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No. 51732-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Kylo,

Appellant.

Cowlitz County Superior Court Cause No. 17-1-00506-9

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Kylo was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel
2. Defense counsel deprived Mr. Kylo of the effective assistance of counsel by proposing an instruction that erroneously shifted the burden of proof.

ISSUE 1: An accused person is denied the effective assistance of counsel when an attorney's deficient performance causes prejudice. Did defense counsel provide ineffective assistance by proposing an instruction that improperly shifted the burden of proof regarding Mr. Kylo's mental state?

3. Mr. Kylo's convictions infringed his Fourteenth Amendment right to due process.
4. The trial court erred by giving Instruction No. 15, which unconstitutionally shifted the burden of proof.
5. Instruction No. 15 failed to make manifestly clear the State's burden to prove knowing possession, a component of possession with intent to deliver.

ISSUE 2: A trial court may not instruct jurors in a way that shifts the burden of proof. Did the trial court violate Mr. Kylo's Fourteenth Amendment right to due process by instructing jurors that he bore the burden of proving his lack of knowledge?

6. The trial court erred by admitting evidence that drug task force officers went to the Super 8 Hotel to execute a search warrant that specifically targeted Mr. Kylo and his alleged drug activity.
7. The trial court violated Mr. Kylo's due process right to a verdict based on the evidence rather than "on grounds of official suspicion."
8. The trial court violated ER 403 by admitting evidence that the search warrant specifically targeted Mr. Kylo and his alleged drug activity.
9. The trial court erred by allowing the State to repeatedly emphasize evidence that the search warrant specifically targeted Mr. Kylo and his alleged drug activity.

ISSUE 3: A criminal conviction must rest on the evidence introduced at trial, rather than on grounds of "official

suspicion” or other circumstances not admitted as proof of the charged crime. Did the trial court violate Mr. Kyllo’s right to due process by admitting evidence that the drug task force had a search warrant specifically targeting Mr. Kyllo and his alleged drug activity?

ISSUE 4: ER 403 prohibits the introduction of evidence that is unfairly prejudicial. Should the trial court have excluded evidence that the drug task force had a search warrant specifically targeting Mr. Kyllo and his alleged drug activity?

10. Mr. Kyllo’s convictions were based on evidence obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7.
11. The search warrant was not based on probable cause, because police knew only that the informant had seen heroin in a hotel room “within the last 72 hours.”
12. The search warrant was not based on probable cause because the affidavit did not provide a basis for the informant’s claim that the drugs belonged to Mr. Kyllo.

ISSUE 5: A search warrant must be based on probable cause. Was the search warrant unsupported by probable cause because police knew only that an informant claimed to have seen heroin in a hotel room “within the last 72 hours”?

13. The search warrant was unconstitutionally overbroad.
14. The warrant improperly authorized police to search for and seize items for which they lacked probable cause, including books and other items protected by the First Amendment.

ISSUE 6: A search warrant is unconstitutionally overbroad if it authorizes a search for items for which there is no probable cause. Was the warrant here unconstitutionally overbroad the affidavit provided no basis to search for numerous items listed in the warrant, including material protected by the First Amendment?

15. Mr. Kyllo was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
16. Trial counsel’s failure to seek suppression of evidence illegally seized amounted to deficient performance that prejudiced Mr. Kyllo.

ISSUE 7: To prevail on an ineffective assistance claim, an accused person must show deficient performance and prejudice. Was Mr. Kylo denied the effective assistance of counsel when his attorney unreasonably failed to seek suppression of the evidence upon which the prosecution rested?

17. The trial court violated Mr. Kylo's Sixth and Fourteenth Amendment right to counsel.
18. The trial court erred by failing to adequately inquire into the conflict between Mr. Kylo and his appointed attorney.
19. The trial court erred by refusing to appoint new counsel to represent Mr. Kylo prior to sentencing.

ISSUE 8: An indigent person accused of a crime has a constitutional right to the appointment of counsel. Did the court's failure to adequately inquire into the breakdown of the attorney-client relationship violate Mr. Kylo's Sixth and Fourteenth Amendment right to counsel?

20. The trial court erred by giving Instruction No. 3.
21. The trial court's reasonable doubt instruction violated Mr. Kylo's right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
22. The trial court's reasonable doubt instruction violated Mr. Kylo's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§21 and 22.
23. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
24. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 9: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with jurors' "belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Kylo's constitutional right to a jury trial?

INTRODUCTION AND SUMMARY OF ARGUMENT

An informant claimed to have seen heroin in a Cowlitz County hotel room “within the last 72 hours.” Without explanation, the informant claimed the drugs belonged to Kenneth Kyllo. Officers did not try to discover who had rented the hotel room or if that person remained a registered guest 72 hours after the informant’s visit. Nor did they seek to determine if Mr. Kyllo had any connection to the room. Instead, they obtained a warrant and forcibly entered. The search warrant was not based on probable cause. Evidence obtained by the police should not have been admitted at Mr. Kyllo’s subsequent trial.

Over objection, the court allowed multiple witnesses to tell jurors that the warrant specifically targeted Mr. Kyllo and his alleged drug involvement, implying that additional evidence, not admitted at trial, supported a guilty verdict. In closing, the prosecutor emphasized that official suspicion focused on Mr. Kyllo, to counter Mr. Kyllo’s assertion that the drugs were not his. The court’s ruling violated ER 403 and infringed Mr. Kyllo’s right to due process, because it allowed jurors to convict based on “official suspicion” rather than evidence admitted at trial.

Despite the State’s burden to prove Mr. Kyllo’s mental state, defense counsel proposed an unwitting possession instruction placing the

burden on Mr. Kyllo to prove his own lack of knowledge. This denied Mr. Kyllo his right to the effective assistance of counsel.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In April of 2017, police sought a search warrant for a hotel room. CP 1-7. They used a confidential informant. CP 4-6. In their application for a search warrant, the informant was not named, nor was any confidential number or any other tracking information listed regarding the informant. CP 1-7.

The informant claimed to have seen a large amount of heroin in the hotel room. CP 6. This heroin was seen 72 hours before it was reported by the confidential informant to the police. CP 6.

The informant did not claim to have seen Kenneth Kyllo in the hotel room at any point. CP 6. The informant did aver that the heroin seen in the hotel room three days before “belonged” to Mr. Kyllo. CP 6. No further information was provided about this conclusion regarding whose heroin it was in the hotel room. CP 1-7.

Trooper Thoma sought a search warrant. CP 1-7. He asked for authorization to search the room for heroin and related items, and to search for Mr. Kyllo in that room. CP 6-7. Based only on the informant’s claim to have seen heroin in the hotel room three days prior, the officer

also requested permission for a broad array of items, like computers, audio tapes, books, weapons, and cell phone content.¹ CP 6-7.

The court granted the permission to search. CP 8-11.

When officers arrived at the room, they found Thomas Wiggins at a table. RP (2/15/18)² 101-102. On the table was a needle, and a bag that contained both heroin and methamphetamine. RP (2/15/18) 101-102, 137-142. Two wallets were there: one from Wiggins and the other belonging to Mr. Kyllo. RP (2/15/18) 104-105. There was also a paper that looked like it listed debts and payments on the table where Wiggins was seated. RP (2/15/18) 104, 120-122. In Wiggin's wallet was found another pay/owe sheet. RP (2/15/18) 122.

They found a woman standing between the two beds. RP (2/15/18) 94, 208; RP (2/16/18) 16-18. On the nightstand were needles and heroin. RP (2/15/18) 96-97. In the drawer where the woman was standing was more heroin and packaging materials. RP (2/15/18) 99-100.

Mr. Kyllo was there too. RP (2/15/18) 94. He threw a backpack out the window as police entered the room. RP (2/15/18) 94, 185. That pack contained a scale, packaging, \$4800, and heroin. RP (2/15/15) 193-

¹The warrant also sought permission to gather items that would show who had occupancy of the hotel room. CP 7. While never presented to the jury, it would turn out that the hotel room was rented by Thomas Wiggins. RP (2/16/18) 9, 81.

² A transcript was ordered from 7/20/17, but once filed, it became clear this volume does not relate to this case.

201. It also contained prescription pill bottles with Wiggins's name on them. RP (2/15/18) 205-212.

The State charged Mr. Kylo with possession of methamphetamine and heroin with intent to deliver. CP 17-18.

Mr. Kylo testified. RP (2/16/18) 79-94. He said that he was in the hotel room as a guest. RP (2/16/18) 81. He told the jury that he tossed the bag right as police were entering and was told to throw it, which he did.³ RP (2/16/18) 81-82, 86.

The confidential informant did not testify at trial.⁴ RP (2/15/18) 81-212; RP (2/16/18) 16-46.

The defense moved in limine to prevent the State from eliciting testimony that the court had authorized a search warrant for controlled substances and Mr. Kylo. RP (2/15/18) 61-63. Mr. Kylo argued that the claim would be prejudicial to their defense. RP (2/15/18) 62. Without explanation or evaluation of prejudice and probity, the trial court denied the motion. RP (2/15/18) 63.

³ The State called staff from the crime lab who testified to testing done on the substances found. RP (2/16/18) 28-45. He said that one of the items he received was also sent to the fingerprint examiner's lab. RP (2/16/18) 44. It appeared that one of the items, including packaging found in the pack Mr. Kylo had thrown outside, had resulted in a print that was not Mr. Kylo's. RP (2/16/18) 48. This information had not been presented to the defense until trial. RP (2/16/18) 48-58. The court denied a motion to dismiss on the issue. RP (2/16/18) 58. It later came out that the print belonged to the woman in the hotel room. RP (4/2/18) 100.

⁴ In fact, neither of the two others in the hotel room were called as witnesses either. RP (2/15/18) 81-212; RP (2/16/18) 16-46.

The prosecutor brought out the goal of the warrant early in the first witness's testimony. Detective Beedle explained his training and experience, and then told the jury that the officers were looking for methamphetamine, heroin, and Kenneth Kyllo in that hotel room. RP (2/15/18) 90.

The second state witness did the same: Detective Brent outlined his expertise, and then told the jury he helped serve a warrant for controlled substances and Mr. Kyllo. RP (2/15/18) 123-133.

As did the third witness, Sargent Yund. RP (2/15/18) 163. In fact, Yund claimed that police "knew" that Mr. Kyllo and drugs were in the hotel room. RP (2/15/18) 163.

The fourth witness did the same: Detective Thoma said law enforcement went there to find Mr. Kyllo and controlled substances. RP (2/15/18) 174-184.

When Mr. Kyllo testified, the prosecutor ended his cross examination on this same theme:

Q: Okay. Were you surprised to find out that the police were looking for you at that hotel room at that exact time?

A: Yes.

Q: And you must've been really surprised to find to find out they were looking for drugs as they were looking for you at that hotel room?

A: Well, yeah. There happened to be drugs there.

RP (2/16/18) 92.

When the prosecutor stood up to give his closing argument, he was quick to remind the jury that there was a search warrant, and law enforcement “went to room 203 of that hotel looking for two specific things: drugs and the Defendant, Ken Kyllo.” RP (2/16/18) 111.

The State returned to the theme in rebuttal as well:

And one thing I want you to keep in mind as they make this argument and you go back there to consider is who were the police looking for on April 19th, 2017, at that hotel room? Were they looking for Thomas Wiggins? Were they looking for Nicole Williams? No. They were looking for Kenneth Kyllo and they found him there. They found him there, and then while they were also looking for drugs. They found a whole lot of drugs.
RP (2/16/18) 144.

The parties agreed that the jury should be instructed as to the affirmative defense of unwitting possession. RP (2/16/18) 95-96; CP 21, 39. The court also gave a standardized jury instruction on reasonable doubt, which included the following: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 27. The jury convicted Mr. Kyllo as charged. RP (2/16/18) 151-154.

Mr. Kyllo had sought to address the court multiple times during the proceedings. At trial readiness, Mr. Kyllo asked to speak but the court declined permission. RP (2/8/18) 50. He tried again on the morning of the second day of trial. RP (2/16/18) 6-10. He told the court that Wiggins

had admitted the pack was his in the police car and expressed frustration that the information was not being presented to the jury. RP (2/16/18) 6-10.

Before taking the stand in his own defense, Mr. Kylo told the court that the way the security officers had placed themselves was prejudicing him. The judge directed the officers' movements. RP (2/16/18) 75-78.

After the verdicts, Mr. Kylo sought a hearing, which was held. RP (2/28/18) 54-58. At that hearing, Mr. Kylo's attorney told the court that his client wanted a new attorney and a motion for a new trial. RP (3/12/18) 60-75. Mr. Kylo said that his attorney had not called Thomas Wiggins as a witness even though Mr. Kylo had clearly expressed his desire for the jury to hear from him. RP (3/12/18) 62-68. He said that he was instructed to reject a plea offer based on the statement of Wiggins. RP (3/12/18) 67.

Without any inquiry into the nature of the attorney client relationship or the effectiveness of communication, the court denied Mr. Kylo's request for a new attorney. RP (3/12/18) 60-75.

The court sentenced Mr. Kylo to 108 months of incarceration. RP (4/2/18) 105; CP 47-57. Mr. Kylo timely appealed. CP 167.

ARGUMENT

I. MR. KYLLO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED A DEFECTIVE INSTRUCTION THAT SHIFTED THE BURDEN OF PROOF.

In a prosecution for possession with intent to deliver, defense counsel provides ineffective assistance⁵ by proposing an unwitting possession instruction. *State v. Newton*, 179 Wn. App. 1056 at p. 4 (2014) (unpublished); *see also State v. Sims*, 119 Wash.2d 138, 142, 829 P.2d 1075 (1992). Here, as in *Newton*, defense counsel erroneously proposed an unwitting possession instruction. *Newton*, 179 Wn. App. 1056 at p. 4 (unpublished); CP 20-21.

The “unwitting possession” defense cannot apply when the State must prove intent to deliver because “[i]t is impossible for a person to intend to...deliver a controlled substance without knowing what he or she is doing.” *Sims*, 119 Wash.2d at 142. A person who intends to deliver a controlled substance “necessarily knows what controlled substance [he or she] possesses [since] one who acts intentionally acts knowingly.” *Sims*, 119 Wn.2d at 142.

⁵ An accused person is constitutionally entitled to the effective assistance of counsel. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

Thus “[w]ithout knowledge of the controlled substance, one could not intend to... deliver that controlled substance.” *Id.* The State therefore bears the burden of proving knowing possession, not as a separate element of the offense, but as a necessary part of its proof on the accused person’s intent to deliver. *Id.* Accordingly, a person accused of possession with intent to deliver has no burden to prove unwitting possession. *Id.*

Defense counsel’s performance was objectively unreasonable. *Newton*, 179 Wn. App. at p. 4 (unpublished). It “cannot be characterized as a tactical decision.” *Id.* Furthermore, there is no evidence in the record that defense counsel was pursuing “any purposeful strategy in undertaking that burden of proof.” *Id.*

Accordingly, defense counsel’s performance was deficient. The error requires reversal because it prejudiced Mr. Kylo. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The error is presumed prejudicial because “the combination of the unwitting possession instruction and the to convict instruction[s] created a clear misstatement of the law.” *Newton*, 179 Wn. App. 1056 at p. 4 (unpublished); *see also State v. Carter*, 127 Wash. App. 713, 112 P.3d 561 (2005).

In *Carter*, defense counsel proposed an unwitting possession instruction in a prosecution for unlawful possession of a firearm. *Carter*,

127 Wn. App. at 716. Like the crimes charged here, UPF requires proof of the defendant's mental state. *Id.*, at 717. The Court of Appeals reversed, noting that "the flawed instruction proffered by defense counsel created an inconsistency in the stated burdens of proof." *Id.*, at 718.

Here, as in *Newton* and *Carter*, the error is presumed prejudicial. *Id.* This is especially true because Mr. Kylo's entire defense rested on his lack of knowledge. ⁶ RP (2/15/18) 81-212; RP (2/16/18) 16-46. Mr. Kylo was denied the effective assistance of counsel. *Id.*

Because his attorney's deficient performance prejudiced him, the convictions must be reversed. *Id.*, at 718. The case must be remanded for a new trial with proper instructions. *Id.*

II. THE TRIAL COURT VIOLATED ER 403 AND MR. KYLLO'S RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE THAT ENCOURAGED JURORS TO CONVICT BASED ON "OFFICIAL SUSPICION" RATHER THAN THE EVIDENCE.

An accused person "is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion...or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). This principle stems from the right to a fair trial

⁶ In fact, neither of the two others in the hotel room were called as witnesses either. RP (2/15/18) 81-212; RP (2/16/18) 16-46.

secured by the due process clause. *Id.*; U.S. Const. Amend. XIV; *see Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Evidence must be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. An objection based on prejudice is adequate to preserve error under ER. 403.⁷ *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (addressing ER 404(b)); *see also In re Det. of Duncan*, 142 Wn. App. 97, 104, 174 P.3d 136 (2007) (*Duncan I*), *aff’d sub nom. In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 219 P.3d 666 (2009) (*Duncan II*).

Here, defense counsel objected to evidence that the warrant specifically targeted Mr. Kyllo and his alleged drug activity. RP (2/15/18) 61-62. He argued that the evidence was prejudicial, and thus alerted the trial court that his objection was based on ER 403. RP (2/15/18) 61-62; *Mason*, 160 Wn.2d at 933; *Duncan I*, 142 Wn. App. at 104.

The evidence should have been excluded: its probative value was substantially outweighed by the danger of unfair prejudice. Furthermore,

⁷ Mr. Kyllo may raise the due process violation for the first time on review. RAP 2.5(a)(3). He need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010). Here, given what the trial judge knew, the court could have corrected the constitutional error. *Id.*

its admission allowed the jury to convict based in part “on grounds of official suspicion...or other circumstances not adduced as proof at trial.” *Taylor*, 436 U.S. at 485.

Mr. Kylo agreed that the State could use the warrant’s existence “to explain why law enforcement was there knocking on the door and entering.” RP (2/15/18) 61. However, there was no reason to tell jurors that officers had judicial authorization to search for Mr. Kylo specifically, or that the warrant tied him to illegal substances.

Evidence that the warrant specifically targeted Mr. Kylo suggested that he was the focus of “official suspicion.” *Id.* It also implied the existence of “other circumstances not adduced as proof at trial.”⁸ *Id.* The evidence had no probative value and posed a substantial risk of unfair prejudice.

By overruling defense counsel’s objection, the trial court violated ER 403 and Mr. Kylo’s due process right to a fair trial. *Id.* The error requires reversal.

When the introduction of evidence violates a constitutional right, the State bears the burden of showing beyond a reasonable doubt that the

⁸The State did not introduce any evidence regarding the informant’s observations or any investigation that preceded issuance of the search warrant. .⁸ RP (2/15/18) 81-212; RP (2/16/18) 16-46.

error is harmless. *State v. DeLeon*, 185 Wn.2d 478, 487–488, 374 P.3d 95 (2016) .; *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014) The court must find “beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error.” *DeLeon*, 185 Wn.2d at 487–488 (emphasis in original) (internal quotation marks and citation omitted).

Here, the State cannot make this showing.⁹ The prosecutor repeatedly emphasized the evidence by introducing it during the testimony of each of the four officers who testified. RP (2/15/18) 90, 160-163, 182-184. He referred to it on cross-examination of Mr. Kylo. RP (2/16/18) 92. He also highlighted the evidence in closing, pointing out that officers from the Drug Task Force “had a search warrant” and “went to room 203... looking for two specific things: drugs and the Defendant, Ken Kylo.” RP (2/16/18) 111. In his rebuttal, the prosecutor asked jurors to consider that police weren’t looking for Wiggins or Williams; instead,

⁹ Furthermore, the error requires reversal even under the nonconstitutional standard for harmless error. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61, 75 (2016), *review denied*, 186 Wn.2d 1007, 380 P.3d 450 (2016). Under that standard, “[a] harmless error is an error that is trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Id.* The error here went to the heart of the case; it cannot be described as harmless under any standard. *Id.*

[t]hey were looking for Kenneth Kyllo and they found him there. They found him there, and then while they were also looking for drugs. They found a whole lot of drugs.
RP (2/16/18) 144.

The prosecutor's argument suggested to jurors that police had additional information – not introduced at trial – establishing Mr. Kyllo's guilt.

Under these circumstances, the error was not harmless beyond a reasonable doubt. *Id.* Mr. Kyllo's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence.

Id.

III. MR. KYLLO'S CONVICTIONS MUST BE REVERSED BECAUSE THEY WERE BASED ON EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I, §7.

Police obtained a warrant to seize books and other items protected by the First Amendment, based only on an informant's claim that s/he had seen heroin in a hotel room "within the last 72 hours." CP 6. The officers did not investigate to determine who had rented the hotel room. CP 6. Nor did they inquire to see if the registered guest remained at the hotel three days after the informant's visit. CP 6.

The warrant affidavit did not provide any basis for the informant's assertion that the drugs belonged to Mr. Kyllo. CP 6. Police did not confirm that Mr. Kyllo was a guest at the hotel or that he had any

connection to the registered guest who occupied the room three days before the warrant issued.

The warrant was not supported by probable cause. It was also overbroad, because it authorized police to search for and seize numerous items, including material protected by the First Amendment, without any basis.

A. The state and federal constitutions require that search warrants be supported by probable cause.

Under both the state and federal constitutions, search warrants must be based on probable cause.¹⁰ *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). To establish probable cause, the warrant application “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Id.*

An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the

¹⁰ The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV. The state constitution protects against disturbance of a person’s private affairs without authority of law. Wash. Const. art I, §7. It provides stronger protection to individual privacy rights than does the Fourth Amendment. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, §7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

issuing magistrate.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). By itself, an inference drawn from the facts “does not provide a substantial basis for determining probable cause.” *Lyons*, 174 Wn.2d at 363-64.

Similarly, generalizations about the habits of drug dealers or other criminals cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148. The constitution requires more. *Id.*; see also *State v. Keodara*, 191 Wn. App. 305, 315-316, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028, 377 P.3d 718 (2016).

B. The warrant affidavit did not establish probable cause: police knew only that the informant saw heroin in a hotel room “within the last 72 hours,” and did not investigate to ensure the same guest occupied the room when the warrant issued.

The informant claimed to have seen “a large amount of heroin on a table” in a hotel room “within the last 72 hours.” CP 6. The informant claimed the heroin belonged to Mr. Kyllo but did not explain the basis for that conclusion and did not assert that Mr. Kyllo himself was in the hotel room. CP 6. The police did not try to determine who rented the hotel room and did not investigate to see if Mr. Kyllo had any connection to the room. CP 6.

This information did not provide probable cause to search the hotel room three days later. First, given the transience of hotel guests, the information was stale. Second, the affidavit did not establish the informant's basis of knowledge for claiming the drugs belonged to Mr. Kylo.

1. The information was stale, because nothing suggested that the drugs seen by the informant remained in the hotel room three days later.

Before issuing a warrant, a magistrate must determine if the information provided in support of the warrant application is stale. *Lyons*, 174 Wn.2d at 361. This determination is “based on the circumstances of each case.” *Id.* In addition to the passage of time, courts consider “the nature of the crime, the nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched.” *State v. Garbaccio*, 151 Wn. App. 716, 728, 214 P.3d 168 (2009) (emphasis added) (quoting *State v. Smith*, 60 Wn.App. 592, 602, 805 P.2d 256 (1991)).

Evidence that a hotel room contained drugs does not provide probable cause to believe the drugs remained there three days later. Here, the basis for the warrant was the informant's claim that the hotel room had contained drugs “within the last 72 hours.” CP 6. The informant did not claim that Mr. Kylo was present in the hotel room and did not provide a

basis to conclude the drugs belonged to him; thus, there is even less support for the idea that Mr. Kyllo would be found in the hotel room 72 hours after the informant's visit.

As one court put it, "a magistrate may not, consistent with common sense, simply presume a suspect's continuing occupancy of a hotel room after 72 hours." *State v. Ward*, 580 N.W.2d 67, 73 (Minn. Ct. App. 1998); *see also State v. Whitley*, 993 P.2d 117, 118 (N.M. Ct. App. 1999); *State v. Lovato*, 879 P.2d 787, 790 (N.M. Ct. App. 1994). The reasons for this are clear: "[T]he most likely conclusion is that the possessor is 'nomadic' rather than 'entrenched' and that the hotel room is a 'mere criminal forum of convenience' rather than a 'secure operational base.'" *Ward*, 580 N.W.2d at 73 (citations omitted).

Furthermore, "while it is far less likely that a suspect will continue to occupy a hotel, as compared with a permanent residence, after a period of days, it is significantly easier for police to verify." *Id.*, at 73-74. Here, the police did not even try to learn the name of the registered guest and made no effort to determine if Mr. Kyllo had any connection to the room.

Absent some indication that drugs would be found in the hotel room three days after the informant's visit, police lacked probable cause for issuance of a search warrant. *Id.* The hotel room search violated Mr. Kyllo's rights under the Fourth Amendment and Wash. Const. art. I, §7.

Id.; *Lyons*, 174 Wn.2d at 361. The convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Lyons*, 174 Wn.2d at 361.

2. The affidavit did not outline the informant's basis of knowledge for the assertion that the drugs "belonged to Kylo."

According to the search warrant affidavit, the informant "observed a large amount of heroin on a table" and asserted that "the heroin belonged to Kylo." CP 6. But nothing in the affidavit explains how the informant concluded the drugs belonged to Mr. Kylo. CP 6.

The informant did not claim that Mr. Kylo was present in the hotel room. CP 6. Nor did the informant provide any other information showing that the drugs were Mr. Kylo's. CP 6. Because of this, the affidavit was insufficient to establish probable cause.

Washington adheres to the two-pronged *Aguilar-Spinelli* test¹¹ for evaluating a search warrant based on an informant's tip. *State v. Jackson*, 102 Wn.2d 432, 436, 688 P.2d 136 (1984). An affidavit based on an

¹¹ The test derives from *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

informant's tip must demonstrate the informant's veracity and basis of knowledge.¹² *Id.*, at 435-438.

The basis-of-knowledge prong “requires the magistrate to determine whether the informant has *personal knowledge* of the facts.”¹³ *State v. Mejia*, 111 Wn.2d 892, 896–897, 766 P.2d 454 (1989) (emphasis in original); *see also State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1, 22 (2013).

Nothing in the affidavit shows the informant's basis for concluding that the drugs belonged to Mr. Kyllo. The informant did not suggest that Mr. Kyllo was in the room, or that he claimed ownership, or even that someone else said the drugs belonged to Mr. Kyllo. CP 6.

The informant's tip does not satisfy the “basis of knowledge” prong, and thus fails to establish probable cause. *Jackson*, 102 Wn.2d at 435-438. Mr. Kyllo's convictions must be reversed and the evidence suppressed. *Id.*

C. The warrant improperly allowed police to seize items for which

¹² If either prong is lacking, the deficiency may be satisfied through “independent police investigatory work that corroborates the tip.” *Id.*, at 438. The police did not undertake any independent investigation in this case. CP 6.

¹³ If the informant's information is hearsay, the basis of knowledge prong can be satisfied “if there is sufficient information so that the hearsay establishes a basis of knowledge.” *Jackson*, 102 Wn.2d at 437–438.

they lacked probable cause.

A search warrant is overbroad if it allows police to search for items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552; *see also Keodara*, 191 Wn. App. at 316-317. Furthermore, a warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements.¹⁴ *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone*, 119 Wn.2d at 545.

The only item of evidentiary value mentioned by the informant was “a large amount of heroin on a table” in the hotel room. CP 6. Despite this, the warrant authorized police to search for and seize, among other things:

c. Personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, computers, palm pilots, cell phones, global positioning system (GPS) devices, pagers, or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;

d. Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;

¹⁴ In this case, the warrant authorized police to search for and seize items protected by the First Amendment. Accordingly, the heightened standards apply. *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 547.

...

h. weapons, including, but not limited to firearms, ammunition, knives, clubs, swords, martial arts devices, chemical irritants, and electric stun guns;

i. Laptop, desktop computers, media storage devices and or portable hard drives.

j. Cellular telephones and the contents of the cellular telephone including, but not limited to call logs, contact information, text messaging, emails and electronic photographs
CP 10-11.

The warrant was overbroad. The affidavit does not supply probable cause to search for anything besides the heroin described by the informant. CP 6. It certainly doesn't provide probable cause to search for and seize the vast trove of First Amendment materials described in the warrant.¹⁵ CP 10-11.

The search violated Mr. Kyllo's rights under the Fourth Amendment and Wash. Const. art. I, §7. The convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d 538, 551-552.

D. The Court of Appeals must review Mr. Kyllo's suppression arguments *de novo*.

The validity of a search warrant is an issue of law reviewed *de*

¹⁵ The affiant's broad generalizations about the habits of criminals (CP 1-6) do not provide probable cause. *Thein*, 138 Wn.2d at 147-148.

novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The introduction into evidence of material unconstitutionally seized creates a manifest error affecting a constitutional right. RAP 2.5 (a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012).

To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *Lamar*, 180 Wn.2d at 583. In this case, the erroneous admission of illegally seized evidence had practical and identifiable consequences. *Id.*

Without the evidence, the State would have been unable to proceed to trial. Accordingly, defense counsel’s failure to seek suppression of the evidence does not bar review. *Id.*; RAP 2.5(a)(3).

E. If the erroneous introduction of evidence is not manifest error, Mr. Kylo was denied the effective assistance of counsel by his attorney’s failure to seek suppression.

To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and prejudice. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). Here, defense counsel’s deficient performance prejudiced Mr. Kylo.

The prosecution rested on evidence illegally seized, as outlined above. Here, as in *Hamilton*, a reasonable attorney would have moved to

suppress the evidence. Suppression would have resulted in dismissal of the charges. *Id.* Under these circumstances, here is no legitimate basis to forego a suppression motion. *Id.*

Because counsel's deficient performance prejudiced Mr. Kylo, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* His convictions must be reversed. *Id.*

IV. THE TRIAL COURT VIOLATED MR. KYLLO'S RIGHT TO COUNSEL BY FAILING TO ADEQUATELY INQUIRE INTO HIS CONFLICT WITH HIS ATTORNEY.

When the "relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel," even if no actual prejudice is shown. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001); *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006).

When a defendant requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008).

An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’... The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’” *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (citation omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.*, at 776-77. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*

Here, the trial court did not sufficiently inquire into the conflict. RP (3/12/18) 60-75. The judge allowed Mr. Kylo to speak but did not ask specific and targeted questions aimed at determining whether defense counsel could continue to represent his client. RP (3/12/18) 60-75. Nor did the judge ask defense counsel whether he believed he could continue to represent Mr. Kylo. RP (3/12/18) 60-75.

The court’s limited inquiry was inadequate. *Cross*, 156 Wn.2d at 607-610. The court’s failure to inquire and its refusal to appoint new counsel violated Mr. Kylo’s Sixth Amendment right to the effective assistance of counsel. *Id.* His sentence must be vacated, and the case remanded for the appointment of counsel. *Id.* Upon remand, counsel may pursue a motion for a new trial prior to sentencing.

V. THE COURT’S “REASONABLE DOUBT” INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH” IN VIOLATION OF MR. KYLLO’S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn.App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 27.

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 11. This violated Mr. Kyllo’s constitutional right to a jury trial. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. It also violated his right to due process. U.S. Const. Amend. XIV; Wash. Const. art. I, §3.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The

problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 27. Jurors were obligated to follow the instruction.

The Court of Appeals has previously rejected a challenge to this language.¹⁶ The court should revisit the issue.

The court’s prior decisions erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.¹⁷ *Id.*

The court’s prior decisions on this issue also rest on *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant *avored* the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which

¹⁶ See *State v. Kinzle*, 181 Wn.App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn.App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016), *review denied* 186 Wn.2d 1026, 385 P.3d 119 (2016); *State v. Rodriguez-Perez*, 1 Wn.App.2d 448, 406 P.3d 658 (2017), *review denied*, 190 Wn.2d 1013, 415 P.3d 1189 (2018).

¹⁷ The *Bennett* court upheld the *Castle* instruction but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

inverted the language found in the pattern instruction. *Id.*, at 656.¹⁸ The *Pirtle* court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

Improper instruction on the reasonable doubt standard is structural error.¹⁹ *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Kylo his constitutional right to a jury trial.

Mr. Kylo’s convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

¹⁸ The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

¹⁹ RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

CONCLUSION

For the foregoing reasons, Mr. Kylo's convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. Alternatively, the case must be remanded for a new trial with proper instructions.

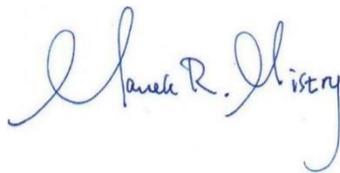
If the convictions are not reversed, the sentence must be vacated, and the case remanded for the appointment of a new attorney, who may pursue a motion for a new trial, if warranted.

Respectfully submitted on September 20, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 20, 2018.



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BACKLUND & MISTRY

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