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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER COBB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 16-1-00703-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant raised an unpreserved and meritless claim that a discovery error exists in jurors finding brown residue and another's casino card in a drug-trafficking kit police seized from defendant since the nature of its contents was disclosed before trial and it was admitted at trial without objection until after an adverse verdict was received?
2. Is the record inadequate to review the claim counsel was deficient for failing to search defendant's drug kit before trial as their communication about its role in his illicit enterprise is unknown? The claim would otherwise fail, for searching a drug kit secured in a police property room was far more likely to reveal overlooked proof of defendant's guilt than improve his chances at trial.

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with first degree unlawful possession of a firearm for the .45 caliber pistol he carried to protect himself from people who target drug dealers for robbery. CP 1-2; 3RP 73. He was also charged with two counts of firearm enhanced unlawful possession of a controlled substance with intent to deliver based on the 73 grams of heroin and 42 grams of meth found in a backpack seized from the car in which he was sitting alone at the time of his arrest. CP 1-2; 4RP 223-25. The backpack was consistent with a backpack police watched him carry about amid drug trafficking that led up to that arrest. 3RP 65-67, 94, 107.

After the backpack's seizure, its presence in police custody as well as the general nature of its illicit content, which included items commonly used to process illegal drugs for sale, was timely disclosed to the defense. CP 231-39.¹ It was admitted at trial without objection. 3RP 174. The jurors' examination of it revealed the brown residue and casino card defendant challenges as newly discovered evidence on appeal. 4RP 285. But defendant did not object to the jurors' continued consideration of that evidence before their verdict. 4RP 284-87. So, no corrective measures other than marking the items were taken. *Id.* (Ex.49-49A).

¹ CP over 230 reflect an estimate of supplemental designations.

Ten days later defendant moved for a new trial, claiming he was prejudiced by the timing of the card's discovery. CP 178. According to his counsel, earlier awareness of it would have enabled her to blame another suspect for the drug-laden backpack police likely saw defendant carry and certainly found within his exclusive reach. 5RP 300-04. That defense was to be predicated on the fact a man whose name appeared on the card was standing between defendant's closed car and a car in which that man had his gun and drugs when police took defendant and the backpack into custody. *Id.* Defendant confessed he planned to pick up more drugs, but he did not identify that gun toting possessor of illegal drugs as his supplier. 3RP 74. The motion was denied, for defendant's control of the backpack during the relevant period made the card immaterial and his ability to examine the backpack before trial defeated the discovery violation and unpreventable surprise alleged. 5RP 302-05.

Currently the record does not reveal any confidential conversations between defendant and his counsel which might have deterred counsel from examining the backpack under police or property room surveillance. So it remains unknown if defendant expressed a belief police overlooked some incriminating items during the timely disclosed inventory search. It is not known if counsel's discussions with defendant and the man named on the card revealed an incriminating link between them. Yet it is clear counsel

had case-related conversations with both men before the card was found at a time when counsel could have altered her trial strategy. 3RP 198-201.

The case proceeded to sentencing. Defendant had an offender score of 12 attributable to an assortment of prior convictions, including an attempt to deliver cocaine, repeated possession of cocaine, efforts to elude police, unlawful possession of a firearm, and third degree assault. CP 191. A lawful sentence was imposed. *Id.* The notice of appeal was timely filed. CP 206.

2. Facts

Defendant was the subject of a several month narcotics investigation that ended with his arrest February 16, 2016. 3RP 62-63, 92-93. Investigator Shaffer developed a case against him by using a confidential informant (CI) to purchase illegal drugs from defendant through techniques that reliably verified him to be the source. *Id.* Surveillance teams developed intelligence on the residences and vehicles involved in his drug business. *Id.* 79-82, 96. Probable cause to arrest him for drug trafficking was achieved.

Police labored to arrest him February 13, 2016. 3RP 183. Three unmarked department vehicles executed a blocking maneuver to confine a car defendant was driving. 3RP 183-85. One of the vehicles stopped short of its mark. 3RP 185-187. A gap formed as another officer left room for the arrest team's advance. *Id.* Defendant exploited the gap by veering to strike the rear bumper of the vehicle to his left. *Id.* Momentum carried it into the

tire of another vehicle. *Id.* He pressed through the breach. Disabled police vehicles could not pursue, so he escaped. *Id.*

Police planned to arrest him and search his cars February 16, 2016. 3RP 63. Investigator Shaffer watched him exit an apartment carrying a camouflage backpack consistent with the backpack at issue in this appeal. 3RP 65-67, 94, 107. The backpack was also consistent with one he carried February 13, 2016, and on several earlier occasions. *Id.* Defendant put his backpack in the trunk of a black Impala. *Id.* He drove off under surveillance. 3RP 67. Police watched him proceed along what appeared to be a drug-delivery route. *Id.* at 67-69. He stopped in the parking lots of area motels and apartments. *Id.* He parked, people approached his driver's side window, their hands extended inside, they left. *Id.* at 97. Defendant's conduct was typical of a higher ranking supplier attended by drug runners or approached by drug customers. 3RP 68-69.

Defendant switched cars in Fife. 3RP 69. He emerged from a motel driving a Dodge Charger. *Id.* Surveillance teams followed him to a parking lot near 2100 Norpoint Way. 3RP 70. Officers prepared a tactical seizure. 3RP 138, 142-43. A man, identified outside the jury's presence as Patton, was standing between his car and the Charger occupied by defendant.²

² 3RP 99, 106, 114-16, 134-36, 147; 5RP 299.

Patton was looking at defendant. 3RP 147. No exchange was observed. 3RP 99. The Charger's tinted windows hindered the arrest team's ability to see into its passenger compartment. 3RP 150-51. A device was detonated to distract defendant from considering a second escape. 3RP 106, 142-43. An officer breached the rear driver's side window. 3RP 116-17. Another officer breached the front passenger window. 3RP 138. They found defendant to be the Charger's sole occupant.³

A loaded .45 caliber pistol was removed from his vest pocket. 3RP 116-18. One bullet was chambered to fire. 3RP 155-57. Fourteen others were seated in the magazine ready to follow. *Id.* He admitted to carrying it, knowing that possession to be unlawful. 3RP 73-74. It was admittedly used to protect him from being "ripped"—a street term for drug robbery. *Id.* That .45 caliber pistol connected him to the backpack on the Charger's rear seat. 3RP 170-74; Ex.49.

For the backpack contained a box of .45 caliber ammunition. *Id.* A search of the backpack further revealed:

Blue tape, latex gloves, Ziploc baggie containing what appeared to be brown sugar, working digital gram scale with apparent heroin residue, a baggie containing [73 grams of] heroin, a baggie containing [42 grams] of crystal meth, a plastic cup with white residue, a blender with apparent heroin residual heroin, assorted sandwich baggies, partial box of American Eagle .45 ammo

³ 3RP 114-15, 134-35, 151.

3RP 170-71 (Ex.49); 4RP 223-25. That much heroin carries a street value near \$4,000 while the meth would likely sell for about \$2,532 to \$3,392. 3RP 89-91.⁴ Items like the blender are used to "step" or "cut" the heroin. 4RP 193-94. Powder substances in the car could be used as cutting agents to increase the apparent yield sold to consumers. 3RP 77. The inventory was recorded on page three of the searching officer's report. 3RP 170-71; Ex.35. It was documented with photographs. 3RP 178-82.⁵ The residue and casino card at issue on appeal *ostensibly* were not noticed before deliberations.

Defendant's link to the contraband was not a mystery. He admitted to selling drugs packaged as "teeners" (1/16 ounce) and "balls" (1/8 ounce). 3RP 72-74. The arrest interrupted his plan to resupply that day with another ounce of heroin and meth. 3RP 74. In a hearing, it was established police found drugs and a gun inside the car Patton had parked beside defendant's Charger at the arrest scene. 3RP 201. 3RP 199-201. Before jurors found the additional brown residue (consistent with heroin) and the casino card in the backpack, defense counsel worked with defendant and Patton to determine whether Patton's testimony could assist the defense. 3RP 192-93, 198-01. Counsel believed Paton's testimony might prove incriminating. *Id.*

⁴ The value of the methamphetamine and heroin is based on Shaffer's testimony. He testified methamphetamine is sold on the street for \$30-40 per half gram and the heroin found in the car has a street value of approximately \$4,000. 3RP 89-91.

⁵ Ex. 3, 5-16, 18, 20, 27-28.

C. ARGUMENT.

1. DEFENDANT RAISED AN UNPRESERVED AS WELL AS MERITLESS CLAIM THAT THERE IS A DISCOVERY ERROR IN JURORS FINDING BROWN RESIDUE AND ANOTHER'S CASINO CARD IN A DRUG-TRAFFICKING KIT TAKEN FROM DEFENDANT DURING HIS ARREST AS THE STATE DISCLOSED THE NATURE OF ITS CONTENTS PRIOR TO TRIAL AND IT WAS ADMITTED WITHOUT OBJECTION UNTIL AN ADVERSE VERDICT WAS RECEIVED.

It is well settled that criminal defendants are entitled to fair trials but not perfect trials, "for there are no perfect trials." *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 267, 172 P.335 (2007) (citing *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565 (1973)). Trial courts have broad discretion to address irregularities in a proceeding. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Their decisions will be affirmed absent an abuse of discretion, which requires a decision to be manifestly unreasonable or based upon untenable grounds. *Id.*; *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). Appellate courts rightly recognize trial judges are best positioned to assess an irregularity's impact on jurors. *Kuhn v. Schnall*, 155 Wn.App. 560, 577, 228 P.3d 828 (2010).

- a. Defendant forfeited review when he gambled on favorable verdicts before claiming to be harmed by the casino card's discovery.

Once a jury is empaneled to decide a case, with few exceptions, the defendant is entitled to have the case decided by that jury. *State v. Connors*, 59 Wn.2d 870, 883, 371 P.2d 541 (1962). They cannot exercise that right despite awareness of an irregularity in deliberations, gamble on a favorable verdict, then receive a new trial in response to an unfavorable result. *State v. Owen*, 24 Wn.App. 130, 135, 600 P.2d 625 (1979); *State v. Atkinson*, 19 Wn.App. 107, 111, 575 P.2d 240 (1978). Review is typically waived unless errors are raised when they can be corrected by the trial court. *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). A defendant's agreement to answers given in response to jury questions likewise waive review. *State v. Barnett*, 104 Wn.App. 191, 200, 16 P.3d 74 (2001); *e.g.*, *State v. Korrami*, 196 Wn.App. 1056 (Unpublished No. 73952-2-I; 2016 WL 6680469 *4).⁶

Defendant waited until the jury was discharged before objecting to its exposure to the casino card and residue discovered amid deliberations. That failure to act forfeited review of the claimed error. For if there was

⁶ Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

error, it was capable of correction short of mistrial. The court could have crafted a presumptively followed curative instruction or reopened the case. *E.g.*, *State v. Brinkley*, 66 Wn.App. 844, 848-49, 837 P.2d 20 (1992). A recess could have enabled strategic adjustments. *E.g.*, *Estes v. Hopp*, 73 Wn.2d 263, 270-71, 438 P.2d 205 (1968). Testimony connecting Patton to the card could have been adduced. Turning juror attention toward another was consistent with the argued defense of general denial, so there was no embarrassment in assimilating another suspect into that theory. *E.g.*, *State v. Sublett*, 156 Wn.App. 160, 180, 231 P.3d 231 (2010).

Defendant's decision to withhold an objection until the jurors were discharged deprived the trial court its ability to order intermediate remedial measures. *E.g.* *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). No procedural principal is as familiar as forfeiture of untimely claims. *State v. Lazcano*, 188 Wn.App. 338, 355-57, 354 P.3d 233 (2015). That principle should bar review of the irregularity in deliberations defendant met without objection until disappointing verdicts were returned. To reward his failed gambit with a new trial would permit him to benefit from invited error. *E.g.*, *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *State v. McDonald*, 138 Wn.2d 680, 689, 981 P.2d 443 (1999).

- b. The undeveloped record of the timing and content of discovery is inadequate to review defendant's claim the casino card and residue were late or new evidence.

A party seeking review must perfect the record so this Court can assess evidence relevant to the issues raised. *State v. Mitchell*, 190 Wn.App. 919, 928, 361 P.3d 205 (2005); *State v. Garcia*, 45 Wn.App. 132, 140, 742, P.2d 412 (1986). Inadequate records preclude direct review, which cannot resolve issues dependent on facts outside the record. *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993); *State v. Kinzle*, 181 Wn.App. 774, 786, 326 P.3d 870 (2014).

Defendant frames his claim under the rubric of newly discovered evidence. So review turns on the specific timing of disclosures as well as their capacity to enable relevant discoveries through due diligence. *Matter of Lui*, 188 Wn.2d 525, 569, 397 P.3d 90 (2017). The precise timing and content of disclosures regarding the backpack are unclear. Ten days after trial, defense counsel claimed to be surprised by Patton's casino card. 5RP 304-05. Earlier, she claimed an inability to recall what Patton told her. 3RP 198-99. There are critical gaps in the record of the discovery and counsel's independent investigation.⁷ Review cannot be predicated on supposition.

⁷ CP 236-38, 241-44; 3RP 171; 5RP 302; Ex.49.

- c. The trial court did not abuse its discretion in denying a new trial based on an immaterial item of evidence that might have further inculpated defendant but had no tendency to undermine his well proven guilt.

CrR 7.5 permits trial courts to grant a new trial following conviction if a defendant's substantive rights have been affected by an irregularity in the proceeding. *State v. Reynoldson*, 168 Wn.App. 543, 547-48, 277 P.3d 700 (2012). But new trials based on a jury's receipt of challenged evidence are only allowed when a defendant has been so prejudiced nothing short of a new trial can ensure fair treatment. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). A trial judge's denial of a motion for new trial will not be reversed unless an abuse of discretion is clearly shown. *Id.*

The backpack at issue matched one police saw defendant carry while dealing drugs across Pierce County. It was seized from the backseat of a car with tinted windows that police breached to arrest him. Patton, the man named on the card, stood outside that apparently sealed car. The backpack contained contraband consistent with drug dealing defendant admitted to perpetrating. It contained .45 caliber ammunition matching the .45 caliber pistol in his pocket. And it contained the same type of drugs he planned to pick up. Counsel alerted the court to unspecified conversations she had with defendant and Patton about calling Patton as a witness. Counsel claimed to be surprised by Patton's casino card in the backpack, yet counsel could not

recall all Patton disclosed to her. Counsel refrained from sharing defendant's still confidential statements about the backpack. 3RP198-201; 5RP 300.

Defendant did not object to the jury's unimpeded consideration of the casino card or additional residue. He was content with having the items marked. 4RP 284-87. His objection followed unfavorable verdicts. The trial court's reason for denying that untimely challenge was explained:

The motion defense counsel filed, certainly the grounds for receipt of evidence, potentially newly discovered evidence couldn't have been discovered with reasonable diligence verdict to trial. That's arguable. Obviously the backpack was in police custody since the time of the arrest. It could have been examined, it wasn't. I would admit there was some point sloppy police work, did not inventory completely the backpack because it did appear it contained another baggie with controlled substances in it, but it was ...lesser quantity than that was found in the main portion of the backpack....

[CrR 7.5] contemplates that it has to affirmatively appear ... a substantial right of the defendant was materially affected, and if this was a case where Mr. Cobb and Mr. Patton were arrested in the same vehicle, I would agree with [defendant]; that ... [Patton's] identification ... would be a significantly different piece of evidence

In this particular case, these gentlemen, or at least Mr. Cobb was being monitored by law enforcement, was followed to the scene of the location where the arrest occurred. Eyes were on him the entire time. There was no indication that a backpack was thrown into his vehicle. There was no unwitting possession defense ... raised in this case. If there had been an unwitting possession and there was showing ... Patton had been in the vehicle previously, I would think it was a different result. But based upon what was presented to this jury, and the amount of investigation and police presence that was involved in the apprehension of Mr. Cobb,

and the following of Mr. Cobb to this location and the other locations where he was allegedly involved in activities, I think it doesn't show that there is any substantial material right of the defendant that was affected by this item of evidence, so I will deny the motion for a new trial.

3RP 302-05. Putting the casino card into perspective, the court added:

[I]t wasn't Mr. Patton's identification. It was a player's casino club ... card so I don't think that changes anything.

5RP 304-05.

- i. **The court correctly ruled the casino card within a backpack defendant actually and constructively possessed amid his admitted drug dealing was immaterial to his convictions.**

A new trial can only be granted under CrR 7.5(a)(3) if a fact alleged to be newly discovered is material to the charge of conviction. A fact is said to be material if it is essential to a claim or defense. *McDonald v. Murray*, 83 Wn.2d 17, 19, 515 P.2d 151 (1973). Late discovery of material evidence cannot support a new trial unless it is probable earlier discovery would have changed the first trial's result. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

Defendant does not argue the additional brown residue was harmful, which makes sense as it was the least problematic of the items stored in his bag of contraband. The presence of Patton's casino card in a backpack police seized from defendant's backseat has no logical link to the pistol taken from

defendant's pocket. So the card is immaterial to the firearm conviction. If materiality exists, it is confined to his controlled substance convictions for the drugs stored elsewhere in the backpack. But review of those crimes in the context of this case proves the card to be immaterial to them as well.

For those crimes did not require the State to disprove ownership; conviction only required proof of possession, which means:

[H]aving a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control....

CP 156-58 (Inst. 8-10). Defendant did not raise the affirmative defense of unwitting possession even though it did not turn on his ability to identify a person responsible for placing controlled substances in his possession. *See State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). He, better than any other, would know if he owned the bag of contraband in his car.

The trial court decided the casino card was immaterial. Police saw defendant in actual possession of a matching backpack while he appeared to deal drugs before arrest. The backpack was in his constructive possession at arrest. It contained bullets matching the gun in his pocket. It contained drugs matching drugs he planned to pick up to supply his admitted dealing. There is no evidence Patton threw the backpack into defendant's car, let

alone without his knowledge or against his will, when surveillance was briefly interrupted. But there is evidence to refute such a transaction. Tinted windows obscured an approaching officer's view inside defendant's car until it was breached, supporting an inference that the windows were closed. 3RP 99, 116-17, 139, 147, 150-51.

Patton was standing outside defendant's car beside his own car when police arrived. *Id.* The presence of drugs and a gun in Patton's car, the ability to smuggle drugs across the border attending his work on Alaskan fishing boats and defendant's admitted plan to meet a drug supplier that day, suggest Patton might be his supplier. 3RP 189-201. Drug conspiracies typically take one of two forms, "chain-and-link" or "hub-and-spoke." *E.g., United States v. Caldwell*, 589 F.3d 1323, 1329 (10th Cir. 2009). In a "chain-and-link," or vertical conspiracy, a series of consecutive buyer-seller relationships exist. *Id.* "Hub-and-spoke" conspiracies are like wheels, with distributors supplied by central figures. *Id.*; *United States v. Asibor*, 109 F.3d 1023, 1031 (5th Cir. 1997). Patton's seemingly interrupted effort to approach defendant's car was also consistent with the behavior of the lower level drug runners or consumers that approached defendant's car on his route. 3RP 68-69. Either relationship would explain a decision not to call Patton as a witness.

Whatever the explanation for its presence, Patton's casino card was neither material to defendant's charges nor capable of affecting the outcome

of his convictions. Defendant may have been dealing from a bag received from Patton. Maybe defendant stole it from Patton. Or perhaps Patton used the card to buy defendant's drugs. Or maybe they gambled together before or after a deal. Whatever link one assumes, it has no bearing on convictions proved by overwhelming evidence defendant was a drug dealer engaged in deliveries and resupply when interrupted by police. Nothing about the card's presence in a backpack containing ammunition for his gun in arm's reach of where he was sitting alone in a sealed car makes his guilt less probable. *E.g.*, *State v. Nord*, 188 Wn.App. 1032 (2015) (Unpublished No. 70904-6-I; 2015 WL 4064032 *2-3) (strength of link to contraband-filled pack in which jurors found a phone made irregular discovery harmless, if error).

ii. The casino card is wrongly called late or new evidence as it was inside a timely disclosed backpack taken from defendant at arrest.

Prosecutors must disclose to defendants, no later than the omnibus hearing, objects in their possession or control which are intended for use at trial or which were obtained from or belonged to the defendant. *State v. Penn*, 23 Wn.App. 202, 204, 596 P.2d 1341 (1979); CrR 4.7(a)(1)(v). A continuing duty to disclose exists after initial compliance. CrR 4.7(h)(2). The term "disclose" is not defined in the rules, but in the context of adequate notice means "to make known." *State v. Boyd*, 160 Wn.2d 434-35, 443, 158

P.3d 54 (2007); Law Dictionary 477 (8th ed.2004); Webster's Third New International Dictionary 645 (2002).

Adequate notice is provided when the State discloses the general nature of a seized item. *Penn*, 23 Wn.App. at 204 ("narcotics paraphernalia in general" adequate description to comply with discovery rule). Once such notice is provided, the onerous is on a defendant to request more specific information. *Id.*; CrR 4.7(c)(1). The State's duty to disclose does not oblige it to search for evidence, conduct tests or pursue every angle of a case. *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 706 (1984).

From the incomplete record of the pretrial discovery available, it can be surmised defendant was timely notified of the State's retention of the bag of contraband seized from his car. It was subjected to an inventory search documented in a report including photographs presumably disclosed before trial.⁸ Pretrial discovery was sent to defendant on six occasions, although it is unclear when each item was disclosed. CP 231-39. Discovery related to the backpack was likely complete by at least May 3, 2016, when only lab results were pending. CP 234-36. Defendant's meritless claim of a discovery violation should fail.

⁸ 3RP 170-71; Ex. 3, 5-16, 18, 20, 27-28, 35, 49.

Whereas defendant cannot establish a newly discovered evidence claim as it requires proof he could not have found the casino card through an exercise of due diligence. *Brown*, 143 Wn.2d at 453. His ability to find the card is plain in the context of the backpack's seizure, storage and central relevance to the case. One reason not to search it in the property room would be to avoid bringing overlooked contraband or incriminating information, like the apparently missed heroin residue beside the card, to the attention of officers supervising the inspection. Still, the card's capacity to have been found before trial through a more careful search of a backpack available in the property room justifies the court's refusal to order a second trial. *Lui*, 188 Wn.2d at 569.

Beyond that claim defeating timeliness of discovery and decision or failure to independently examine the backpack, is a conceptual question of whether the card and additional residue are evidence different from the bag of contraband in which they were found. An attribute of an admitted exhibit does not transform into new or extrinsic evidence merely because it is found by jurors subjecting the exhibit to a more critical examination than made of it in court. *State v. Balisok*, 123 Wn.2d 114, 119, 886 P.2d 631 (1994); *State v. Everson*, 166 Wash. 534, 536, 7 P.2d 603 (1932) (exhibit's inconspicuous quality properly viewed by jurors who looked into it with magnifying glass). Pursuant to CrR 6.15(e), all exhibits received in evidence may generally be

used by a jury as it sees fit. *State v. Elmore*, 129 Wn.2d 250, 296, 985 P.2d 289 (1999); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Courts retain limited discretion to withhold exhibits deemed dangerous or unduly subject to misuse. *State v. Oughton*, 26 Wn.App. 74, 82, 812 (1980).

The record does not support a reliable inference the parties believed the backpack to be empty when admitted without objection. The backpack's relevance to the case was its undisputed character as a bag of contraband seized from the backseat of a car singularly occupied by defendant amid his admitted drug dealing. So the backpack's illegal and miscellaneous content was within the scope of that exhibit under the circumstances of this case. *Everson*, 166 Wash. at 536; *Balisok*, 123 Wn.2d at 118; *People v. Garrison*, 303 P.3d 117, 125-26 (2012) (jury properly discovered message on phone admitted as an exhibit); *Pratt v. Rocky Mountain Nat. Gas. Co.*, 805 P.2d 1144, 1147 (1990) (not improper for jurors to look inside admitted furnace with flashlight); *State v. Aiello*, 221 A.2d 40 (1967); *Nord*, *supra* at *2; *Cf. United States v. Byrne*, 171 F.3d 1231, 1233-34 (10th Cir. 1999) (child abuse leads unforeseeably found in admitted atlas). Defendant even invited jurors to examine the backpack's storage capacity in argument. 4RP 269. This case presents jurors who detected unappreciated attributes of a timely disclosed and properly admitted exhibit. A claim of late or new, much less prejudicial, evidence cannot be supported by the available record.

2. THE RECORD IS INADEQUATE TO REVIEW A CLAIM COUNSEL WAS DEFICIENT FOR NOT SEARCHING DEFENDANT'S CONTRABAND-LADEN BACKPACK BEFORE TRIAL AS THEIR CONVERSATIONS ABOUT THE BAG REMAIN UNKNOWN. THE CLAIM WOULD OTHERWISE FAIL FOR IT WOULD BE SOUND STRATEGY TO REFRAIN FROM A SEARCH LIKELY TO ALERT POLICE TO OVERLOOKED EVIDENCE OF DEFENDANT'S ILLICIT ACTIVITIES.

The right to effective assistance of counsel is a right to require the prosecution's case to survive meaningful adversarial testing. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045 (1984). When an adversarial proceeding has been conducted, even if counsel made demonstrable errors, the testing envisioned by our constitution occurred. *Id.* The essence of an ineffective assistance claim is counsel's unprofessional errors prejudicially upset the adversarial balance. *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582 (1986). A claim of ineffective assistance requires the defendant to demonstrate an outcome determinative deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

This is not a case in which defendant or his counsel were blindsided by the prospect of a third party's connection to defendant's activities at the moment of his arrest. Counsel knew Patton was observed standing between defendant's car and the car in which Patton had drugs and a gun when police arrived. 3RP 198-201. Counsel recalled Patton's description of the incident concurred with defendant's unrevealed account. 3RP 198. Although counsel

purportedly did not recall the substance of Patton's anticipated testimony, she believed he was available (back from fishing in Alaska) and a potential component of defendant's "strategy." 3RP 199. The decision whether to call Patton was postponed until counsel could further discuss that strategy with him and defendant. *Id.* Those conversations remain outside the available record. It is unknown if defendant directed counsel not to call Patton. Or if costs of opening the door to what Patton knew about defendant's activities outweighed the perceived benefits of his testimony. Unspecified drugs and a firearm were seized from Patton's car. 3RP 199-201.

Closing remarks clarified ownership is not an element of unlawful possession. 4RP 249. Evidence of defendant's actual as well as constructive possession of the backpack was recalled. 4RP 250-52; Ex. 49. Its content was connected to defendant's admitted drug dealing and plan to restock his inventory. 4RP 252-63. The police officers' credibility was challenged; their investigation attacked. 4RP 264-66. Innocent explanations for defendant's conduct were offered. 4RP 267-68. Chain of custody was raised. 4RP 268. The backpack's capacity to store recovered contraband was questioned. 4RP 269-72. Unwitting possession went unasserted. And the admitted exhibits were verified by counsel before they were submitted to the jury. 4RP 283.

Later that day, the jury asked if the casino card and additional brown residue in the backpack had been admitted. 5RP 285-86. Counsel agreed

with the court's plan to have them marked. 4RP 285-86. That remedy was informed by the response approved in *Nord. Id.* The guilty verdicts arrived about an hour later. *Id.* Defendant was convicted as charged. 5RP 287-94. And the jury was discharged without objection. 5RP 295.

Defendant's motion for a new trial was filed ten days later. CP 178. Counsel argued awareness of the card would have affected her strategy; however, she did not attach affidavits regarding what she knew about the backpack's role in the incident or what defendant and Patton said about it during their conversations. Nor did she disclose why the affirmative defense of unwitting possession was not raised. *Id.*; 5RP 299-304. The State pointed out the unexplained injection of a third party's casino card in the backpack was more likely to be held against the State due its burden of proof. Still, other evidence persuaded the jury to convict just after the card's discovery. 5RP 301. Defendant's motion for a new trial was denied, for the card was discoverable before trial and benign. 5RP 302-05.

- a. The record is inadequate to review counsel's performance because it does not reveal what she knew about Patton's actual connection to the case, defendant's disclosures about the backpack or why they elected not to pursue an unwitting possession defense.

When an ineffective assistance of counsel claim is raised on appeal, the reviewing court may only consider evidence in the record. *State v. Grier*,

171 Wn.2d 17, 29-30, 246 P.3d 1260 (2011). "[I]nquiry into counsel's conversations with a defendant may be critical to a proper assessment of counsel's investigative decisions, just as it may be critical to ... assessment of counsel's other litigation decisions." *Id.* (quoting *Strickland*, 466 U.S. at 691). This is because conduct capable of being characterized as legitimate trial strategy or tactics is not deficient performance. *Id.* at 33.

Too much is unknown about what counsel knew or why she acted as she did to accurately assess the professionalism of her conduct. She reported a plan to confer with defendant and Patton about a defense strategy that involved calling Patton as a witness. The content of their discussion is unknown. It remains possible defendant or Patton divulged something to undermine the utility of Patton's testimony. It would be sound strategy not to call a witness capable of opening doors to unfavorable facts. There is also a possibility defendant directed counsel not to implicate Patton for fear of reprisal or because it was bad for defendant's drug business. Mere argument about unpursued theories is an inadequate gauge of performance.

- b. The claim of deficiency could be undermined by a sound reason for counsel's decision to avoid alerting police to overlooked evidence of defendant's crimes.

Deficient performance will not be found where counsel's conduct is attributable to reasonable tactics or strategy. *Grier*, 171 Wn.2d at 33. To

rebut the strong presumption of effectiveness, defendants must prove the absence of a legitimate tactic conceivably accounting for the performance. *Id.* Counsel's investigation should be reasonably tailored to the defense. *Strickland*, 466 U.S. at 691. Our Supreme Court has never held professional representation requires an independent defense investigation. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Counsel must reasonably investigate or reasonably decide against it. *Strickland*, 466 U.S. at 691. Scrutiny of the choice is highly deferential, for the investigation required, if any, varies according to each case. *A.N.J.* 168 Wn.2d at 111. It has been long understood:

Experienced lawyers know that what may appear to be a blunder in tactics at the trial may have been deliberately undertaken with calculated risk; that out-of-court interviews may open the doors to the admission of damaging evidence not otherwise admissible; that questions on cross-examination may elicit surprisingly damaging answers; that what on paper might read as very favorable testimony to the accused may, in counsel's judgment, when given from the witness stand, appear fabricated or suborned and thus far more damaging than that left unsaid....

State v. Pinche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967).

Defense attorneys are not called upon "to scour the globe on the off chance something will turn up..." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527 (2007). Reasonably diligent counsel may draw a line when they have

good reason to think further investigation would be a waste. *Id.* They may avoid investigation likely to alert police to overlooked evidence. *Pinche*, 71 Wn.2d at 590-91. And they can avoid witnesses capable of opening the door to incriminating evidence otherwise off limits to the State. *Id.* The fact useful evidence might have come from additional investigation does not make counsel deficient, for defendants are not entitled to perfect counsel. *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)).

There are at least a few conceivable strategic reasons for counsel to have refrained from conducting an independent examination of the bag of contraband taken from defendant's car. Any additional contraband found in the bag was more likely to be attributed to defendant than another given the circumstances of its seizure. The backpack was in police custody. 3RP 302-05. So a defense examination of its contents would either have to be done under police observation or pursuant to a chain of custody order likely to prompt police to reexamine the backpack before or after its return. *E.g.*, *Boyd*, 160 Wn.2d at 438; *State v. Cheatam*, 150 Wn.2d 626, 637, 81 P.3d 830 (2003); *Pinche*, 71 Wn.2d at 590-91. Heroin residue the police ostensibly overlooked was found beside the casino card. 3RP 302-05. That is precisely the type of trouble experienced counsel would expect to find in the bag. Without a complete record it remains possible defendant warned

counsel nothing good could come from looking in the bag. It remains possible the card is itself evidence of a property crime committed against Patton. RCW 9A.56.010(1), .160(1)(c) (stolen access device).

Keeping Patton away from the witness stand is as patently a strategy of conceivable merit. Patton was seen standing next to defendant's car, right next to his own car which was also carrying drugs and a gun, on a day when defendant planned to acquire an extra ounce of heroin and meth from his supplier. It just so happens crossing the U.S. border on a commercial fishing boat is one way Patton makes money. Counsel's record made it clear Patton is defendant's associate; so Patton may know how defendant makes money, like the \$6,000 cash he had on him when it appeared he was about to meet Patton. Calling Patton as a witness might enable the State to ask him why he had drugs and a gun in the car he drove to meet defendant. *E.g., Matter of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998). How would jurors interpret defendant's planned meeting with that similarly equipped friend? Likely as more evidence of drug dealing.

- c. The obvious risks inherent in searching the backpack or calling Patton combine with the persuasive evidence of defendant's guilt to undermine his claim of prejudice.

To prevail on the prejudice prong, defendant must prove there is a reasonable probability the result of the trial would have been different if the

claimed deficiency had not occurred. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The evidence adduced at trial is that defendant was an admitted drug dealer who violently escaped from police before being arrested in his car on his way to pick up an ounce of heroin and meth. At the time, he had heroin and meth in a backpack matching one he carried. It contained bullets matching the gun he had on his person with \$6,000 in cash. So it should be hard to conceive of anything he could have said about Patton's casino card that would have changed the jury's consideration of it given those facts. If anything, its discovery was a benefit to the defense as unanswered questions about its relevance to possession would be held against the State because it carried the burden of proof. A sense of that potential windfall may have prompted defendant to gamble on the verdicts instead of seeking remedial measures. Outcome determinative prejudice has not been proved.

D. CONCLUSION.

Defendant is not entitled to a new trial. There is an inadequate record to review his forfeited claim of untimely disclosed, or newly discovered, evidence. He elected to gamble on the verdicts after being apprised of an irregularity in deliberations more likely to help him than harm his case. Only after his hopes were dashed by unfavorable verdicts, and the opportunity to address the irregularity with intermediate remedial measures had passed,

did he devise a theory for how the irregularity hindered his defense. His claims otherwise fail on the merits given the sound reasons counsel had to steer clear of the strategy he would allegedly default to with the advantage of hindsight. The overwhelming proof of his guilt ensures his convictions are just. So they should be affirmed.

RESPECTFULLY SUBMITTED: December 14, 2017

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Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by *file* ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/14/17 *[Signature]*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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