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SUPREME COURT NO. 96055-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER COBB,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 49890-1-II
Pierce County No. 16-1-00703-3

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, CHRISTOPHER COBB, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Cobb seeks review of the June 5, 2018, unpublished decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

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

2. If trial counsel could have discovered the evidence before trial with the exercise of due diligence, did Cobb receive ineffective assistance of counsel?

3. This Court should review the issues raised in Cobb's statement of additional grounds for review.

D. STATEMENT OF THE CASE

1. Trial Testimony

The Pierce County Sheriff's Department relied on a series of controlled buys to obtain a search warrant for a Dodge Charger driven by Christopher Cobb. 6RP[1] 92-93. On February 16, 2016, Cobb was arrested when law enforcement executed the search warrant. 6RP 63-65. Deputy Kory Shaffer, the lead investigating officer, testified that he was conducting surveillance on Cobb and had seen him that morning coming out of an apartment complex carrying a small dark backpack. 6RP 65-66. Cobb placed the backpack in the trunk of a Chevy Impala and drove the car out of the parking lot. 6RP 66. Shaffer followed Cobb to multiple parking lots, where Cobb had brief interactions with people who approached the driver's side of his car and then walked away. 6RP 67-68.

The surveillance officers followed Cobb in the Impala to an apartment complex and lost sight of him for a time. They later saw him leaving that complex in the Charger. 6RP 69. Shaffer had seen Cobb using the Charger at some point in the days prior to obtaining the search warrant. Shaffer said that on that occasion he saw Cobb place a brown

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

backpack in the trunk of the Charger, retrieve something from the back seat, and then drive off. 6RP 94-95.

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

Police found a semi-automatic handgun, a wallet, a cell phone, and $6,193 in cash on Cobb's person. 6RP 71, 118. There were no controlled substances on Cobb's person. 6RP 129. In the rear passenger side seat of the Charger deputies found a camouflage backpack containing blue tape, latex gloves, a Ziploc baggie of brown sugar, a working digital scale with apparent heroin residue, a baggie with 76-78 grams of heroin, a baggie with 45 grams of methamphetamine, a plastic cup with white residue, a

bottle of caffeine cut, a blender with apparent heroin residue, assorted baggies, and a partial box of .45 ammunition. 6RP 77-79, 90-91, 170-71, 180.

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

2. Motion for New Trial

Prior to trial, the State moved to exclude reference to "other suspect" evidence, including evidence pertaining to Lamontez Patton, who was contacted in the same parking lot at the same time as Cobb. The State argued that Patton was associated with a separate vehicle from the one Cobb was driving, and the State was not seeking to admit any evidence found in Patton's vehicle. CP 3-4; 3RP 9-10. Defense counsel responded that she had no intention of offering other suspect evidence, and the court granted the State's motion. 3RP 10.

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

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

After the jury returned its verdicts, the defense moved for a new trial. CP 178-81. Counsel argued that the items found in the backpack during deliberations, particularly the casino card in Patton's name, could have been helpful to the defense. CP 179. Counsel argued that the connection of Patton to the backpack where the evidence was found was significant. 8RP 299. The motions in limine had specifically addressed

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

The court denied Cobb's motion for a new trial. It stated that it was arguable whether the evidence could not have been discovered before trial with reasonable diligence, since the backpack was in police custody. The fact that the backpack was not previously examined indicated sloppy police work. 8RP 302. The court concluded that Cobb had not shown the late discovery of the evidence materially affected a substantial right, however. The Court believed the evidence showed that Cobb was monitored by law enforcement, who followed him to the scene of the arrest and had eyes on him the entire time. In addition, Patton was not in the vehicle with Cobb, there was no indication the backpack was thrown into the vehicle, and Cobb did not present an unwitting possession defense. 8RP 303. The court concluded that the additional evidence connecting Patton to the backpack did not affect the defense. *Id*.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER DENIAL OF COBB'S MOTION FOR A NEW TRIAL VIOLATED HIS RIGHT TO PRESENT A COMPLETE DEFENSE IS PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION THIS COURT SHOULD ADDRESS.

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

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

> (a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
> (2) Misconduct of the prosecution or jury;
> (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
> (4) Accident or surprise;

> (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
> (6) Error of law occurring at the trial and objected to at the time by the defendant;
> (7) That the verdict or decision is contrary to law and the evidence;
> (8) That substantial justice has not been done.

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

After the verdicts and before sentencing, Cobb moved for a new trial citing CrR 7.5(a)(2), (3), (4), and (5). He noted that Patton's casino card was found under highly unusual circumstances. Although the evidence discovered during deliberations was not prejudicial to the defense, it would have changed the entire defense strategy had it been disclosed sooner. CP 180. The trial court denied Cobb's motion, concluding that no substantial right of the defendant was materially affected. 8RP 302-03. The Court of Appeals affirmed, holding that Cobb waived his grounds for a new trial by failing to object to the jury's consideration of the evidence found in the backpack until after a verdict

was reached. It indicated the defense could have moved to reopen its case and present its other suspect defense before a verdict was entered. Opinion, at 6.

As defense counsel argued in the motion for new trial, the evidence discovered by the jury was not itself harmful to the defense, and it was not in the defense interest to object to the jury's consideration of that evidence. In fact, the evidence could have changed the entire defense strategy, but the circumstances under which it was discovered placed the defense at a disadvantage. While the Court of Appeals suggests that a continuance could have been granted before the verdict, it does not address how taking the case back from the jury after it had already heard argument so that the defense could offer another theory of the case would remove the prejudice from this surprise discovery of evidence. Opinion, at 6. Cobb's right to present a complete defense is a substantial right, and the circumstances under which Patton's casino card was discovered and considered by the jury materially affected that right. The trial court abused its discretion in denying the motion for new trial.

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

It is appropriate for the court to grant a new trial on the basis of newly discovered evidence when the evidence (1) will probably change

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

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

The newly discovered evidence is also material to the element of possession. Because Cobb was not in actual possession of the drugs, the jury had to determine whether the circumstances established that Cobb had

dominion and control. CP 158; 7RP 250. Patton's association with the backpack in which the drugs were found, when Patton was standing right next to the backpack at the time of his arrest, is material to the determination of possession.

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

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

b. Surprise justified a new trial.

While there is very little case law addressing a motion for new trial based on a claim of surprise, Washington courts have identified three

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

Certainly the material evidence discovered by the jury during deliberations was a surprise to both parties and the court. 7RP 286-87. This surprise was prejudicial in that the defense was unaware of the additional items in the backpack prior to and during trial and thus unable to rely on them in presenting its case. The defense would have taken a different stance on the State's motion to exclude other suspect evidence regarding Patton if Patton's connection to the backpack had been disclosed.

Next, the court was made aware of the surprise at the same time as the parties, but continuance was not an appropriate remedy due to the timing of the discovery. *Id*. The remaining question is whether ordinary

prudence could have guarded against the surprise, a factor which overlaps with the due diligence factor of a newly discovered evidence claim. As addressed above, the police and prosecution failed to discover the items in the backpack while it was in police custody, and the items were not provided to the defense in discovery. Cobb should not be denied a new trial based on lack of diligence by the State.

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

Courts look at three factors in determining whether a trial irregularity justifies a new trial: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether it could be cured by an instruction. *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853, 858 (2011) (Serious irregularity for witness to vouch for victim's credibility, but improper statement was cumulative of other evidence and court gave curative instruction, thus trial court did not abuse discretion in denying new trial motion).

As discussed above, the late discovery of the items in the backpack resulted in the jury considering evidence the defense did not have the ability to address. While the evidence was not prejudicial to the defense, the lost opportunity to rely on that evidence as part of the defense strategy was. This impact on Cobb's right to present a defense makes the

irregularity serious. In addition, the items found in the backpack were not cumulative of any other evidence at trial. Finally, this error could not be cured by an instruction from the court. The court responded to the jury's question by informing it that the items were part of the evidence they could consider. But the court could not, through instructions, present further evidence about who Patton was or why he was relevant to the defense.

Cobb was unable to present Patton as another suspect because the evidence connecting Patton to the backpack in which the drugs were found was not discovered until the jury was in deliberation. Cobb's right to present a complete defense was materially affected, and a new trial was justified based on newly discovered evidence, surprise, and irregularity in the proceedings. This Court should grant review and remand for a new trial. RAP 13.4(b)(3).

2. WHETHER TRIAL COUNSEL'S FAILURE TO DISCOVER THE EVIDENCE BEFORE TRIAL DENIED COBB EFFECTIVE ASSISTANCE OF COUNSEL PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION THIS COURT SHOULD ADDRESS.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229,

743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied,* 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

If Patton's connection to the backpack went undiscovered due to defense counsel's lack of diligence, there was no legitimate reason for trial counsel not to examine the backpack prior to trial. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it

constitutes ineffective assistance of counsel. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

The Court of Appeals concluded that Cobb cannot establish he was prejudiced by counsel's error because there was sufficient evidence that Cobb was in constructive possession of the backpack. Opinion, at 7-8. To establish ineffective assistance of counsel, however, Cobb need only show that counsel's error is sufficient to undermine confidence in the outcome of the case. The record here establishes prejudice.

First, the State's evidence regarding possession was not without issues. Although Cobb was being monitored by law enforcement, surveillance lost sight of Cobb for a time. 6RP 69. There was no testimony describing Cobb arriving at the location where the arrest occurred and no testimony about how and when Patton made contact with Cobb. 6RP 148. While there was testimony that Cobb had been seen with a dark or brown or camouflage backpack, there was no testimony identifying the backpack in which the drugs were found as the one Cobb had been seen carrying. And no one testified to seeing Cobb place a backpack in the passenger compartment of the Charger, where the backpack with the drugs was found.

Moreover, the circumstances would support a defense argument that Patton put the backpack in the car. Patton was standing outside the

passenger side of the Charger when police approached, right next to where the backpack was located. 6RP 115-16, 170-71. No one noticed whether the rear passenger window was open. 6RP 127, 135. Patton was in a position to hear law enforcement announce their presence and intent, and he was in a position to drop the backpack inside the vehicle. 6RP 116, 149. With evidence that Patton's casino card was found in the backpack, the defense could have made the argument that Patton possessed the drugs in the backpack, not Cobb.

Cobb was prejudiced by counsel's failure to discover Patton's connection to the backpack prior to trial. It was this error which cost Cobb the opportunity to present Patton as another suspect in the case. If Patton's casino card had been discovered prior to trial, there would have been no basis to grant the State's motion to exclude other suspect evidence regarding Patton. Patton would have been identified at trial as the man standing right next to the backpack containing controlled substances at the time of the arrest. There is a reasonable probability that evidence of Patton's connection to the crime would have raised a reasonable doubt as to Cobb's guilt, and the outcome of the trial would have been different. This Court should grant review under RAP 13.4(b)(3) and remand for a new trial.

3. THIS COURT SHOULD REVIEW ISSUES RAISED IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

Cobb raised several arguments in his statement of additional grounds for review, including the following:

1. The warrant was based on stale information and thus failed to establish probable cause.

2. The State failed to establish actual or constructive possession of the controlled substances, because Cobb's passing control of the vehicle in which he was arrested was insufficient to establish dominion and control, relying on *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Cobb's convictions and remand for a new trial.

DATED this 5th day of JULY, 2018.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Christopher Cobb,* Court of Appeals Cause No. 49890-1-II, as follows:

Christopher Cobb/DOC#892844
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Catherine E. Glinski
Done in Manchester, WA
July 5, 2018

Filed
Washington State
Court of Appeals
Division Two

June 5, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER LEE COBB, Appellant.	No. 49890-1-II UNPUBLISHED OPINION

BJORGEN, J. — A jury returned verdicts finding Christopher Lee Cobb guilty of two counts of unlawful possession of a controlled substance with intent to deliver and first degree unlawful possession of a firearm. Cobb appeals, asserting that (1) the trial court abused its discretion by denying his CrR 7.5 motion for a new trial based on the jury finding previously undiscovered evidence during its deliberations and, alternatively, (2) his defense counsel was ineffective for failing to discover the evidence before trial. In his statement of additional grounds (SAG), Cobb argues that the trial court erred by failing to suppress evidence based on a search warrant that he contends lacked probable cause in support. We affirm.

FACTS

On February 9, 2016, the Pierce County Sheriff's Department obtained a warrant to search Cobb and his 2016 Chevrolet Impala for evidence of illegal drug activity. On February 13, the sheriff's department obtained a second warrant to search Cobb and his 2014 Dodge Charger.

On February 16, Deputy Kory Shaffer saw Cobb leave an apartment and place a small dark backpack in the trunk of his Impala. Shaffer then saw Cobb drive to multiple parking lots

and have brief interactions with people who approached his vehicle. Based on his training and experience, Shaffer believed these short interactions were consistent with illegal drug transactions. Shaffer lost sight of Cobb and the Impala after Cobb drove to a parking lot in an apartment complex. Officers later saw Cobb leaving the parking lot in the Charger. Officers followed Cobb to another parking lot and executed the search warrant.

Officers from Special Weapons and Tactics (SWAT) and the Special Investigations Unit (SIU) approached the parked Charger while Cobb was sitting the driver's seat. Another man, identified outside the presence of the jury as Lamontez Patton, was standing outside the passenger door. SWAT officers announced their presence before deploying a flash-bang device to disorient Cobb and Patton. Officers also broke the rear driver's side window and front passenger side window before opening the front driver's side door and removing Cobb from the vehicle and arresting him.

Officers found a Glock .45 semi-automatic handgun and $6,193 in cash on Cobb's person. Officers also found a camouflage backpack on the rear passenger seat of the Charger. Inside of the backpack, officers found latex gloves, assorted baggies, a baggie containing 45 grams of methamphetamine, a baggie containing 76-78 grams of heroin, a baggie containing brown sugar, a digital scale with apparent heroin residue on it, a blender with apparent heroin residue, a plastic cup with white residue, and a partially filled box of .45 ammunition.

After being advised of his *Miranda*[1] rights, Cobb agreed to speak with Shaffer. Cobb told Shaffer that he was not employed, used heroin and methamphetamine, and sold drugs in

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

quantities of "teeners" and "balls"[2] to support his habit. Verbatim Report of Proceedings (VRP) (Volume III) at 73. Cobb also stated that he knew he was prohibited from possessing a firearm but that he carried it for safety because "he has been ripped before." VRP (Volume III) at 73-74. Cobb told Shaffer that he was planning to pick up an ounce of heroin and methamphetamine that day.

The State charged Cobb with two counts of unlawful possession of a controlled substance with intent to deliver and one count of first degree unlawful possession of a firearm. Before trial, Cobb moved to suppress evidence seized during the February 16 arrest and search of his person and vehicle. Cobb's suppression motion asserted that the February 13 search warrant was based on stale probable cause. Following a hearing, the trial court denied Cobb's suppression motion and later entered findings of fact and conclusions of law in support of its ruling.

At trial, witnesses testified consistently with the facts as stated above. Additionally, Pierce County Sheriff's Deputy Tom Olesen testified that officers had attempted to execute a search warrant on Cobb on February 13, three days prior to his February 16 arrest. Deputy Olesen stated that on February 13, three unmarked police vehicles attempted to block the vehicle Cobb was driving. Cobb struck two of the vehicles when he fled. Deputy Olesen was unable to pursue Cobb because his vehicle had been disabled by Cobb's collision with it.

During deliberations, the jury found an empty bag with brown residue and a casino card with Patton's name on it in the front zipper pocket of the camouflage backpack that was admitted as a trial exhibit. The jury submitted a question asking whether they were to consider those

[2] Shaffer testified at trial that a "teener" means "one sixteenth of an ounce" and that a "ball" or "8-ball" means "an eighth of an ounce." VRP (Volume III) at 73.

items as evidence in the case. The State and defense counsel agreed that the jury could consider those items as evidence. The trial court submitted a response to the jury's question stating, "The exhibit is being marked as 49(a), part of the admitted exhibit." Clerk's Papers (CP) at 144. The jury thereafter returned verdicts finding Cobb guilty of the charged offenses. The jury also returned special verdicts finding that Cobb was armed with a firearm during the commission of his two counts of unlawful possession of a controlled substance with intent to deliver.

Before sentencing, Cobb filed a CrR 7.5 motion for a new trial based on the jury finding previously undiscovered evidence in the backpack during its deliberations, which motion the trial court denied. Cobb appeals.

ANALYSIS

I. MOTION FOR NEW TRIAL

Cobb first contends that the trial court abused its discretion by denying his CrR 7.5 motion for a new trial. We disagree.

CrR 7.5 governs motions for a new trial and provides in relevant part:

> (a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> . . . .
>
> (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
>
> (4) Accident or surprise;
>
> (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial.

A new trial in a criminal proceeding "is necessitated only when the defendant 'has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). The mere possibility of prejudice is insufficient to warrant a new trial. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

We will not disturb a trial court's ruling on a motion for a new trial absent "'clear abuse of discretion.'" *State v. McKenzie*, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006) (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)). "An abuse of discretion will be found 'only when no reasonable judge would have reached the same conclusion.'" *McKenzie*, 157 Wn.2d at 52 (internal quotation marks omitted) (quoting *Bourgeois*, 133 Wn.2d at 406). As an initial matter, the State argues that Cobb waived his contentions with the jury's consideration of previously undiscovered evidence found in the backpack by failing to object until after it had reached its verdicts. We agree with the State.

Our Supreme Court has held that a "motion for a new trial is not a substitute for raising a timely objection that could have completely cured the error." *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016). "Indeed, the failure to raise a timely objection strongly indicates that the party did not perceive any prejudicial error until after receiving an unfavorable verdict." *Jones*, 185 Wn.2d at 426-27.

Cobb contends that the purported error in the jury finding previously undiscovered evidence prejudiced his right to present a complete defense and to a fair trial because, had defense counsel known that Patton's casino card was contained in the backpack, counsel could have presented the defense that another suspect had possessed the backpack found in the

backseat of Cobb's vehicle. However, Cobb could have sought remedial measures short of a new trial upon his discovery that Patton's casino card was contained in the backpack. For example, Cobb could have sought a continuance to reevaluate his trial strategy and could have moved to reopen the case to present additional evidence concerning possession of the backpack at issue.

It is well established that a trial court has discretion to allow a party to reopen its case to present additional evidence. *Estes v. Hopp*, 73 Wn.2d 263, 270-71, 438 P.2d 205 (1968); *State v. Miles*, 168 Wash. 654, 13 P.2d 48 (1932); *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Had Cobb been granted a motion to reopen the case, he could have presented a defense that another suspect had possessed the backpack at issue and thereby cured the prejudice he had claimed for the first time in his motion for a new trial. Instead, Cobb declined to raise any objection regarding the previously undiscovered evidence until after the jury returned its adverse verdicts. By doing so, he has waived his grounds for a new trial under CrR 7.5. *Jones*, 185 Wn.2d at 426-27.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Cobb argues that his defense counsel was ineffective for failing to discover Patton's casino card before trial. On this record, we disagree.

To demonstrate ineffective assistance of counsel, Cobb must show both (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We need "not address both prongs of the ineffective assistance test if the defendant's showing on one prong is insufficient." *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Cobb contends that he was prejudiced by defense counsel's failure to discover the casino card because "[t]here is a reasonable probability that evidence of Patton's connection to the crime would have raised a reasonable doubt as to Cobb's guilt." Br. of Appellant at 20. However, the presence of Patton's casino card in the backpack, alone, did not undermine the evidence showing Cobb's constructive possession of the backpack and the items contained therein.

Constructive possession may be established by evidence that the defendant had dominion and control over an item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control can be over "either the drugs or the premises on which the drugs were found." *State v. Callahan*, 77 Wn.2d 27, 30-31, 459 P.2d 400 (1969). Dominion and control need not be exclusive to establish constructive possession, but close proximity alone is insufficient; other facts must enable the trier of fact to infer dominion and control. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Here, the backpack and items in it were located on the backseat of the Charger Cobb was driving. Facts apart from close proximity tended to show Cobb's dominion and control over the backpack. Shaffer observed Cobb possess a similar backpack while engaged in suspected illegal drug transactions. Additionally, the backpack contained a partially-filled box of .45 ammunition, and a Glock .45 handgun was found on Cobb's person. Cobb also admitted to selling the same type of narcotics found in the backpack and that he was planning to obtain more of those same narcotics on the day of his arrest. Evidence that another person's casino card was contained in

the backpack does not undermine this evidence of Cobb's dominion and control over the backpack. Accordingly, Cobb fails to make the necessary showing of prejudice in support of his ineffective assistance of counsel claim.

To the extent that Cobb is asserting Patton's connection to the backpack could have resulted in the discovery of additional evidence raising a reasonable doubt as to his guilt if discovered before trial, such assertion is unsupported by the record before us. Although defense counsel was unaware of the casino card contained in the backpack, the record shows that counsel was aware of Patton's presence near the Charger when Cobb was arrested, had spoken with him, and declined to call him as a witness. As such, Cobb's claim that he was prejudiced by defense counsel's failure to discover the casino card before trial is speculative and lacks support in the record. Accordingly, we hold that Cobb fails to demonstrate ineffective assistance of counsel.

III. SAG/MOTION TO SUPPRESS

In his SAG, Cobb asserts that the trial court erred by failing to grant his motion to suppress evidence seized pursuant to the February 13 search warrant. Specifically, Cobb contends that (1) the February 13 search warrant was based on stale probable cause and (2) the affidavit in support of the February 13 search warrant failed to establish a nexus between the alleged criminal activity and the Charger. On both contentions, we disagree.

A search warrant may issue only upon a determination of probable cause "based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists as a matter of law if the affidavit in support of the warrant contains sufficient facts and circumstances to establish a reasonable inference that the

defendant probably engaged in illegal activity and that evidence of that illegal activity is at the location to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Thus, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

We generally review the validity of a search warrant for abuse of discretion, giving great deference to the issuing judge or magistrate. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, in reviewing a trial court's determination of probable cause at a suppression hearing, we review the trial court's conclusions of law de novo. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 (2015). Under our de novo review, we determine "whether the qualifying information as a whole amounts to probable cause." *Dunn*, 186 Wn. App. at 896. This review is limited to the four corners of the document supporting probable cause. *Neth*, 165 Wn.2d at 182. Facts that, standing alone, do not support probable cause can support probable cause when viewed together with other facts. *Cole*, 128 Wn.2d at 286. We review a search warrant's supporting affidavit "'in a commonsense manner, rather than hypertechnically'" and resolve any doubts in favor of the warrant. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

A. Staleness

Cobb first contends that the trial court erred in denying his suppression motion because the information presented in the probable cause affidavit was stale. We disagree.

Whether information contained within a search warrant affidavit is stale depends on the circumstances of each case. *Lyons*, 174 Wn.2d at 361. Some length of time naturally passes

between observations of suspected criminal activity and the presentation of an affidavit to an issuing magistrate or judge. *Lyons*, 174 Wn.2d at 360. However, when the passage of time is so prolonged that it is no longer probable that a search will uncover evidence of criminal activity, the information underlying the affidavit is deemed stale. *Lyons*, 174 Wn.2d at 360-61.

Cobb asserts that the information underlying the affidavit in support of the February 13 search warrant was stale because it contains the following language, which was identical to that in the affidavit in support of the February 9 search warrant:

> Within the past seventy two hours the C/I [(Confidential Informant)], while under constant surveillance of the Pierce County Sheriff's Department Special Investigations Unit, has made a controlled buy of methamphetamine from [Cobb]. Prior to the buy the C/I was searched. No money or narcotics were located. The C/I called [Cobb] on his cellular telephone and they agreed to meet in a public parking lot in Pierce County.

CP at 27. Cobb argues that this information, as it pertains to the February 13 search warrant, was stale because it did not provide sufficient information from which the issuing magistrate could determine whether the "past seventy two hours" was in reference to the date of the second search warrant application or merely reiterated the facts supporting the issuance of the first search warrant. In resolving this argument at the suppression hearing, the trial court concluded as follows:

> Chronologically, the description of the controlled buy in the February 13 search warrant complaint is placed after [a description of the February 13] encounter with law enforcement. The encounter with law enforcement occurred after Deputy Shaffer obtained the February 9 search warrant. In addition, the February 13 search warrant complaint contains additional information not included in the February 9 affidavit, regarding the fact that defendant retrieved the methamphetamine from the brown back pack before selling it to the CI. A common sense reading of the search warrant complaints would indicate that the controlled buy, which was said to have occurred within the last 72 hours, is not the same controlled buy referenced in the February 9 complaint.

CP at 105. We agree with the trial court's conclusion.

A commonsense reading of the February 13 search warrant affidavit indicates that the controlled buy described therein was within 72 hours of that warrant's application, and not the same controlled buy described in the application for the February 9 search warrant. As the trial court recognized, although using the same language as in the previous search warrant affidavit, the February 13 reference to a controlled buy occurring within the past 72 hours follows a description of the facts underlying the attempted service of the February 9 search warrant. When read in a commonsense manner and in context with the otherwise chronological description of facts supporting probable cause in the February 13 affidavit, the controlled buy described therein occurred *after* February 9 and, thus, could not be the same controlled buy described in the February 9 search warrant application.

Additionally, the February 13 search warrant affidavit described particular facts regarding the controlled buy not described in the previous affidavit, namely that Cobb had retrieved the suspected methamphetamine from a brown backpack. In short, there was nothing within the four corners of the February 13 search warrant affidavit showing that the controlled buy described therein occurred at any time other than 72 hours before submission of that search warrant application. Accordingly, the trial court properly concluded that the information contained therein was not stale.

B. Nexus

Next, Cobb appears to argue that the February 13 search warrant affidavit failed to establish a nexus between evidence of suspected illegal narcotics activity and the Charger. We disagree.

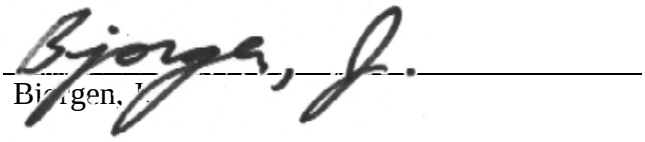
Cobb's argument on this point relies on the search warrant affidavit lacking facts that a controlled buy had occurred while he was in the Charger. However, such facts are not required to establish probable cause. Rather, the affidavit was required only to present sufficient facts to establish a reasonable inference that evidence of Cobb's alleged illegal activity would be found in the Charger. *Thein*, 138 Wn.2d at 140.

Here, the February 13 search warrant affidavit provided the following facts supporting a nexus between Cobb's suspected criminal activity and the Charger. The CI stated that Cobb had retrieved methamphetamines from a brown backpack during the controlled buy that had taken place in the Impala. Sometime after the controlled buy, Shaffer observed Cobb carrying a brown backpack while leaving an apartment where he commonly parked his Impala. Shaffer then saw Cobb look around the parking lot, open the trunk to the Charger, and place the backpack inside. Shaffer saw another individual approach the Charger and talk with Cobb while Cobb retrieved something from the trunk. After the other individual left, Cobb slowly drove the Charger to another location of the parking lot and parked. After Cobb appeared to be using his cell phone, another individual approached the driver's side of the Charger and appeared to make contact with Cobb as Cobb sat in the driver's seat of the vehicle. After the apparent contact, Cobb slowly drove away from the parking lot.

Taken together, and when read in a commonsense manner, the above facts establish a reasonable inference that evidence of Cobb's suspected illegal narcotics activity would be found in the Charger. Accordingly, we affirm the trial court's ruling denying Cobb's motion to

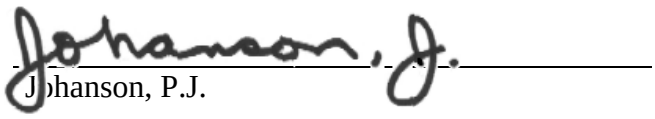
suppress, and we affirm Cobb's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

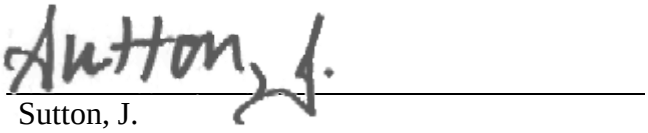


Bjorgen, J.

We concur:



Johanson, P.J.



Sutton, J.

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