

NO. 49890-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER COBB,

Appellant.

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

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding the evidence discovered during deliberations was not material.

2. The trial court erred in concluding the late discovery of evidence did not materially affect appellant's substantial right.

3. The court abused its discretion in denying appellant's motion for a new trial.

4. Trial counsel's failure to examine the evidence before trial constitutes ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charge with two counts of possession of a controlled substance with intent to deliver based on substances found in a backpack located in the backseat of the car he was driving. During deliberations the jury discovered evidence in the backpack, which had not been discovered by police or identified during trial, which tended to connect another person to the charged offenses. Where late discovery of this evidence cost appellant the opportunity to present a complete defense, did the trial court abuse its discretion in denying his motion for a new trial?

2. If this Court determines that trial counsel could have discovered the evidence before trial with the exercise of due diligence, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On February 17, 2016, the Pierce County Prosecuting Attorney charged appellant Christopher Cobb with unlawful possession of a controlled substance with intent to deliver, heroin and methamphetamine, and first degree unlawful possession of a firearm. CP 1-2; RCW 69.50.401(1)(2)(a); RCW 69.50.401(1)(2)(b); RCW 9.41.040(1)(a). The State alleged that Cobb or an accomplice was armed with a firearm during the commission of the drug offenses. CP 1; RCW 9.94A.530.

Prior to trial Cobb filed a motion to suppress evidence obtained during an illegal search and seizure, arguing that the affidavit on which the search warrant was issued was based on stale information. CP 6-12. The court denied Cobb's motion. CP 63.

The case proceeded to jury trial before the Honorable James Orlando, and the jury returned guilty verdicts and affirmative findings on the firearm allegations. CP 173-77. Cobb moved for a new trial under CrR 7.5, arguing that misconduct, newly discovered evidence, accident or

surprise, or an irregularity in the proceedings affected his right to a fair trial. CP 178-81. The court denied Cobb's motion and imposed standard range sentences consecutive to firearm enhancements, for a total of 240 months confinement. CP 198. Cobb filed this timely appeal. CP 206.

2. Substantive Facts

a. Trial Testimony

The Pierce County Sheriff's Department relied on a series of controlled buys to obtain a search warrant for a Dodge Charger driven by Christopher Cobb. 6RP¹ 92-93. On February 16, 2016, Cobb was arrested when law enforcement executed the search warrant. 6RP 63-65. Deputy Kory Shaffer, the lead investigating officer, testified that he was conducting surveillance on Cobb and had seen him that morning coming out of an apartment complex carrying a small dark backpack. 6RP 65-66. Cobb placed the backpack in the trunk of a Chevy Impala and drove the car out of the parking lot. 6RP 66. Shaffer followed Cobb to multiple parking lots, where Cobb had brief interactions with people who approached the driver's side of his car and then walked away. 6RP 67-68.

The surveillance officers followed Cobb in the Impala to an apartment complex and lost sight of him for a time. They later saw him

¹ The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—10/25/16; 2RP—11/16/16 (am); 3RP—11/16/16 (pm); 4RP—11/17/16; 5RP—11/18/16; 6RP—11/21/16; 7RP—11/22/16; 8RP—12/16/16.

leaving that complex in the Charger. 6RP 69. Shaffer had seen Cobb using the Charger at some point in the days prior to obtaining the search warrant. Shaffer said that on that occasion he saw Cobb place a brown backpack in the trunk of the Charger, retrieve something from the back seat, and then drive off. 6RP 94-95.

At about 3:00 in the afternoon on February 16, 2016, the SWAT team executed the warrant and arrested Cobb. Cobb was in the driver's seat of the Charger, parked in a strip mall parking lot, and there was another man standing outside the passenger door who was arrested as well. 6RP 106, 115-16. Members of the SWAT team approached the Charger, announced two times that they were police and had a warrant, deployed a flash-bang device, then broke the driver's side rear window and opened the driver's door. 6RP 116-17, 134. The distractions were used to disorient or stun Cobb and the other person so they could be taken into custody safely. 6RP 106, 117. Cobb was removed from the car and placed face down on the ground. 6RP 117. The man standing outside was also taken to the ground. 6RP 136.

Police found a semi-automatic handgun, a wallet, a cell phone, and \$6,193 in cash on Cobb's person. 6RP 71, 118. There were no controlled substances on Cobb's person. 6RP 129. In the rear passenger side seat of the Charger deputies found a camouflage backpack containing blue tape,

latex gloves, a Ziploc baggie of brown sugar, a working digital scale with apparent heroin residue, a baggie with 76-78 grams of heroin, a baggie with 45 grams of methamphetamine, a plastic cup with white residue, a bottle of caffeine cut, a blender with apparent heroin residue, assorted baggies, and a partial box of .45 ammunition. 6RP 77-79, 90-91, 170-71, 180.

Shaffer spoke to Cobb in the back of a patrol car. 6RP 70. Cobb told Shaffer that he was not working, and he admitted to using narcotics and drinking alcohol. 6RP 72. When Shaffer asked Cobb if he sold narcotics to support his habit, Cobb said he sold teeners and balls, referring to 1/16 and 1/8 ounce quantities. 6RP 73. Cobb also admitted he knew he was not permitted to possess a firearm, but he carried one for his safety since he had been “ripped” before. 6RP 74. He told Shaffer he was planning to pick up one ounce of heroin and methamphetamine that day. 6RP 74.

b. Motion for New Trial

Prior to trial, the State moved to exclude reference to “other suspect” evidence, including evidence pertaining to Lamontez Patton, who was contacted in the same parking lot at the same time as Cobb. The State argued that Patton was associated with a separate vehicle from the one Cobb was driving, and the State was not seeking to admit any evidence

found in Patton's vehicle. CP 3-4; 3RP 9-10. Defense counsel responded that she had no intention of offering other suspect evidence, and the court granted the State's motion. 3RP 10.

Before the State rested, defense counsel informed the court that she was considering calling Patton as a rebuttal witness, but he was reluctant to testify. 6RP 198-99. Counsel noted that Patton might need to be represented if called as a witness. The State responded that drugs and firearms had been found in Patton's vehicle, but that was not relevant to the charges against Cobb, and the court indicated that an offer of proof might be necessary before Patton testified. 6RP 200-01. Defense counsel did not raise the issue again.

During jury deliberations, the jury located a casino card with Patton's name on it and an empty bag with brown residue in the front zipper pocket of the backpack. CP 144; 8RP 299. These items had not been identified at trial, and the jury asked whether they were in evidence. CP 144; 7RP 286-87. With agreement from the parties, the court marked the items as Exhibit 49A and told the jury they were part of the admitted Exhibit 49, the backpack. CP 144; 7RP 285-86.

After the jury returned its verdicts, the defense moved for a new trial. CP 178-81. Counsel argued that the items found in the backpack during deliberations, particularly the casino card in Patton's name, could

have been helpful to the defense. CP 179. Counsel argued that the connection of Patton to the backpack where the evidence was found was significant. 8RP 299. The motions in limine had specifically addressed whether Patton could be identified as a suspect, and with this surprise evidence the defense would have taken a different position. 8RP 300; CP 179. Had those items been disclosed in discovery, Cobb could have argued that Patton was in possession of the controlled substances found in the backpack. CP 179-80. The evidence could have changed the entire defense strategy, and the highly unusual circumstances under which the evidence was discovered warranted a new trial. CP 180-81.

The court denied Cobb's motion for a new trial. It stated that it was arguable whether the evidence could not have been discovered before trial with reasonable diligence, since the backpack was in police custody. The fact that the backpack was not previously examined indicated sloppy police work. 8RP 302. The court concluded that Cobb had not shown the late discovery of the evidence materially affected a substantial right, however. The Court believed the evidence showed that Cobb was monitored by law enforcement, who followed him to the scene of the arrest and had eyes on him the entire time. In addition, Patton was not in the vehicle with Cobb, there was no indication the backpack was thrown into the vehicle, and Cobb did not present an unwitting possession

defense. 8RP 303. The court concluded that the additional evidence connecting Patton to the backpack did not affect the defense. *Id.*

C. ARGUMENT

1. LATE DISCOVERY OF EVIDENCE CONNECTING PATTON WITH THE BACKPACK MATERIALLY AFFECTED COBB'S RIGHT TO PRESENT A COMPLETE DEFENSE, AND THE TRIAL COURT SHOULD HAVE GRANTED HIS MOTION FOR A NEW TRIAL.

The Sixth Amendment, as well as article I, section 21 of the Washington Constitution, guarantee accused persons the right to a jury trial and to defend against the State's allegations. These protections afford the accused a meaningful opportunity to present a complete defense, a fundamental element of due process. U.S. Const. Amend. VI; Wash. Const. art. I, § 21; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

A trial court may grant a motion for new trial under CrR 7.5 when a substantial right of the defendant's has been materially affected:

- (a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

CrR 7.5. A trial court's decision on a motion for new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). The court's findings of fact are reviewed for substantial evidence, and the court's legal conclusions are reviewed de novo. *McKoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012).

After the verdicts and before sentencing, Cobb moved for a new trial citing CrR 7.5(a)(2), (3), (4), and (5). He noted that the circumstances under which Patton's casino card were found were highly unusual. Although the evidence discovered during deliberations was not prejudicial to the defense, it would have changed the entire defense strategy had it been disclosed sooner. CP 180. The trial court denied

Cobb's motion, concluding that no substantial right of the defendant was materially affected. 8RP 302-03. The court's decision denying relief cannot be sustained.

First, the court's decision was based on factual errors. The court concluded that the evidence found in the backpack during deliberations was not material because the evidence at trial showed Cobb was being monitored by law enforcement, who followed him to the scene of the arrest and had eyes on him the entire time, and there was no indication the backpack was thrown into the vehicle. 8RP 303. But that was not the evidence.

In fact, Shaffer testified that surveillance lost sight of Cobb for a time. 6RP 69. And although Shaffer gave detailed descriptions of what he observed, there was no testimony describing Cobb arriving at the location where the arrest occurred and no testimony about how and when Patton made contact with Cobb. 6RP 148. While there was testimony that Cobb had been seen with a dark or brown or camouflage backpack, there was no testimony identifying the backpack in which the drugs were found as the one Cobb had been seen carrying. And no one testified to seeing Cobb place a backpack in the passenger compartment of the Charger, where the backpack with the drugs was found.

The court is correct that no one saw Patton put the backpack in the car, but the testimony did not refute that possibility. Moreover, the circumstances would support a defense argument that that is what happened. The evidence showed that Patton was standing outside the passenger side of the Charger when police approached, right next to where the backpack was located. 6RP 115-16, 170-71. No one noticed whether the rear passenger window was open. 6RP 127, 135. Patton was in a position to hear law enforcement announce their presence and intent, and he was in a position to drop the backpack inside the vehicle. 6RP 116, 149. With evidence that Patton's casino card was found in the backpack, the defense could have made the argument that Patton possessed the drugs in the backpack, not Cobb.

The court's conclusion that no substantial right was materially affected was also error. Cobb's right to present a complete defense is a substantial right, and the circumstances under which Patton's casino card was discovered and considered by the jury materially affected that right. The court abused its discretion in denying the motion for new trial on the bases of newly discovered evidence, surprise, and irregularity in the proceedings.

- a. A new trial was justified on the basis of newly discovered evidence.

It is appropriate for the court to grant a new trial on the basis of newly discovered evidence when the evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. All of these factors must be present for a new trial to be granted. *State v. Savaria*, 82 Wn. App. 832, 837, 919 P.2d 1263 (1996), *disapproved of on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003).

The circumstances here are not typical of newly discovered evidence cases, in which evidence is discovered after the verdict is rendered. Here, the evidence in question was discovered by the jury during deliberations, and the jury was permitted to consider it. But the discovery of that evidence made additional evidence, identification of Patton as the man standing outside Cobb's car at the time of arrest, material to the defense. Because the parties did not know that Patton's casino card was in the backpack with the drugs Cobb was charged with possessing, the defense agreed that no evidence would be offered establishing Patton as another suspect of the crimes. The newly

discovered evidence together with the previously known but not presented evidence supports such a defense theory, however.

A criminal defendant is permitted to present evidence of another suspect when there is “some combination of facts or circumstances [which] point to a nonspeculative link between the other suspect and the charged crime.” *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). Other suspect evidence is relevant if it tends to connect someone other than the defendant with the crime. *Id.* The question is not whether the evidence establishes the other suspect’s guilt beyond a reasonable doubt but whether the evidence tends to create a reasonable doubt as to the defendant’s guilt. *Id.*

The presence of Patton’s casino card in the backpack which contained the drugs Cobb was charged with possessing, together with identification of Patton as the man who was standing right next to that backpack, tends to connect Patton to the charged offenses and tends to create a reasonable doubt as to Cobb’s guilt. Had the casino card been located prior to trial, Cobb would have been able to offer an other suspect defense. There is a reasonable probability that connecting Patton to the crime would create a reasonable doubt as to Cobb’s guilt and change the result of the trial.

The newly discovered evidence is also material to the element of possession. Because Cobb was not in actual possession of the drugs, the jury had to determine whether the circumstances established that Cobb had dominion and control. CP 158; 7RP 250. Patton's association with the backpack in which the drugs were found, when Patton was standing right next to the backpack at the time of his arrest, is material to the determination of possession.

Moreover, the evidence is not merely cumulative or impeaching. The jury heard no other evidence associating Patton with the backpack or any other evidence found in the Charger. In fact, although there was evidence that another man was standing outside the car and was arrested, that man was never identified at trial.

The final required element of a newly discovered evidence claim is whether the evidence could have been found before trial with due diligence. The trial court found it was arguable whether the evidence could not have been discovered sooner with reasonable diligence. It noted that the backpack had been in police custody since the time of Cobb's arrest and could have been examined. The fact that it was not indicated sloppy police work. 8RP 302. Lack of diligence on the part of the police, who had custody of the backpack, is not a legitimate reason to deny Cobb's motion for a new trial.

In *Savaria*, the Court of Appeals held that denial of the defendant's motion for a new trial based on newly discovered evidence was an abuse of discretion. *Savaria* was convicted of intimidating a witness based on testimony that he threatened revenge if the complaining witness appeared in court. When defense counsel attempted to impeach the witness by pointing out that she did not tell anyone about the alleged threat at the time, she testified that she had called her father and told him, and the father corroborated her assertion. The father had said in a pretrial interview, however, that the witness did not call him that night. *Savaria*, 82 Wn. App. at 836.

After *Savaria* was convicted, he moved for a new trial based on newly discovered evidence of telephone records which would have impeached the witness and her father. *Id.* The Court of Appeals found that all five factors necessary for a new trial based on newly discovered evidence were present. It specifically rejected the State's contention that defense counsel could have discovered the phone records before trial with due diligence, because the testimony about the phone call was a surprise and the father kept it from the defense during pretrial discovery. *Id.* at 838.

As in *Savaria*, the defense in this case was surprised by evidence not disclosed in pretrial discovery. The impact was different in that the

defense here did not need to rebut the surprise evidence but to rely on it to establish a defense theory of the case, which the parties had agreed not to explore in ignorance of the additional evidence. The court cannot fairly blame defense counsel for failing to discover these items when neither the police nor the prosecution discovered them.

b. Surprise justified a new trial.

While there is very little case law addressing a motion for new trial based on a claim of surprise, Washington courts have identified three elements necessary for granting a new trial on that basis: (1) the moving party was surprised in fact, (2) ordinary prudence would not have guarded against the surprise, and (3) the claim of surprise was promptly made known to the trial court and a continuance requested. *Jensen v. Spokane Falls & N. Ry. Co.*, 51 Wash. 448, 451, 98 P. 1124 (1909). *See also Ward v. Ticknor*, 49 Wn.2d 493, 495, 303 P.2d 998 (1956) (party waived claim of surprise by failing to bring it to court's attention immediately and request continuance); *State v. Gay*, 82 Wash. 423, 435–37, 144 P. 711 (1914) (claim of error must be made at time error occurs, and reasonable diligence may be exacted of defendant).

Certainly the material evidence discovered by the jury during deliberations was a surprise to both parties and the court. 7RP 286-87. This surprise was prejudicial in that the defense was unaware of the

additional items in the backpack prior to and during trial and thus unable to rely on them in presenting its case. The defense would have taken a different stance on the State's motion to exclude other suspect evidence regarding Patton if Patton's connection to the backpack had been disclosed.

Next, the court was made aware of the surprise at the same time as the parties, but continuance was not an available remedy, because the surprise occurred after the case was submitted to the jury. *Id.* The remaining question is whether ordinary prudence could have guarded against the surprise, a factor which overlaps with the due diligence factor of a newly discovered evidence claim. As addressed above, the police and prosecution failed to discover the items in the backpack while it was in police custody, and the items were not provided to the defense in discovery. Cobb should not be denied a new trial based on lack of diligence by the State.

- c. This irregularity in the proceedings justified a new trial.

Courts look at three factors in determining whether a trial irregularity justifies a new trial: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether it could be cured by an instruction. *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265

P.3d 853, 858 (2011) (Serious irregularity for witness to vouch for victim's credibility, but improper statement was cumulative of other evidence and court gave curative instruction, thus trial court did not abuse discretion in denying new trial motion).

As discussed above, the late discovery of the items in the backpack resulted in the jury considering evidence the defense did not have the ability to address. While the evidence was not prejudicial to the defense, the lost opportunity to rely on that evidence as part of the defense strategy was. This impact on Cobb's right to present a defense makes the irregularity serious. In addition, the items found in the backpack were not cumulative of any other evidence at trial. Finally, this error could not be cured by an instruction from the court. The court responded to the jury's question by informing it that the items were part of the evidence they could consider. But the court could not, through instructions, present further evidence about who Patton was or why he was relevant to the defense.

Cobb was unable to present Patton as another suspect because the evidence connecting Patton to the backpack in which the drugs were found was not discovered until the jury was in deliberation. Cobb's right to present a complete defense was materially affected, and a new trial was justified based on newly discovered evidence, surprise, and irregularity in

the proceedings. The court abused its discretion in denying Cobb's motion for a new trial, and this Court should remand for a new trial.

2. IF THIS COURT CONCLUDES THAT THE EVIDENCE COULD HAVE BEEN DISCOVERED BEFORE TRIAL WITH DUE DILIGENCE BY DEFENSE COUNSEL, THEN COBB RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather,

only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

If this Court determines that Patton's connection to the backpack went undiscovered due to defense counsel's lack of diligence, there was no legitimate reason for trial counsel not to examine the backpack prior to trial. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

Moreover, Cobb was prejudiced by counsel's failure to discover Patton's connection to the backpack prior to trial. It was this error which cost Cobb the opportunity to present Patton as another suspect in the case. If Patton's casino card had been discovered prior to trial, there would have been no basis to grant the State's motion to exclude other suspect evidence regarding Patton. Patton would have been identified at trial as the man standing right next to the backpack containing controlled substances at the time of the arrest. There is a reasonable probability that evidence of Patton's connection to the crime would have raised a reasonable doubt as to Cobb's guilt, and the outcome of the trial would have been different.

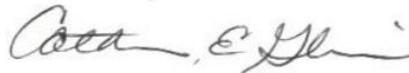
Counsel was ineffective in failing to exercise due diligence in examining the evidence, and Cobb is entitled to a new trial.

D. CONCLUSION

The late discovery of evidence materially affected Cobb's right to present a complete defense, and his motion for a new trial should have been granted. To the extent the late discovery was due to trial counsel's lack of diligence, Cobb received ineffective assistance of counsel and is entitled to a new trial.

DATED August 17, 2017.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
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Christopher Cobb DOC# 892844
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
August 17, 2017

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