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NO. 51732-9-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH KYLLO,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

1. Was the Appellant denied effective assistance of counsel when his trial counsel proposed an unwitting possession instruction?
2. Did the trial court err when it allowed the State to introduce evidence that the law enforcement officers were executing a search warrant that targeted the Appellant and controlled substances?
3. Was the search warrant based upon probable cause?
4. Was the search warrant stale?
5. Was the search warrant overbroad?
6. Was the Appellant denied effective assistance of counsel when his trial counsel failed to challenge the search warrant?
7. Did the trial court fail to adequately inquire into the alleged conflict between the Appellant and his trial counsel?
8. Did the trial court err when it gave Instruction No. 3 to the jury?

II. SHORT ANSWER

1. No. Although the unwitting possession instruction should not have been given to the jury, the Appellant was not prejudiced.
2. No. Testimony establishing the basis for the law enforcement officers' presence was not overly prejudicial and did not allow the jury to convict on "official suspicion."
3. Yes. The search warrant was based upon probable cause.
4. No. The search warrant was not stale.
5. Yes. The search warrant was overbroad. However, the evidence is still admissible under the Severability Doctrine.
6. No. The Appellant was not denied effective assistance of counsel when his trial counsel failed to challenge the search warrant because the evidence was still admissible.

7. No. The trial court properly inquired into the Appellant's alleged conflict with his trial counsel.
8. No. The trial court properly instructed the jury with Instruction No. 3.

III. FACTS

On April 19, 2017, detectives with the Cowlitz-Wahkiakum Narcotics Task Force applied for a search warrant for Super 8 Hotel room #203 in Kelso, WA. CP 1-7. The complaint and affidavit for the search warrant stated that within 72 hours of April 19, 2017, a reliable confidential informant had been inside of #203 and observed approximately eight ounces of heroin. CP 5-6. The informant informed the detectives that the heroin belonged to Ken Kylo, the Appellant. CP 5-6. The informant identified the Appellant via a photograph from the police database. CP 6.

The reviewing magistrate approved the search warrant and authorized the detectives to search room #203 for the Appellant, controlled substances, drug paraphernalia, computers, cell phones, books, documents, and weapons. CP 8-11. The warrant was executed on April 19, 2017. RP (2/15/18) at 89-90, 132, 162-63, 182-83. The detectives knocked and announced their presence, but were not allowed entry. The detectives then forcibly entered the hotel room. RP (2/15/18) at 92-93, 183-85. Upon entry, the detectives found a male, later identified as Thomas Wiggins, sitting at a

table. RP (2/15/18) at 94. A female, later identified as Nichole Williams, was seen standing between the two beds in the room. RP (2/15/18) at 94. Both Mr. Wiggins and Ms. Williams remained where they were as the detective entered the room. RP (2/15/18) at 95, 134, 186.

The Appellant was also in the room. He was seen in possession of a backpack. As soon as the detectives entered the room, the Appellant began to run towards a window. RP (2/15/18) at 185. Detective Thoma ordered the Appellant to stop and chased after him. RP (2/15/18) at 186. The Appellant made it to the window and threw the backpack out of the window. RP (2/15/18) at 187. Detective Thoma was then able to detain the Appellant. Sergeant Khembar Yund, who was outside of the hotel room, observed the backpack fly out of the window and took possession of it. RP (2/15/18) at 163-64.

Once the room was secured, the detectives began their search. On the table where Mr. Wiggins had been seated, the detectives located methamphetamine, heroin and drug paraphernalia and a pay/owe sheet. RP (2/15/18) at 101-02, 137-142. Also on the table were two wallets: one belonging to Mr. Wiggins and the other belonging to the Appellant. Both wallets contained pay/owe sheets. RP (2/15/18) at 103-05. On the nightstand where Ms. Williams had been standing, the detectives located heroin, packaging material, and paraphernalia. RP (2/15/18) at 96-100. In

the backpack that the Appellant had thrown out the window, the detectives located a large amount of heroin, \$4,800 in cash, packaging material, and a digital scale. RP (2/15/18) at 191-201. The money was located within the same bag as the heroin – a smaller floral bag – that was inside of the backpack. RP (2/15/18) at 193-197. The heroin was packaged in nine separate bags, each weighing approximately one ounce. RP (2/15/18) at 196. Also located in the backpack was Mr. Wiggins' prescription pill bottle. RP (2/15/18) at 205.

The Appellant was charged by information with of Possession of Methamphetamine with Intent to Deliver and Possession of Heroin with Intent to Deliver. CP 17-18. The case proceed to trial on February 15, 2018. The Appellant's trial counsel made a motion in limine to exclude testimony that the detectives were executing a search warrant to look for the Appellant and controlled substance, arguing that it was prejudicial. RP (2/15/18) at 61. The State argued that the jury was entitled to hear why the detectives were present on April 19, 2017, why there seeking entry into the hotel room, and why the Appellant was their primary focus in a room of three people. The State informed the trial court that there would be no mention of an informant or what information had been provided to the detectives prior to April 19, 2017. RP (2/15/18) at 61-62. The trial court agreed with the State and allowed the State to proceed with this evidence. RP (2/15/18) at 63. The

Appellant, likewise, agreed to the State's proposed limitation of the evidence. RP (2/15/18) at 63.

The State presented testimony from the investigating detectives. The detectives explained why there were at the hotel room on April 19, 2017 and what they were looking for. The detectives also testified about the evidence they located and how it connected to drug trafficking. Det. Thoma also testified that the Task Force and seized the money found in the backpack for forfeiture proceedings and that the Appellant contested the forfeiture, claiming that money was his, but not attributable to drug dealing. RP (2/15/18) at 203; RP (2/16/18) at 26.

The Appellant testified. He denied being responsible for the methamphetamine and heroin in the hotel room. RP (2/16/18) at 82-83. He also denied claiming ownership of the money found in the bag with the heroin, claiming that he was trying to "get a windfall" and get free money. RP (2/16/18) at 83, 87-91.

Both parties agreed that the jury was to be instructed on the affirmative defense of unwitting possession. RP (2/16/18) at 95. The unwitting possession instruction did not state that it was a defense to the crime of Possession of a Controlled Substance with Intent to Deliver; rather, it stated that it was a defense to Possession of a Controlled Substance. CP 39. The remaining jury instructions were standard and taken directly from

the WPICs. The jury deliberated for approximately 80 minutes and returned with two guilty verdicts. RP (2/16/18) at 150.

On March 12, 2018, at a review hearing, the Appellant addressed the court and asked for a new trial and for new counsel to be appointed. RP (3/12/18) at 61-73. The basis for the Appellant's requests were focused on a disagreement over trial strategy and whether potential witnesses should have been called to testify. RP (3/12/18) at 61-67. The trial court determined that since the Appellant was essentially arguing ineffective assistance of counsel, his claims were best addressed through the appeal process and denied the motions. RP (3/12/18) at 72-73. The Appellant was ultimately sentenced to 108 in prison and 12 months of community custody. RP 4/2/18 at 105; CP 47-57. The Appellant filed a timely appeal. CP 167.

IV. ARGUMENT

A. **The Unwitting Possession Instruction is Subject to Harmless Error Analysis.**

An erroneous jury instruction is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). The error is harmless if the reviewing court is "satisfied beyond a reasonable doubt that the jury verdict would have been the same absent the error." *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). "Even misleading

instructions do not require reversal unless the complaining party can show prejudice.” *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

Here, it is undisputed that the unwitting possession instruction was not applicable to the two charges of Possession of a Controlled Substance with Intent to Deliver. However, the Appellant cannot show that he was prejudiced by the instruction or that it relieved the State of its burden of proof. First, the instruction itself did not even reference the crimes that were charged; instead, it clearly stated that “A person is not guilty of *possession of a controlled substance* if the possession is unwitting. *Possession of a controlled substance* is unwitting if...” CP 21 (emphasis added). This is the only portion of the entire jury instructions that referenced the lesser crime of Possession of a Controlled Substance. The definitional instruction clearly defined the charged crimes as Possession of a Controlled Substance with Intent to Deliver. The two “to-convict” instructions clearly identified the charged crimes as Possession of a Controlled Substance with Intent to Deliver. The verdict forms, likewise, clearly stated the charged crimes as Possession of a Controlled Substance with Intent to Deliver.

Additionally, the State’s burden of proof was not relieved or reduced by any means. The State was still required to prove beyond a reasonable doubt that the Appellant possessed methamphetamine and heroin, that he possessed those substances with the intent deliver them, and that these acts

occurred in Washington. “Juries are presumed to follow the court’s instructions.” *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) (citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). Thus, we can presume that the jury did not consider the instruction detailing an affirmative defense for an uncharged crime. Nor did the inclusion of this instruction have any effect to negate or diminish the State’s burden. Therefore, we can conclude beyond a reasonable that the jury verdicts would have been the same without the error.

B. The Appellant Was Not Denied Effective Assistance Of Counsel When His Attorney Proposed An Unwitting Possession Instruction.

a. Standard of review.

The Appellant proposed the erroneous instruction; thus, he is barred from claiming error on appeal under the Invited Error Doctrine. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (citing *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)). However, the offering of an incorrect jury instruction can be reviewed by examining if the Appellant was denied effective assistance of counsel. *Bradley*, 141 Wn.2d at 736 (citing *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.3d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Jury*, 19 Wn. App. at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)Error! Bookmark not defined.). The second prong requires the

defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Visitacion*, 55 Wn. App. at 173.

b. Appellant’s trial counsel’s performance was deficient.

If the Court finds that that the error was not harmless, the State agrees with the Appellant that his trial counsel’s performance was deficient. Unwitting possession is not a defense applicable to Possession of a Controlled Substance with Intent to Deliver. Although the instruction specifically referenced a crime that was not charge, the inclusion of this instruction cannot be considered a legitimate trial strategy or tactic.

c. Appellant was not prejudiced by his trial counsel’s performance.

Even with the erroneous instruction, the Appellant was not prejudiced because there is not a reasonable probability that, despite his trial counsel’s error, the outcome of the trial would have been different. Although prejudice is presumed when an instruction misstates the law, a defendant is not entitled to a new trial if the error can be declared harmless beyond a reasonable doubt. *State v. Woods*, 138 Wn.2d 191, 202, 156 P.3d 309 (2007) (citing *State v. Caldwell*, 94 Wn.2d 614, 618, 18 P.2d 508 (1980)). An instructional error is harmless if it “in no way affected the final

outcome of the case.” *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

The Appellant argued that his possession was unwitting, thereby asking the jury to reject the State’s evidence that he was in actual and constructive possession of the drugs. The unwitting possession instruction would have been applicable to the lesser crime of Possession of a Controlled Substance. However, a Possession of a Controlled Substance with Intent to Deliver charge requires the State to prove the additional element of *intent to deliver*. The jury found both the possession and the intent to deliver. Based upon these verdicts, we can reasonably believe beyond a reasonable doubt that the jury would have rejected the Appellant’s argument even if the lesser included Possession of a Controlled Substance had been an option for them.

Simply put, the Appellant was able to argue his theory of the case, and the State was not relieved of its burden of proof. The jury verdicts would have been the same regardless of the presence of the unwitting possession instruction. The Appellant cannot show prejudice.

C. The Trial Court Did Not Err When It Allowed The State To Introduce Evidence That The Law Enforcement Officers Were Executing A Search Warrant That Targeted The Appellant And Controlled Substances.

a. Standard of review.

The correct standard of review when examining the trial court's determination to exclude or admit evidence at trial is abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). A trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

b. The testimony was relevant and its probative value was not outweighed by a risk of prejudice.

The trial court determination that this evidence was admissible was not an abuse of discretion. The testimony at issue was limited to three things: (1) search warrant; (2) drugs, and (3) the Appellant. There was no testimony about what information was provided to the detectives prior to the search warrant or how it was obtained. The evidence directly focused

on explaining to the jury why the detectives were present at that particular hotel room, on that particular day and time, looking for two specific things.

Without this testimony, the jury would have been presented with the detectives kicking down the door of a random hotel room and seizing one particular person in a room that contained three people without any proper context. Limiting the State's evidence in this regard would have permitted, and likely encouraged, the jury to speculate about: (1) why did the detectives pick that hotel room?; (2) why did the detectives show up on that specific date?; (3) why did the detectives immediately grab the Appellant?; (4) what happened to the other two people in the room?

The Appellant claims that this testimony permitted the jury to convict on "grounds of official suspicion or other circumstances not adduced as proof at trial" and that the subsequent argument "suggested to the jurors that the police had additional information – not introduced at trial – establishing Mr. Kylo's guilt." The jury convicted the Appellant based upon the fact that he was seen in possession of a backpack, was seen throwing that backpack out of a window, the backpack contained a large amount of heroin and the Appellant's money, the room was littered in additional drugs and drug trafficking paraphernalia, and the Appellant had a pay/owe sheet in his wallet. In other words, the Appellant was convicted based upon the direct observations of the detectives. All evidence is

prejudicial. This does not automatically require a finding that it outweighs the probative value. The Appellant has not shown that the trial court abused its discretion in admitting this evidence. The testimony at issue here was introduced to provide the basis for the detectives' presence, something the jury should be entitled to hear.

c. Alternatively, if the Court concludes that trial court erred, it was harmless.

Any error in admitting this evidence was harmless in light of the rest of the State's evidence at trial. A constitutional error is harmless if "the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error." *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2001) (citing *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)). A reviewing court will examine the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *State v. Anderson*, 171 Wn.2d at 770 (citing *State v. Guloy*, 104 Wn.2d at 426). "If there is no 'reasonable probability that the outcome of the trial would have been different had the error not occurred,' the error is harmless." *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

As detailed above, the evidence against the Appellant was overwhelming. He was seen throwing the backpack full of heroin and his

money out of the window as the detectives made entry. The room he was in was littered with drugs and drug trafficking paraphernalia. The Appellant's wallet contained a pay/owe sheet. Whether or not the detectives should have been able to explain why they were present or what they were looking for, the result of the trial would have been the same.

D. The Search Warrant was Based Upon Probable Cause.

a. Standard of Review

Article I, section 7 of the Washington Constitution requires that the issuance of a search warrant be based upon of a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); CrR 2.3(c). “Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity.” *Vickers*, 148 Wn.2d at 108; *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972). Whether probable cause is established is a legal conclusion that is subject to de novo review. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). Great deference is given to the magistrate's determination of probable cause, and will only be disturbed if its decision to issue a warrant was based upon an abuse of discretion. *Vickers*, 148 Wn.2d at 108. “The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” *State v. Emery*, 161 Wn. App. 172,

202, 253 P.3d 413 (2011). “Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant.” *Vickers*, 148 Wn.2d at 108-09.

For an informant’s tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer’s affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information was credible.

State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 587, 21 L.Ed.2d 637 (1969)). In other words, the warrant affidavit “must demonstrate the informant’s (1) ‘basis of knowledge’ and (2) ‘veracity.’” *State v. Taylor*, 74 Wn. App. 111, 116, 872 P.2d 53 (1994) (quoting *Jackson*, 102 Wn.2d at 437).

b. Basis of Knowledge

“The first or ‘basis of knowledge’ prong requires that the informant have personal knowledge of the facts asserted to establish probable cause.” *State v. Casto*, 39 Wn. App. 229, 233, 692 P.2d 890 (1984). Here, the affidavit for search warrant states that within 72 hours of the writing of the

affidavit, the informant personally saw approximately eight ounces, or a half pound, of heroin with the hotel room. The affidavit also states that according to the informant informed the detective that the heroin belonged to the Appellant. The affidavit established that the informant had personal experience with heroin, specifically what heroin looks like, how it is typically packaged, and approximate weights based upon visual observations. The affidavit “provides precisely the type of underlying factual data from which a magistrate could reasonably conclude that [heroin] would be present.” *Casto*, 39 Wn. App. at 234. The basis of knowledge prong was clearly met.

c. Veracity

The magistrate must again receive factual data from which to determine the informant’s present reliability. This is most commonly done by asserting an informant’s “track record” for giving accurate information. An officer may swear that previous information given by this informant proved true and resulted in an arrest or conviction, or aided in an investigation.

Casto, 39 Wn. App. at 233 (citing *State v. Fisher*, 96 Wn.2d 962, 964, 639 P.2d 743, *cert. denied* 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982) and *State v. Partin*, 88 Wn.2d 899, 903, 567 P.2d 1136 (1977)). Here, the affidavit for search warrant established the informant’s veracity. The Appellant is not challenging this issue.

E. The Search Warrant Was Not Stale.

A search warrant affidavit or search warrant can be stale, and thus lack probable cause to search and seize evidence, in two ways: (1) “the passage of time is so prolonged” between an officer's or informant's observations of criminal activity and the presentation of the affidavit to the magistrate “that it is no longer probable that a search will reveal criminal activity”; or (2) a delay in the execution of the search warrant “may render the magistrate's probable cause determination stale.” *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012). Because “[c]ommon sense is the test for staleness of information in a search warrant affidavit . . . [t]he information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.” *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004).

In order to make a commonsense determination as to whether the information is stale, the magistrate shall look at the totality of the circumstances to include “the nature of the criminal activity, the length of the activity, and the nature of the property to be seized.” *Maddox*, 152 Wn.2d at 506; *Lyons*, 174 Wn.2d at 361 (“Among the factors for assessing staleness are the time between the known criminal activity and the nature and scope of the suspected activity.”). Consequently, “[t]he amount of time

between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances. . . .” *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987); *State v. Hall*, 53 Wn. App. 296, 300, 766 P.2d 512 (1989) (“The tabulation of the number of days is not the deciding factor; rather, it is only one circumstance to be considered with all the others. . . .”). Evaluating the entire affidavit and making commonsense inferences from the information contained therein is important because, “[a]n affidavit lacking the timing of the necessary observations might still be sufficient if the magistrate can infer recency from other facts and circumstances in the affidavit.” *Lyons*, 174 Wn.2d at 361-62. Moreover, “even information which is stale standing alone may still provide probable cause if it is confirmed by other more recent information.” *Petty*, 48 Wn. App. at 622.

Here, in making commonsense inferences from the information provided in the search warrant affidavit, it was still probable that evidence of criminal activity would be found within the hotel room at the time the search warrant was executed. The gap in time between the last reported criminal activity in the affidavit and when the search warrant was executed

is minimal considering the criminal activity and the nature of the of the evidence sought.

The information detailed in the affidavit was gathered within 72 hours of April 19, 2017. The affidavit was filed and the search warrant was approved on April 19, 2017. The detectives executed the search warrant on April 19, 2017. The amount of heroin observed by the informant is significant in this matter. The State presented evidence that a typical user amount of heroin and/or methamphetamine is up to one gram. RP (2/16/18) at 177-78. The informant observed approximately 227 times a typical user amount (8 ounces equals 226.796 grams). It was reasonable for the detectives serving the warrant to conclude that probable cause still existed that the heroin was still within the hotel room within three days of the informant's observations. As a result, the information supporting the probable cause in the affidavit was not stale at the time the search warrant was issued and executed.

F. Although The Search Warrant Was Overbroad, The Evidence Was Still Admissible Under The Severability Doctrine.

A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exists or because it describes items for which probable cause does not exist. *State v. Maddox*, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). In the present matter, the State agrees

with the Appellant that the search warrant was overbroad. The probable cause established that the confidential informant observed approximately eight ounces of heroin within the hotel room. CP 6. There is no mention of any items listed in sections C, D, H, I, and J of the search warrant.

The Severability Doctrine “does not require suppression of anything seized pursuant to the valid parts of the warrant. *Id.* at 807 (citing *State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 1992)). This doctrine applies when at least five requirements are met: (1) lawfully authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant supported by probable cause must be significant when compared to the warrant as a whole; (4) the officers must have found and seized the disputed items while searching for the items supported by probable cause; and (5) the officers must not have conducted a general search. *Maddox*, 116 Wn. App. at 807-09.

Here, the warrant validly authorized a search of the hotel room for drugs. The defect of the warrant was limited to searching for items listed in C, D, H, I, and J of the warrant, rather than an invalid entry into the premises. Since the probable cause of the warrant was limited to drugs, the authority to search for drugs was a significant part of the warrant. Each piece of evidence that was seized and presented at trial was found while the

detectives were searching for drugs. The packaging material was located in dresser drawers. The scales were found in the backpack that contained over 1/2 pound of heroin. The \$4,800 in cash was found in this same backpack. The pay/owe sheet was found in the Appellant's wallet. These are all places, locations and manners in which drugs can be contained, held, or secreted. Any additional items that were seized were not used at trial. Therefore, all five factors of the Severability Doctrine are met and the evidence was properly admitted at trial.

G. The Appellant Did Not Receive Ineffective Assistance Of Counsel.

The Appellant has not established that he received ineffective assistance of counsel. As detailed above, the affidavit for search warrant clearly established the CI's basis of knowledge and veracity. The warrant was not stale. And although the warrant was overbroad, the evidence was still admissible at trial. Therefore, the Appellant's trial counsel did not fail to exercise customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. Instead, the Appellant's trial counsel recognized that there was no issue to preserve.

H. The Trial Court Properly Inquired Into The Appellant's Alleged Conflict With His Attorney.

To justify appointment of new counsel, a defendant must show a conflict of interest, an irreconcilable conflict, or complete breakdown in

communication between the defendant and counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). “The determination of whether an indigent’s dissatisfaction with his court-appointed counsel warrants appointment of substitute counsel rests within the sound discretion of the trial court. *State v. Stark*, 48 Wn. App. 245, 252-53, 738 P.2d 684 (1987). When reviewing a trial court’s refusal to appoint new counsel, three factors are considered: “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing *U.S. v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). “A conflict over strategy is not the same as a conflict of interest.” *State v. Cross*, 156 Wn.2d 580, 608, 132 P.2d 580 (2006) (abrogated on other grounds by *State v. Gregory*, 427 P.3d 621 (2018)).

By reviewing the record, it is obvious that the Appellant’s alleged conflict with his attorney was solely based upon a disagreement over trial strategy. The trial court permitted the Appellant to address his alleged issues with his trial counsel. The Appellant did not make a single statement in regards to a breakdown in communication or an inability to work with trial counsel. Instead, the Appellant’s stated issues were directly targeted towards his trial counsel’s decisions during the court of the two-day trial. This is not the type of conflict that raises Sixth Amendment concerns.

I. The Trial Court Did Not Improperly Instruct The Jury With Instruction No. 3.

The Appellant did not object to Instruction No. 3; therefore, he is precluded from raising this issue for the first time on appeal unless he can show that giving the instruction was a manifest error affecting a constitutional right. RAP 2.5(a)(3). “Characterizing an alleged error as a violation of a constitutional right, however, does not automatically meet the RAP 2.5(a)(3) threshold for our reviewing even a constitutional error for the first time on appeal.” *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011). WPIC 4.01 is the “correct” and “proper” instruction for the trial court to give when instructing about reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015).

Instruction No. 3 was identical to WPIC 4.01. The Washington Supreme Court has determined that WPIC 4.01 is correct and proper. The Appellant did not object to the instruction. This issue cannot be raised for the first time on appeal.

V. CONCLUSION

Although unusual, the court instructing the jury about the affirmative defense of unwitting possession was harmless error. The instruction specifically referenced the uncharged lesser crime of Possession of a Controlled Substance; therefore, the instruction did not lessen the State’s burden of proof nor was the Appellant prejudiced. The Appellant

did not receive ineffective assistance of counsel because the unwitting possession instruction did not affect the jury's verdict.

The trial court properly utilized its discretion when it allowed the State to present evidence that the detectives executing the search warrant were looking for the Appellant and drugs. If the trial court abused its discretion, the error was harmless. The State presented overwhelming evidence of the Appellant's guilt.

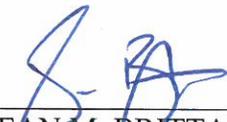
The search warrant was supported by probable cause. The informant's basis of knowledge was properly established. The information in the affidavit for search warrant was not stale. Although the search warrant was overbroad, the evidence was still admissible based upon the Severability Doctrine. The Appellant did not receive ineffective assistance of counsel for failure to challenge the search warrant.

The trial court's inquiry into the Appellant's alleged conflict with his trial counsel was proper. The Appellant's issues were directly related towards trial strategy, which does not amount to a Sixth Amendment issue.

The Appellant is precluded from raising an objection to Instruction No. 3 for the first time on appeal. The Appellant did not object to the instruction. The Washington Supreme Court has determined that WPIC 4.01 is the correct instruction to use.

The State requests this Court affirm the Appellant's convictions.

Respectfully submitted this 16th day of January, 2018.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on January 16th, 2019.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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