No. 44492-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NAAMAN JAMAL WASHINGTON

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Rules

A. ARGUMENT

1. Mr. Washington's trial counsel was ineffective for failing to support his suppression motion with evidence that was available and persuasive.

a. Counsel was deficient in failing to direct the court's attention to portions of the dash-cam video that directly and strongly supported the motion to suppress.

In his opening brief, Mr. Washington argued that trial counsel was ineffective for failing "to introduce [dash-cam video] evidence at the CrR 3.6 hearing that would have established the illegality of the marijuana seizure." Appellant's Opening Br. at 11. The State claims to be "a bit befuddled by this claim" because the full dash-cam video was formally admitted as an exhibit during the hearing. Br. of Resp't at 9-10.

Although the recordings from Trooper Meldrum's two in-car cameras were indeed admitted as an exhibit during the hearing, that does not undermine Mr. Washington's claim. Even where evidence is technically before the court, counsel still has an obligation to *use* that evidence competently. *See, e.g.*, Rules of Professional Conduct (RPC) 1.1, Comment 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of

competent practitioners. It also includes adequate preparation."); RPC 1.3, Comment 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act . . . with diligence in advocacy upon the client's behalf.").

Courts at all levels regularly rely on attorneys to identify the portions of the evidence that support their clients' positions. *See, e.g., In re Welfare of H.S.*, 94 Wn. App. 511, 520, 973 P.2d 474 (1999); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987). The trial court reasonably did so here. The two videos admitted at the hearing have a combined running length of 89 minutes and 42 seconds. Ex. 7, "631@20110522215827.mpg" (41 minutes, 47 seconds), "631@20110522215221.mpg" (47 minutes, 55 seconds). The trial court cannot have been expected to watch these videos in their entirety, on its own initiative, after counsel for both parties had identified and discussed the excerpts that the court could reasonably presume counsel viewed as important to the motion. Nor would any reasonable, competent attorney have expected the court to independently review the full videos—especially given that the suppression hearing in this case was held on the first day of trial,

immediately before the trial began. RP 12 (showing the suppression hearing starting January 17, 2013, at 9:25 a.m.), 115 (showing the suppression hearing ending at 12:05 p.m. and the court taking a recess from 12:05 until 1:30), 119 (showing the trial beginning the same day at 1:30 p.m.).

Thus, even though the full videos were admitted as evidence during the hearing, defense counsel still had an obligation to identify and utilize the portions of the videos that directly supported his client's motion. Yet counsel failed to play, or otherwise bring to the court's attention, the portions of the videos that directly supported Mr. Washington's claim that the marijuana was seized illegally.[1]

Counsel thus cannot reasonably be said to have met his obligation to "act . . . with diligence in advocacy upon the client's behalf," RPC 1.3. And, as noted in the opening brief, this failure "to use any of the video evidence—which shows Trooper Meldrum taking actions clearly inconsistent with an inventory search—to support [the]

[1] Although the State claims that it "played the video for the court in its case in chief on the suppression motion ," Br. of Resp't at 10, this significantly overstates the matter. It is clear from the hearing transcript that the State played only brief portions from the rear-facing camera that supported its argument. RP 49-53. The remainder of the videos, including the portions from the front-facing camera cited in Mr. Washington's opening brief that strongly supported the motion to suppress, *see* Appellant's Opening Br. at 15-19, were not played or referenced by either party in the motion pleadings or during the hearing. *See* RP 49-53, 70-75.

argument that the seizure did not occur during a valid inventory search" rendered counsel's performance objectively deficient. Appellant's Opening Br. at 20-21.

b. Mr. Washington met his burden to demonstrate prejudice.

As discussed in his opening brief, Mr. Washington has the burden in making an ineffective-assistance claim to show both that counsel's performance was deficient and that he suffered prejudice as a result. Appellant's Opening Br. at 10 (citing *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010); *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Preliminarily, the State appears to argue that this Court should not even consider the video evidence in the record to evaluate these elements, because "[i]t is not the proper role of this Court to draw inferences or make factual determinations." Br. of Resp't at 13. This argument is misplaced. Appellate courts generally do not receive evidence or conduct de novo reexaminations of trial court findings of fact. *Bale v. Allison*, 172 Wn. App. 435, 458, 294 P.3d 789 (2013); *see also* RAP 9.11. But that does not mean that when a legal question rests in part on some factual inquiry relating to the record, appellate courts simply cannot address the issue. Rather, appellate courts make factual

inquiries into trial records all the time, in order to address legal issues that require some evaluation of the record. Such is the case, for example, with harmless-error analysis. *See, e.g.*, *State v. Hamlet*, 133 Wn.2d 314, 327-28, 944 P.2d 1026 (1997) (evaluating the trial evidence to determine whether there was "a reasonable probability that [a trial court error] affected the verdict").

Ineffective-assistance claims also require this type of factual inquiry. Indeed, in *every* such case, the defendant must make two inherently factual showings: that counsel's performance was objectively deficient, and that the deficient performance caused him prejudice. *Strickland*, 466 U.S. at 694. The State's argument would effectively prevent any defendant from ever claiming ineffective assistance of counsel, because the claim by its nature requires the defendant to argue *to the appellate court* that the evidence below establishes that those two facts are both true. Thus, as with every other ineffective-assistance claim, it is entirely proper for this Court to examine the record in order to determine whether the trial evidence establishes the facts required to support the legal claim of ineffective assistance of counsel. *E.g.*, *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006) ("Ineffective assistance of counsel is a mixed question of law and fact

that we review de novo.") (citing *Strickland*, 466 U.S. at 698); *State v. Shaver*, 116 Wn. App. 375, 384, 65 P.3d 688 (2003) (reversing a conviction for ineffective assistance where the appellate court found, upon reviewing the record, that "[i]t appears defense counsel was caught by surprise regarding [the defendant's criminal history]"); *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007) ("We determine whether counsel was competent based upon the entire trial record.") (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

Mr. Washington has made both of the required showings. As explained above, counsel's performance was deficient because he did not provide "professionally competent assistance," *Strickland*, 466 U.S. at 690. And as explained below, Mr. Washington has demonstrated that he suffered prejudice as a result of his attorney's inadequate performance.

i. Prejudice exists when counsel's deficient performance undermines confidence in the outcome of the proceeding.

As discussed in the opening brief, to establish prejudice, a defendant must show

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The defendant does not, however, need to "show that counsel's deficient conduct more likely than not altered the outcome in the case."

Appellant's Opening Br. at 10-11 (citing *Strickland*, 466 U.S. at 693-94).

The State attempts to add to Mr. Washington's burden by incorporating requirements imposed on defendants who claim that counsel was ineffective for failing to move to suppress evidence or failing to object to the admission of evidence. Br. of Resp't at 11-12, 16-17. But Mr. Washington's claim is neither of those. Rather, the claim is that, although trial counsel appropriately moved to suppress the seized evidence, he failed to competently prosecute that motion in light of the available evidence—namely, the videos from Trooper Meldrum's in-car cameras. *See* Appellant's Opening Br. at 20-21.

Thus, in order to establish prejudice, Mr. Washington is required only to identify facts in the record that show how his attorney's deficient performance created a probability of error that is "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. Under the explicit holding of *Strickland*, this does *not* require Mr. Washington to "show that counsel's deficient conduct more

likely than not altered the outcome in the case." *Id.* at 693. Because the record in this case establishes a "reasonable probability," *id.* at 694, that counsel's errors affected the outcome of the proceeding, Mr. Washington has made the required showing of prejudice.

ii. The portions of the video that counsel should have presented to the court establish prejudice because they undermine confidence in the court's factual findings, and thus in the outcome of the proceeding.

Contrary to the State's argument, *see* Br. of Resp't at 16, the video evidence at issue directly supports Mr. Washington's claim of illegal seizure. As noted in the opening brief, the relevant question is whether Trooper Meldrum seized the marijuana during a bona fide inventory search. Appellant's Opening Br. at 14-15. The video excerpts identified in the opening brief strongly suggest that Trooper Meldrum seized the marijuana before any inventory search took place. *Id.* at 15-19. As discussed there, the videos show Trooper Meldrum repeatedly discussing with other troopers whether he needed a warrant to seize the marijuana, what warrant exceptions might apply, and whether he could get consent to search the car. Appellant's Opening Br. at 16-18. Only after Trooper Meldrum had seized the marijuana did he ask another officer to "start a tow." *See id.* at 17. Then, nearly ten minutes later,

Trooper Pearson conducted the inventory alone, without any involvement by Trooper Meldrum. *See id.* at 17-18.

The State asserts that Mr. Washington's claim "rests on the argument that Trooper Meldrum could not have been conducting an inventory pursuant to impound because that was done by Trooper Pearson." Br. of Resp't at 14. This is incorrect. As the State notes, "[n]othing precludes the officers from working together as a team and dividing up the different aspects of the inventory process." *Id.* at 14. Had Trooper Meldrum actually participated with Trooper Pearson in taking an inventory of the car, the fact that two troopers had completed the inventory instead of one would not render it invalid.

The problem here, however, is that the evidence shows that Trooper Meldrum was not involved in the inventory process at all. He seized the marijuana, then asked another trooper to start the impound process, and then remained in his car while Trooper Pearson conducted the inventory search alone ten minutes later.[2]

[2] Notably, the inventory form as filed shows that there were keys in the car, but does not record the presence or seizure of a cell phone, cell phone charger, wallet, or marijuana. Ex. 21. In other words, the inventory form does not list any of the items, other than possibly Mr. Washington's keys, that Trooper Meldrum removed from the car. This further suggests that Trooper Meldrum seized the marijuana prior to the inventory search, not as part of it.

Thus, Mr. Washington's claim is not that Trooper Pearson's involvement inherently precluded Trooper Meldrum from participating in the inventory search. Rather, it is that the video evidence at least strongly suggests that Trooper Pearson did the inventory *alone*, without Trooper Meldrum's assistance. If Trooper Meldrum was not involved in the inventory process, then his seizure of the marijuana also was not part of that inventory process, and therefore did not occur during a valid inventory search.

Trial counsel's failure to bring any of this evidence to the court's attention directly undermines confidence in the accuracy of the court's subsequent finding that Trooper Meldrum seized the marijuana during a lawful inventory search. Because that finding underpinned the court's denial of Mr. Washington's motion to suppress, there is a "reasonable probability," *Strickland*, 466 U.S. at 694, that the outcome of the proceeding would have been different but for counsel's unprofessional errors. Mr. Washington therefore has met his burden of showing prejudice to establish ineffective assistance of counsel.

2. Mr. Washington may claim ineffective assistance of counsel without challenging the trial court's factual findings.

The State notes that Mr. Washington did not assign error to any of the trial court's factual findings. Br. of Resp't at 9. The State argues

that those findings are now verities on appeal, and because the trial court found that Trooper Meldrum seized the marijuana during a valid inventory search, Mr. Washington may not now argue that the marijuana was seized illegally. *Id.* at 9, 15-16. But, as with the State's earlier argument regarding an appellate court's ability to make factual inquiries into the record, the State here errs by applying a well-known principle of appellate review outside the context in which it is valid.

Mr. Washington is not claiming that the trial court made any errors during the suppression hearing. Based on the evidence actually argued at the suppression hearing, the trial court reasonably could have found as it did. Mr. Washington does not claim otherwise, and hence, does not claim that the trial court committed any error in entering its findings.

Trial counsel, on the other hand, failed to present evidence that, had it been brought to the court's attention, would have created a reasonable probability of a different outcome in the proceeding. Mr. Washington has therefore argued that he received ineffective assistance of counsel. The right to effective assistance of counsel can be violated, as here, even without any commission of error by the trial court. Thus, Mr. Washington's failure to identify any error made by the trial court in

the suppression hearing does not preclude him from challenging the performance of his counsel during that hearing. *See* RAP 10.3(a)(4) ("The brief of the appellant or petitioner should contain . . . [a] separate concise statement of each error a party contends was made *by the trial court* . . . .") (emphasis added), 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error *or clearly disclosed in the associated issue pertaining thereto.*") (emphasis added).

3. Mr. Washington was entitled to the medical-marijuana defense, and counsel was ineffective for failing to offer the necessary jury instruction.

The State argues that Mr. Washington did not produce sufficient evidence to entitle him to the medical-marijuana affirmative defense. Br. of Resp't at 17-22. But the State's argument is misplaced, because it is based on the weight of the evidence, not its sufficiency. And the State's contention that "[t]he record lacked any evidence whatsoever that would entitle [Mr. Washington] to raise the medical cannabis affirmative defense," *id.* at 21, is simply wrong.

To support his defense, Mr. Washington presented (1) a copy of Latoya Cole's signed medical-marijuana authorization; (2) a copy of the signed contract showing him as Ms. Cole's designated provider; and (3)

his own testimony regarding Ms. Cole's status as a qualifying patient and his role as her designated provider. *See* Appellant's Opening Br. at 23. Based on this evidence, a reasonable finder of fact could have found that Ms. Cole was a qualifying patient, that Mr. Washington was her designated provider, and that he validly possessed the marijuana in that capacity on the day he was arrested. Regardless of whether additional evidence might have strengthened his case, the evidence presented was sufficient to support the affirmative defense. Mr. Washington was therefore entitled to present it.

Moreover, trial counsel argued the affirmative defense as the only defense to the charge of marijuana possession, yet inexplicably failed to offer the instruction required to permit the jury to find in his client's favor. The State claims that "[i]t was a sound tactical decision not to seek the instruction where the record lacked sufficient facts to support the trial court giving such an instruction." Br. of Resp't at 22. The State does not offer any explanation as to how an attorney could make a sound tactical decision to argue only a single defense to a charge and then fail to offer an appropriate jury instruction on that defense.

The claim that trial counsel omitted the instruction as a tactical decision is further belied by the fact that counsel offered an instruction for an affirmative defense to *delivery* of marijuana—with which Mr. Washington was not charged—but not for *possession with intent to deliver* marijuana, with which Mr. Washington *was* charged. *See* Appellant's Opening Br. at 23-24. The only plausible explanation for this combination of facts—failing to offer the necessary jury instruction while instead offering an irrelevant, but similarly worded, instruction—is that trial counsel mistakenly offered the wrong instruction.

Thus, as argued in the opening brief, trial counsel deficiently failed to offer a jury instruction to which Mr. Washington was entitled, and the absence of the instruction caused prejudice. *See* Appellant's Opening Br. at 21-25. Mr. Washington therefore received ineffective assistance of counsel during trial as to the marijuana-possession charge, and his conviction must be reversed.

4. The stipulation regarding Mr. Washington's prior conviction was admitted as evidence and was subject to the court's limiting instruction.

The State argues that by agreeing to enter a stipulation regarding his criminal history, Mr. Washington waived his right to hold the State to its burden of proof as to that element. Br. of Resp't at 22-32. This

argument, however, ignores the plain language of the stipulation itself. The court read the stipulation to the jury as follows:

> Members of the Jury, evidence is going to be presented to you by means of a stipulation. A stipulation is an agreement between the parties as to what the evidence would be if it were presented to you through testimony or exhibits. The facts contained in this stipulation are not in dispute. This evidence is entitled to the same consideration, and it's to be judged as to credibility and weight, and otherwise considered by you insofar as possible in the same way as if a witness were testifying from the stand here.
>
> The stipulation is as follows:
>
> NAAMAN JAMAL WASHINGTON had previously been convicted of a felony, which is a seri[ou]s offense.

RP 320; CP 142-43.

The scope of this stipulation is, by its own terms, clearly limited to admitting the stipulated statement as evidence that was "entitled to the same consideration . . . as if a witness were testifying from the stand." The stipulation expressly left to the jury the responsibility to evaluate the "credibility and weight" of the stipulated evidence, and to consider it "insofar as possible in the same way" as evidence elicited from a witness. Thus, contrary to the State's proposition, this stipulation certainly did not reflect any agreement by the parties that "an element

of the offense was not in dispute and had been conclusively established," Br. of Resp't at 32.

This stipulation therefore cannot reasonably be interpreted as a waiver that relieved the State of its burden of proof as to the prior-conviction element. Instead, the stipulation simply presented evidence for the jury's consideration, in the same way as if Mr. Washington had acknowledged on the stand having been previously convicted of a felony. And this evidence, thus presented, was subject to limiting instructions, just as though it had been presented by a witness or in an exhibit instead of by stipulation. *See Rice v. Janovich*, 109 Wn.2d 48, 63-64, 742 P.2d 1230 (1987) (holding that a jury instruction limiting the use of stipulated evidence was effective).

The State claims that *State v. Wolf*, 134 Wn. App. 196, 139 P.3d 414 (2006), controls this issue. Br. of Resp't at 30. But *Wolf* does not control here, both because it is distinguishable and because the *Wolf* court explicitly limited its holding to exclude cases where, as here, a stipulation is presented to the jury as evidence, instead of in a jury instruction.

In *Wolf*, as here, the defendant stipulated to having previously been convicted of a "serious offense." 134 Wn. App. at 198. The

defendant in *Wolf* "agreed that the fact of the stipulation would be included in a jury instruction," and the stipulation was in fact presented to the jury as part of an instruction, rather than being given as evidence. *Id.* This Court held that the stipulation waived the State's burden to prove that fact, so that even though the State had not presented the stipulation as evidence, the conviction would not be overturned for insufficient proof of the prior conviction. *Id.* at 199.

In *Wolf*, the defendant had expressly agreed to present the stipulation in a jury instruction, and that is how the stipulation in fact was delivered to the jury. 134 Wn. App. at 198. In doing so, the defendant effectively agreed to remove the factual determination from the jury's purview altogether—to present the stipulation as part of the court's instructions on the law, instead of as evidence for the jury to evaluate. In agreeing to remove the issue from the jury, the defendant waived his right to put the State to its burden of proof on that fact.

Mr. Washington's stipulation, on the other hand, was different than that in *Wolf*. The stipulation here was presented as evidence, not as a jury instruction, and provided that the jury was to consider the evidence as though a witness had testified to the fact at issue. RP 320; CP 142-43. Unlike the defendant in *Wolf*, Mr. Washington did not

agree to remove the issue from the jury's consideration—rather, the stipulation simply reflected an agreement as to "what the evidence would be if it were presented . . . through testimony or exhibits." *Id.*

Thus, the stipulation here did not operate as a waiver of Mr. Washington's right to put the State to its burden of proof on every element. Rather, it simply introduced evidence that the State could point to as proof of the prior conviction, while leaving to the jury the ultimate determination of whether the element had been proved beyond a reasonable doubt. Because of this distinction between the stipulation here and the one at issue in *Wolf*, that decision does not control the outcome in this case.[3]

Moreover, *Wolf* explicitly limited its holding to exclude cases where the stipulation was presented to the jury as evidence, instead of in a jury instruction. 134 Wn. App. at 203 ("It is unnecessary for us to decide how a trial court should deal with a written stipulation of the parties to an element of a charged crime. Here, the parties agreed that

[3] *Wolf* could alternately be viewed as simply applying the law-of-the-case doctrine. By agreeing to have the stipulation presented as a jury instruction, the defendant in *Wolf* was bound to accept the jury's decision based on that instruction, even absent supporting evidence in the record. So understood, *Wolf* in fact supports Mr. Washington's claim: because the State failed to object to the limiting instruction in this case, it is now stuck with the result, which is an invalid conviction. *See* Appellant's Opening Br. at 25-33.

the stipulation would be included in a jury instruction."). Even by its own express terms, then, *Wolf* does not apply here.

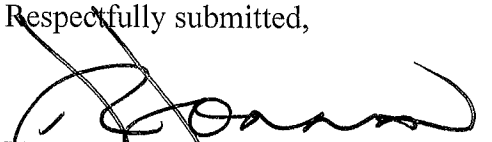
Wolf does not control this case, and the law-of-the-case doctrine dictates that Mr. Washington's conviction for possessing a firearm was invalid for lack of sufficient evidence of a prior conviction. *See* Appellant's Opening Br. at 25-33. This Court should therefore reverse that conviction and remand for dismissal with prejudice.

B. CONCLUSION

For the reasons above and those stated in the opening brief, Mr. Washington asks this Court to reverse his convictions for possession of marijuana and unlawful possession of a firearm.

DATED this 23rd day of December, 2013.

Respectfully submitted,



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

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	)	
Respondent,	)	
	)	NO. 44492-5-II
v.	)	
	)	
NAAMAN WASHINGTON,	)	
	)	
Appellant.	)	

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