense: OK.

Viada: For another thing, a brief interview that I conducted with someone other than the defendant

Defense: . . . who did you speak with aside from . . . [defendant] . . .

Viada: Michael Lynch.

Defense: And so that interview with Mr. Lynch along with a couple of other things led you to suspect Mr. Fellas, am I correct?

Viada: Yes. (RP 10/31/06: 56)

84⁶). All these references make it clear that the Appellant was the person who had the more direct connection to the backpack. In fact, the bag was almost in contact with him as he sat in the passenger seat in a cab where there were other places the bag could have been placed, particularly had it belonged to Lynch. On cross-examination, Corporal Viada, responding to questioning from defense counsel as to why he believed that the bag in question belonged to his client, indicated that the owner of the truck, Lynch, had indicated that the bag did not belong to him. (RP 10/31/06-56) *See footnote 4, below.*

The jury was instructed that:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

(WPIC 50.03 – CP 35).

⁵ Prosecutor: When you first saw the backpack . . . on the floorboard . . . how close [was it] to the defendant?

Viada: Extremely close, perhaps even touching his leg.
(RP 10/31/06: 77)

⁶ Defense: Why would that have changed your opinion? (series of questions related to placement of the backpack within the vehicle cab and the existence of probable cause to charge meth possession)

Viada: Had I located the backpack and seen it on the seat exactly the same distance from where Lynch had been sitting as from where Mr. Fellas had been sitting, then it would have been maybe harder to decide who was more likely to be in possession of it. But since it was extremely close to where Mr. Fellas was sitting, that tipped the scales. (RP 10/31/06: 84)

Corporal Viada's testimony was clear that the Appellant had, through close proximity, dominion and control, constructive possession of the backpack as he sat in the vehicle while Lynch was being arrested.

Appellant had cigarette papers on his person at time of arrest (RP 10/31/06: 42, 43).

This alone is enough for a reasonable jury to conclude that the Appellant possessed the illegal contraband and the Court should so find.

But there was more evidence connecting Fellas to the backpack. While there was no indicia of ownership introduced from the backpack and connecting the Defendant with it and the drugs found, such as items in his name, correspondence and the like (RP 10/31/06:54), following an examination of the items within the seized backpack, the Washington State Crime laboratory and discovered a number of fingerprints or latent prints, one of which clearly connected the bag to the Appellant.

Testimony was heard and an exhibit introduced through a forensic scientist, Donald Brannan, from the State Laboratory, Latent Print Section.

Mr. Brannan gave evidence as to the theory behind fingerprint identification, instructing also that prints are permanent and unique (RP 11/1/06:25). He explained the processes by which he would look for and develop any latent prints left on the surfaces of the items he was to examine and then went on to explain how he processed the cigarette papers he had found within the backpack, admitted as Exhibit 6. On these papers, he discovered an identifiable latent which he then

compared to the known fingerprints of Michael Lynch and the Appellant, Anthony Fellas. He identified the developed latent found on a item from within the backpack as that of the Appellant (RP 11/1/06: 32-39). He then made a brief presentation to the jury of how he could be sure the prints were from the same person, and how that person was the Appellant. (RP 11/1/06: 39)

Evidence controverting the State's case and presenting a viable defense theory suggests that an error is not harmless. *State v. Damon*, 144 Wn.2d 686, 25 P.3d 418 (2001). This did not occur. There was no evidence, suggestion or inference that in any way challenged any of the evidence introduced or conflicted with the logical conclusions that flow therefrom.

Taken together, these two pieces of evidence inextricably tie the backpack, wherein the methamphetamine was found, to the person at whose feet the backpack was initially seen, the Appellant, Anthony Fellas. No reasonable jury would have concluded otherwise and this Court should conclude that the requisite standard has been met and that the untainted evidence here overwhelmingly points directly and surely towards guilt.

C. THE CURATIVE INSTRUCTION GIVEN BY THE COURT CORRECTED THE ERROR

On the second day of trial, following the defense cross examination of Corporal Viada, in which the exercise of the right to silence was brought out in questioning by defense counsel as well at the prosecutor,

the trial court raised the issue of the lack of denial of ownership of the backpack on two occasions in questioning by the prosecutor, characterizing such as a comment on the defendant's constitutional right to remain silent. This was brought up *sua sponte* by the court, there not having been an objection by counsel. (RP 11/1/06: 8)

Following a brief discussion between the court and counsel, defense counsel initially made a motion for a mistrial, followed by a request for a curative instruction. This latter was joined in by the State. (RP 11/1/06: 10-11)

The trial court's analysis was that the matter was a close one, that, while improper, the questions did not amount to willful misconduct (RP 11/1/06: 12) and that a curative instruction would be sufficient to rectify the matter given that there were a number of other factors in play. The court wished the jury to discount the comment and focus on these other facts. (RP 11/1/06: 12)

As a result, when the jury returned to the courtroom the following instruction was given:

During yesterday's testimony there was a question asked as to whether or not the defendant had ever denied that the backpack in question was his. There was some follow up questioning relating to his exercise of his constitutional right to remain silent. I'm instructing you to disregard that line of testimony entirely. You are not to consider it for any purpose whatsoever during your deliberations.

(RP 11/1/06: 21)

It is clear that the trial court gave careful consideration to the matter, raising it without being prompted by counsel before testimony

got underway on the second day of trial. A trial court is given a high degree of deference when the reviewing court assesses whether or not a mistrial should have been declared. *State v. Munguia*, 107 Wn.App. 328, 26 P.3d 1017 (2001). Such a decision is reviewed with an abuse of discretion standard. *Ibid.* See also *State v. Sloan*, 133 Wn.App. 120, 134 P.3d 1217 (2006); *State v. Smith*, 124 Wn.App. 417, 102 P.3d 158 (2004).⁷ It is accepted that the trial court is in the best position to discern and assess prejudice. *Smith*, 124 Wn.App. 428, citing *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996). A mistrial motion should be granted only where a “defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Lewis*, 130 Wn.2d 700, 707.

When a trial court decides to give curative instruction, it is presumed that jurors can and do follow the court’s instruction to disregard improper evidence or testimony. *State v. Munguia*, 107 Wn.App. 328, 337, citing: *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). In *State v. Warren*, 134 Wn.App. 44, 138 P.3d 1081 (2006), the court held that even violations of constitutional matters can be cured with proper instruction to the jury. See also *State v. French*, 101 Wn.App. 380, 4 P.3d 857 (2000).

Appellant argues that the questions issued by the jury suggest that

⁷ In *Smith*, there was an allegation and sustained objection to a line of questioning from the prosecutor which defendant characterized as a comment on the defendant’s right to remain silent. Following the sustained objection, the State ceased its pursuit of the matter.

the ownership of the backpack was an issue they struggled with. It is to be hoped, in a constructive possession case, who was the true owner of the receptacle of the contraband would be an issue that the jury addressed. Certainly the desire to achieve certainty is a motivator and certainty, as far as possible, is something that juries typically seek in the evidence. The question related to the cell phone (CP 37) should be viewed in that light. Similarly, the note received by the court suggesting that a unanimous decision could not be reached (CP 38) should be seen in context and in the light of how long the jury had had the case. The jury received the case at 11:47 a.m., and the note was issued at 1:48 p.m. (CP 38, 42). A deliberation of two hours is not an excessive amount of time, particularly as lunch would have been provided within that two hours. The jury returned with a unanimous verdict just under an hour later (CP 42). Neither does the question with respect to “dominion” reveal anything other than a lack of familiarity with a term that is hardly ever heard outside legal circles – a term which is not defined in the instructions. Appellant’s argument that these questions lead to the conclusion that the conceded error was not harmless, is faulty. (Appellant Brief at 6).

It is accepted law that a curative instruction, as any other judicially issued instruction, may obviate error, constitutional or otherwise, that has occurred during the trial. The trial court issued a clear instruction to disregard comments that could be construed as a comment on the right to remain silent. In doing so, the court cured any prejudice.

D. THE COMMENT UPON RIGHT TO REMAIN SILENT IN SECOND PART WAS INVITED ERROR

While the State concedes error in asking the initial question related to whether the Appellant ever denied ownership of the backpack in question (RP 10/31/06: 76), it points out that the question itself was a short, simple reference that was not dwelt upon. The question was asked, answered, the officer was asked if he was sure and the questioning moved on. There was no objection from defense counsel.

On cross-examination, defense counsel revisited the issue briefly, referring to the question asked earlier about ownership and stating that the Defendant had been read his *Miranda* warnings and had chosen to exercise his right to remain silent.

It is accepted that the vast majority of people who make up the jury pool are not unfamiliar with the concept of *Miranda* warnings and the right to remain silent. Television, movies and literature are replete with such references. In making reference to the prosecutor's earlier question, defense counsel can be seen to have explained away and defused a great deal of any taint or potential prejudice that may have been caused by the initial inartful question. Any implication that the lack of denial of ownership could be used as evidence of guilt, though this was not explicitly done, was obviated by defense counsel's clarification of the choices before his client who, after *Miranda* warnings, had it made clear to him that he could remain silent. (RP 10/31/06: 81)

It can also be argued that by making such a reference to the

State's question, the Defendant invited further error, prompting a return to this area in the questioning on redirect (RP 10/31/06: 86). However, at this stage there was no explicit reference to the question of denial of ownership nor any reference at all to the backpack. The questions simply related to the fact that once a suspect has exercised his right to remain silent, he can change his mind and speak to officers should he so choose. It was pointed out by the prosecutor that this did not occur in the case being tried. This extra question, the State concedes, can be seen again as a comment on the right to remain silent. But the argument is that this error, if seen as such, was invited to a certain degree. Had defense counsel not revisited the matter it is most likely that no further reference would have been made to the matter.

The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 979 P.2d 298, 979 P.2d 417 (1999). If the party asserting error "materially contributed thereto," then the error is deemed waived. It is accepted that this doctrine applies equally to constitutional issues. *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990).

E. APPELLANT IS INCORRECT IN ASSERTING ANY EVIDENCE WAS UNLAWFULLY SEIZED

Appellant seeks to argue that he was improperly detained while a warrant check was performed, suggesting that in the absence of a suspicion of criminal activity afoot, there was no reason to detain him. How-

ever, Corporal Viada was clear in his direct testimony that as Fellas was asked to exit Lynch's truck in which he was a passenger, the officer noticed a "huge knife on the seat right where he had been sitting, right by where his left side would have been." (RP 10/31/06: 26). The clear testimony from the officer was that the Appellant was "asked to wait near by" (RP 10/31/06: 27), rather than ordered or required. It is not clear whether or not he was free to leave at that time, but the implication is that he was in fact able to leave had he so wished.

Certainly, while not expressed in testimony, there having been a motion in limine to prevent details from law enforcement about past interaction with the Appellant (RP 10/31/06: 10), on seeing the knife on the seat from which the Appellant was leaving the truck, Corporal Viada, as evidenced by the probable cause document (CP 1), had cause for concern because he was aware of the Appellant's history. He testified that he recognized the Appellant, but went no further than that, due to the order in limine. (RP 10/31/06: 25)

Appellant was in fact charged with the Unlawful Possession of a Weapon, but this was following his being processed at the jail and it was following the closer examination of the knives he was carrying, one of which was a switchblade, that this charge became known. Nevertheless, it should be obvious that, given the officer's knowledge of the Appellant's criminal history and the existence of the knife he could see where the Appellant had been sitting, gave rise to a reasonable suspicion of criminal activity, sufficient to perform a *Terry* pat down for weapons and

based upon officer safety concerns.

Though not addressed directly in testimony the time needed to check the Appellant's warrant status could not have been more than a minute or so, most likely much shorter. The interaction took place after midnight and at least three officers were involved. This does not suggest that the Dispatch center was involved in a lot of ongoing activities at that time and probably would have responded with the information about Appellant's warrants almost immediately. As a result, even had Fellas walked away, as it may be assumed he was free to do, the information would have been passed on extremely quickly that there were warrants out for his arrest.

The State does not concede that there was anything done improperly here. Nevertheless, the doctrine of inevitable discovery permits the reviewing court to presume that had there been anything improper with respect to seizing the Appellant, the fact that the warrant status would have been received almost immediately, permits the court to evaluate this interaction as entirely within constitutional bounds. Corporal Viada knew Lynch and suspected warrants may have been outstanding, ran him and found this to be the case, hence the arrest. On encountering Fellas and recognizing him, he proceeded in exactly the same manner. This scenario falls precisely within the framework set out in *State v. White*, 76 Wn.App. 801, 888 P.2d 169 (1995), where illegally discovered evidence should not be excluded from trial when the State can satisfactorily explain the actions of the police according to the following factors:

(1) the police did not act unreasonably for the purpose of accelerating discovery, (2) that proper, predictable discovery procedures would have been used, (3) these procedures would have inevitably resulted in the discovery of the evidence. The State can easily meet these three prongs by the requisite preponderance standard.

Officer safety concerns were implicated when they saw the large knife on the seat next to the Appellant. Officers were involved in an interaction with the Appellant by virtue of his association with Lynch, not through any actions taken by the officers themselves. It was Lynch who, upon his arrest, wished the vehicle to be locked up (RP 10/31/06: 24). Officers, in asking the Appellant to exit the vehicle, were simply responding to the request of the vehicle's owner and, on seeing the "huge knife" and being familiar with Fellas, were entirely correct in separating him from the vehicle where the weapon was found.

There was no coercion or seizure here in the actions of law enforcement, neither was there any impermissible invasion of Fellas' rights.

F. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail in a claim of ineffective assistance of counsel, Appellant must prove that defense counsel's performance was deficient and that this deficient performance resulted in prejudice. *State v. Beasley*, 126 Wn.App. 670, 109 P.3d 849 (2005). Deficient performance is defined as when counsel's conduct falls "below an objective

standard of reasonableness and [is] . . . not based on legitimate, strategic or tactical decision.” *State v. Beasley*, 126 Wn.App. 670, 686. Prejudice occurs when there is a reasonable probability that “but for trial counsel’s errors, the result of the trial would have been different.” *State v. Price*, 127 Wn.App 193, 110 P.3d 1171 (2005). Furthermore, a failure to make a motion will not support an ineffective assistance claim “unless the defendant can show that the motion would properly have been granted.” *Price*, 127 Wn.App. 193, 203. The Appellant must meet both prongs to establish ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

Appellant here claims initially that defense attorney’s failure to object and request a curative instruction was ineffective, as to have done so may have mitigated prejudice. However, earlier in his brief appellant suggested that a curative instruction does little to mitigate prejudice, that “the bell is hard to unring,” and that a curative instruction may emphasize prohibited evidence. (Appellant Brief at 6).

Appellant is arguing both for and against a curative instruction. A case cited, *State v. Curtis*, 110 Wn.App. 6, 37 P.3d 1274 (2002), makes the point that defense counsel are often placed in the difficult position of having to decide whether to request a curative instruction, thereby drawing attention to the matter, or to remain silent, leaving the comment alone. *Curtis* at 15.

Clearly there are conflicting considerations potentially in play. It may well be the case that Fellas’ counsel was similarly conflicted and

decided on the latter course at first, though later changing his mind and addressing the issue directly. Certainly Appellant has not shown performance below an objective standard of reasonableness here. There may well have been strategic concerns and reasons for his actions and choices.

Appellant has failed to show prejudice occurred through counsel's failure timely to object to the question or his decision to explain to the jury his client's reasons for not speaking out.

Secondly, Appellant suggests that there had been an invalid warrantless search which defense counsel failed to move to suppress at the pre-trial phase.

While it is clear that the suppression of evidence makes proving that such evidence was illegally possessed nearly impossible, as the drugs themselves tend to be important articles of evidence in a drug possession trial, Appellant cannot show with any degree of certainty that a motion to suppress would have been successful.

While it might be the case that the driver, Lynch, arrested away from his vehicle, perhaps should not have had his vehicle searched, that is not the case for the Appellant who was arrested on outstanding warrants and was seen sitting in the vehicle with the backpack almost touching his feet, clearly within his zone of control. Under these circumstances, a search incident to the arrest on warrants was entirely proper.

Under *State v. Horrace*, 144 Wn.2d 386, 399 P.3d 753 (2001), when an officer is "able to point to specific, articulable facts giving rise

to an objectively reasonable belief that the passenger could be armed and dangerous” then a frisk of that passenger is acceptable. Here, the Appellant was sitting next to a large knife. It was unknown to what extent he might have been armed. A frisk was entirely acceptable under both Federal and Washington law. Moving the Appellant away from the location of the directly perceived weapon was not an infringement, more a component of reasonable officer safety.

III. CONCLUSION

Officers involved in the arrest of Lynch on warrants were asked by the arrestee to lock up his vehicle. Corporal Viada went to do so and saw for the first time that night the Appellant sitting in the passenger seat of Lynch’s truck. The officer noted a backpack at Appellant’s feet, almost touching him. He asked the Appellant to exit the vehicle and then noticed a “huge knife” and was concerned for his and the other officers’ safety. He knew the person sitting in the truck and this gave him more concern. On running a warrant check on the appellant, as he had already done on Lynch, it transpired that there were warrants for his arrest. Appellant was arrested and what clearly appeared to be his backpack was searched incident to that arrest. Methamphetamine was found therein.

The actions of the officers on the scene were entirely correct.

During the trial, it is conceded that the prosecutor asked a question that reflected upon the Appellant’s right to remain silent. But the question was short and immediately questioning moved on. On re-cross,

defense counsel sought to explain his client's exercise of this right to silence. This prompted the prosecutor to return to the subject but all that was asked was whether, once invoking the right, suspects were known to the officer to have relinquished the right to remain silent by speaking. This short line of questioning was not error, for it did not relate to Appellant but to the officer's experience. This was followed by a question seeking clarification that the Appellant did not change his position. The reference to appellant not having relinquished the right to remain silent was probably improper, but can be seen in terms of invited error. In any case, the trial court took it upon itself to issue a very clear curative instruction to the jury, this after consultation with both counsel.

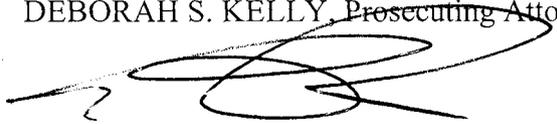
Under these circumstances, no lasting prejudicial error resulted, and the weight of the other evidence in the trial clearly outweighed any such.

The Appellant's arguments are unfounded and without substance.

The reviewing court should affirm.

DATED this 17th day of July, 2007.

DEBORAH S. KELLY, Prosecuting Attorney



TIMOTHY DAVIS
Deputy Prosecuting Attorney
Attorney for Respondent

WBA #33427

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

vs.

ANTHONY W. FELLAS,
Appellant.

NO. 35640-6-II

AFFIDAVIT OF SERVICE BY MAIL

⓪

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 18th day of July, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

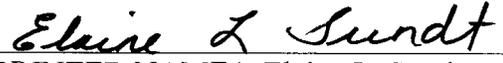
Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Jodi Backlund/Manek Mistry
Backlund & Mistry
203 Fourth Ave. East, Suite 404
Olympia, WA 98501

Anthony W. Fellas
c/o B.J. Arrington
2301 West 18th Street, B-7
Port Angeles, WA 98363-1512


Linda G. Mayberry

SUBSCRIBED AND SWORN TO before me this 18th day of July, 2007.


(PRINTED NAME:) Elaine L. Sundt
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 9-16-2010