

NO. 35243-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAUL D. MAKI,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael Sullivan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence obtained as result of a search where the Affidavit for Search Warrant failed to establish probable cause by failing to set forth facts to establish the veracity of the informant.

2. The trial court erred by failing to rule on the defense motions for new trial.

3. The trial court erred by permitting Maki to be represented by counsel who provided ineffective assistance by failing to properly preserve the issue relating to the veracity of the informant by failing to ensure the court issued a ruling on the motions for new trial.

4. The trial court erred by improperly commenting on the evidence by inferring the air pistol was dangerous and capable of inflicting bodily harm, and by drawing the jury's attention to a trigger lock placed on the pistol.

5. The trial court erred in permitting Maki to be represented by counsel who provided ineffective assistance by failing to properly preserve the issue relating to the trial court's improper comment on the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Affidavit for Search Warrant failed to establish probable cause by failing to set forth facts necessary to establish the veracity

of the informant? Assignment of Error No. 1.

2. Was it error for the trial court to fail to issue a final ruling on the defendant's motions for new trial where the court heard argument on several issues pertaining to the motions for new trial, took the matter under advisement, but failed to issue a ruling on the motions? Assignment of Error No. 2.

3. Whether the trial court erred in permitting Maki to be represented by counsel who provided ineffective assistance by failing to properly preserve the issue relating to the veracity of the informant in the Affidavit for Search Warrant, failed to properly preserve the issue regarding the court's comment on the evidence, and failed to ensure that the court issued a final ruling on the motions for new trial? Assignments of Error No. 3 and 5.

4. Whether the trial court improperly commented on the status of the air pistol as "a weapon or other instrument likely to produce bodily harm[,] " as alleged by the State in Count 1, where the judge interrupted the testimony of Police Officer Arlie Boggs to instruct him to "turn the weapon so it's facing toward the window," asked the deputy prosecutor in the presence of the jury "there's a trigger lock on that device, correct?" and asked the deputy prosecutor in the presence of the jury "[s]o there's no way that device can fire, correct?" Assignment of Error No. 4.

C. STATEMENT OF THE CASE

1. Procedural history:

A jury convicted Paul Maki of two counts of third degree assault. Clerk's Papers [CP] at 35, 37. The State charged Maki in an information filed in the Pacific County Superior Court on April 3, 2006, with third degree assault against Ramiro Lopez-Servin, in violation of RCW 9A.36.031(1)(d),¹

¹RCW 9A.36.031 provides:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

and third degree assault against Ron Davis, a police officer, contrary to RCW 9A.36.031(1)(g). CP at 6-7.

a. **Motion to suppress weapons and ammunition obtained during the search of Maki's residence.**

During the execution of a search warrant of Maki's house on March 29, 2006, law enforcement obtained an air pistol, as well as ammunition and firearms. Defense counsel filed a motion to suppress on June 13, 2006. CP at 8. Defense counsel subsequently obtained a stipulation that the prosecution would seek to introduce only the air pistol at trial. Report of Proceedings [RP] (6.14.06) at 12-16. CP at 10. The Affidavit of Search Warrant , and Return were introduced at the suppression hearing on June 14, 2006. Exhibit A. Appendix A-1 through !-5.

b. **Jury instructions.**

Defense counsel requested an instruction for a lesser included offense

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

in Count 1. 2RP at 138.² The trial court granted an instruction for fourth degree assault in that count. 2RP at 141. CP at 28-29. Counsel did not take exceptions to requested instructions not given or objected to instructions given. 2RP at 146.

c. Verdict.

The jury found Maki guilty of two counts of third degree assault as charged in the information. CP at 35, 37.

d. Motions for new trial.

Counsel for Maki filed a Motion for New Trial on July 14, 2006. CP at 38-40. Maki submitted that he made a potentially exculpatory audio recording of his arrest on March 29 that was not introduced at trial. RP (7.14.06) at 3. Counsel argued that the audiotape demonstrates that there was reasonable doubt as to whether there was an assault on Officer Davis and also pertained to the credibility of the officer. RP (7.14.06) at 3. Counsel argued that the tape falls within CrR 7.5 because Maki's prior counsel "would not even listen to the tape or allow it to even attempt to be entered" and it was therefore "constructively hidden from his use at trial because counsel would not allow it to be entered" RP(7.14.06) at 8.

² 2RP pertains to the Verbatim Report of Proceedings of the trial, which was heard July 5,

Maki also asserted in his motion, *inter alia*, that Lopez-Servin pleaded guilty to a sex offense two days prior to trial, which was not disclosed to defense counsel, and that Lopez-Servin “was operating under some sort of alias.” CP at 40.

Sentencing was continued to July 28. Defense counsel provided a copy of the audiotape recording to the State. RP (7.28.06) at 3. The deputy prosecutor noted that he had not listened to the tape, but had read a transcript of the recording provided by defense counsel. RP (7.28.06) at 3. The audiotape and transcript were entered as Exhibits 1 and 2, respectively. RP (7.28.06) at 7. Appendix B-1 through B-26.

Counsel filed a second motion for new trial and memorandum on July 20, alleging that previous counsel was ineffective for failing to raise the issue of the veracity of an unnamed informant regarding the search warrant issued on March 29. RP (7.28.06) at 11. CP at 41-45, 46-48.

Following a hearing on the motion on July 28, 2006 prior to sentencing, Judge Sullivan stated that he needed to read the transcript of the March 29 audiotape and took the matter under advisement. RP (7.28.06) at 12, 29. To date Judge Sullivan has not issued a ruling on the motions for new trial.

2006.

e. **Sentencing.**

Following argument on the motions for new trial, the court proceeded with sentencing. Judge Sullivan imposed a standard range sentence of five months for Count I and six months for Count II, to be served concurrently. RP (7.28.06) at 28. CP at 64. Maki had no criminal history. RP (7.28.06) at 22. CP at 60.

2. **Substantive facts:**

a. **Alleged Assault of Lopez-Servin**

Ramiro Lopez-Servin testified that in late March, 2006, he was told by his wife that someone had shot at the front door.³ 2RP at 4. Lopez-Servin went into the street and heard someone yelling “I’m going to kill you.” 2RP at 4. Lopez-Servin said he saw the person ride away on a bicycle. 2RP at 5. Lopez-Servin got on one of his children’s bicycles and intercepted the bicyclist approximately three blocks from his house. 2RP at 6. Lopez-Servin identified the bicyclist in court as Paul Maki. 2RP at 9. Lopez-Servin testified that the bicyclist produced an air pistol and shot him with BBs in the head two times and three times in the chest. 2RP at 8. He stated that it “hurt worse than when I cut my finger.” 2RP at 8.

After being shot, Lopez-Servin followed the bicyclist to a house

located on Cedar Street in Raymond, approximately two blocks away from where he was shot. 2RP at 11, 73. He called the police, who subsequently obtained a warrant to enter the house. 2RP at 13, 29, 30. Appendix A-4. After an initial refusal to open the door until he saw a search warrant, the occupant of the house opened the front door and police entered the residence. 2RP at 31, 76. The occupant of the house was identified as Maki. After entry into the house, an officer showed Maki a warrant. 2RP at 32.

During a search of the residence, police obtained a pellet pistol from the back porch. 2RP at 60. Exhibit 1. Exhibit 1 is a .177 Daisey BB gun model 188. 2RP at 68.

Maki denied seeing Lopez-Servin on March 29, stating that he went to bank and liquor store before it closed, and then rode his bicycle home at approximately 8 p.m. 2RP at 88-89, 90. Maki testified that he did not fire the BB pistol the night of March 29. 2RP at 102. He stated that he knew Lopez-Servin because Lopez-Servin was "attempting to sell drugs." 2RP at 103. Lopez-Servin denied selling drugs to Maki. 2RP at 133.

b. Alleged Assault of Ron Davis

Maki was agitated, used profanity, and told police they had no right to be there and to get out of his house. 2RP at 35, 62, 77, 79. Maki testified

Lopez testified through an interpreter.

that he was “scared” and “confused” when he saw the police outside the house. 2RP at 94. Maki stated that police arrived at the house on Cedar Street in Raymond at a little after 9 p.m. 2RP at 90.

Maki was handcuffed while police conducted the search and remained seated on a couch. 2RP at 37, 38, 77. Raymond police officer Charles Gailey testified that while on the couch, Maki kicked Raymond police officer Ron Davis in the groin. 2RP at 40. Raymond police officer Arlie Boggs testified that Maki “was trying to get up and Officer Gailey and Officer Davis was [sic] telling him to sit down, be quiet and calm down.” 2RP at 63. He stated that Maki’s right foot came up and went “in between Mr. Davis’s legs.” 2RP at 63. Davis testified that Maki became upset and got up off the couch and was yelling at another officer. 2RP at 80. Davis stated that he “put him back on the couch” and Maki struck him in the groin with his right foot. 2RP at 80. Maki denied kicking Davis. 2RP at 98, 99.

c. Maki’s testimony regarding the air pistol

Maki testified that he owned the BB pistol obtained by law enforcement on March 29. 2RP at 99. He stated that the pistol does not work correctly and cannot be “rapid fire[d].” 2RP at 101. To fire the pistol, he explained:

[y]ou have to place one BB in the barrel and making sure that

it falls down to the bottom of the barrel and you take a lever that's underneath the barrel and you pull it once and it's all you can and you can fire one BB.

2RP at 101-02.

Timely notice of appeal was filed on August 17, 2006. CP at 74.

This appeal follows.

D. ARGUMENT

1. THE SEARCH WARRANT AFFIDAVIT FAILED TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH.

When the existence of probable cause depends on information supplied by an informant, the two-prong *Aguilar-Spinelli* test must be satisfied. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). An affidavit establishes probable cause to support a search warrant if it sets forth facts sufficient to allow a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110, *rev. denied*, 124 Wn.2d 1029 (1994). Issuance of a warrant is reviewed under the abuse of discretion standard. *Olson*, 73 Wn.App. at 348.

The knowledge prong requires that the basis of the informant's information be established. The credibility prong requires that the reliability of the informant be established. The affidavit must establish both the reliability or credibility of the informant and the basis of the informant's knowledge. *Olson*, at 355. The two prongs of the *Aguilar-Spinelli* test have an independent status and are analytically severable. *Jackson*, 102 Wn.2d at 437.

When the identity of a citizen informant is not revealed to the magistrate, Washington courts require a heightened demonstration of the informant's veracity. *State v. Bauer*, 98 Wn. App. 870, 876, 991 P.2d 668 (2000). This more rigorous test protects against the possibility that the informant is an “anonymous troublemaker” involved in the criminal activity or motivated by self-interest. *Cole*, 128 Wn.2d at 287 (quoting *State v. Ibarra*, 61 Wn. App. 695, 699-700, 812 P.2d 114 (1991)). The affidavit must contain sufficient background facts to support an inference that the anonymous citizen informant is telling the truth. *Bauer*, 98 Wn. App. at 876.

- a. **The statement from the informant contained in the affidavit did not satisfy the reliability requirement of the *Aguilar-Spinelli* test for determining probable cause.**

In the case at bar, the statement from the informant failed to satisfy

the *Aguilar-Spinelli* requirement of reliability. Under the Fourth Amendment, a search warrant may only be issued upon a showing of probable cause.

Washington courts have drawn distinctions between different kinds of informants. In general, the reliability prong is relaxed somewhat where the information comes from a “citizen informant” as opposed to a “professional” police informant who supplies information to the police on a regular or recurring basis. *State v. Chatmon*, 9 Wn. App. 741, 746, 515 P.2d 530 (1973). The lesser burden for citizen informants rests on three grounds:

(1) the report of an identified nonprofessional informant who is a victim or eyewitness of a crime substantially minimizes the danger of casual rumor or irresponsible conjecture which accompanies the report of an anonymous professional informant. . . . (2) an identified citizen informant’s report does not raise the spectre of the “anonymous troublemaker” which is always present in unidentified citizen informant situations, . . . (3) *an identified citizen informant’s report is less likely to be colored by self-interest.*

State v. Riley, 34 Wn. App. 529, 533, 663 P.2d 145 (1983) (emphasis added).

Generally then, for citizen informants there is no requirement to show past reliability. *Riley*, 34 Wn. App. at 533.

Although a lesser standard is applied, there must still be a showing of reliability for citizen informants. “[P]resent credibility is the touchstone. . .”.

State v. Northness, 20 Wn. App. 551, 556, 582 P.2d 546 (1978).

While it is true that the courts draw a distinction between “professional” and “citizen” informers, relaxing somewhat the necessary showing of reliability as to the latter, some such showing is nonetheless necessary [I]t is axiomatic under the *Aguilar-Spinelli* rule that the police must ascertain some information which would reasonably support an inference that the informant is telling the truth.

. . .

To establish the reliability of a citizen informant . . . it is only necessary for the police to interview the informant and ascertain such background facts as would support a reasonable inference that he is “prudent” or credible, *and without motive to falsify*.

Chatmon, 9 Wn.App. at 746, 748 (emphasis added). *Accord*, *State v. Berlin*, 46 Wn. App. 587, 590, 731 P.2d 548 (1987).

The *Northness* court further distinguished between citizen informants whose identification is disclosed in the affidavit as opposed to those who remain anonymous. The court held that the reliability requirement is most relaxed where the informant’s identification is disclosed. *Northness*, 20 Wn. App. at 555-58.

When an informant is unknown to the issuing magistrate, “there exists a concern that the information may be coming from an ‘anonymous troublemaker.’” *Cole*, 128 Wn.2d at 287 (citing *State v. Ibarra*, 61 Wn.App. 695, 699-700, 812 P.2d 114 (1991)). The concern is decreased where

information in the affidavit establishes that the informant is not involved in criminal activity or motivated by self-interest. *Id.* “Consequently, if a citizen informant wishes to remain anonymous, the affidavit must contain background facts to support a reasonable inference that the information is credible and without motive to falsify.” *Cole*, 128 Wn.2d at 287-88 (citing *State v. Wilke*, 55 Wn. App. 470, 474, 778 P.2d 1054 (1989)).

In the present case, the complaining witness, presumably Lopez-Servin, was not identified to magistrate who issued the warrant.

The affidavit states in relevant part:

On March 29, 2006, I received a call at my residence reference an assault with an air pistol of some type in the Riverdale area of Raymond. Upon arrival at the scene I was told by Officer Charles Gailey who was first on scene that the victim was not seriously injured and had chased the suspect to a residence located at 1235 Cedar St. The victim advised the subject had told him he was going to kill him, shot him twice in the chest with what appeared to be an air pistol, and fled on a bike and rode to the residence and entered. When officers arrived they went to the door and knocked. A male individual answered verbally to the name of Paul, and refused entry of Law Enforcement. The residence has been under constant observation since the suspect entered.

Raymond Police Department officers have had contact in the past with an individual known as Paul, at this residence. The victim also indicated the suspects name was Paul.

Therefore I am respectfully requesting a search warrant for a single story white house located at 1235 Cedar St., for the purpose of identifying and arresting the subject within, and to search for any weapons and ammunition associated with this assault.

CP at 44-45. Appendix A-1 though A-2. Exhibit A.

The affidavit at issue lacks any facts at all to support the veracity of the citizen informant. All the magistrate is able to discern from the facts presented are that the informant said that the suspect was going to kill him, shot him twice in the chest with an air pistol, and that the subject then fled on a bike to a residence and entered it. He identified the suspect as “Paul,” and that the suspect answered to the name “Paul” when police arrived at the house. Police kept the house under constant observation “since the suspect entered.” CP at 44-45. Nothing in the affidavit reveals the informant’s name, nor addresses the informant’s background, including any possible criminal associations, standing in the community or possible motives for making a false report to police. *Cole*, 128 Wn.2d at 287-88; *State v. Dobyms*, 55 Wn.App. 609, 618, 779 P.2d 746 (1989). Looking only at the information available to the magistrate, there was insufficient information to establish the veracity of the citizen informant.

b. The evidence seized from Maki’s house must be suppressed.

The affidavit fails to establish probable cause under the *Aguilar-Spinelli* test, and the issuance of the search warrant was an abuse of discretion. The evidence seized as a result of the improper warrant should be

suppressed. *State v. Franklin*, 49 Wn. App. 106, 110, 741 P.2d 83 (1987); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

2. **THE TRIAL COURT JUDGE ERRED BY FAILING TO ISSUE A RULING REGARDING THE MOTIONS FOR NEW TRIAL.**

The trial court erred in failing to rule on the motions for new trial. Despite having heard argument of counsel and despite having taken the motions under advisement, Judge Sullivan made no ruling regarding the existence of the audiotape, which was not introduced at trial, merited a new trial. Moreover, the court did not rule on whether the failure of counsel to challenge the validity of the affidavit supporting the search warrant constituted ineffective assistance, on other issues raised in the motion.

3. **THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE.**

b. **The Washington Constitution prohibits judges from commenting on the evidence.**

Article 4, § 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900); *see also State v. Lane*, 125

Wn.2d 815, 838, 889 P.2d 929 (1995) (quoting *Crotts*). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). When a statement by the court directly or implicitly conveys the court's attitudes toward the merits of the case or the weight to be afforded certain evidence, the statement is an impermissible comment on the evidence. *See Lane*, 125 Wn.2d at 838 (citing *Hansen*, 46 Wn. App. at 300; *State v. Trickel*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977)); *State v. Jacobsen*, 78 Wn.2d 491, 494, 477 P.2d 1 (1970) (improper comment on the evidence where words or actions of court convey opinion as to credibility, weight, or sufficiency).

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *Lane*, 125 Wn.2d at 838. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. *Trickel*, 16 Wn. App. at 25.

- b. **Reversal is mandated because the trial court implicitly commented on the perceived "dangerousness" of the air pistol by drawing the jury's attention to a trigger lock placed on the pistol and by directing a witness to "turn the weapon so it's facing toward the window."**

Where the trial court violates Article 4, § 16 of the Constitution, “a reviewing court will presume the comments were prejudicial and the burden is on the State to demonstrate that no prejudice resulted.” *State v. Eaker*, 113 Wn. App. 111, 119, 53 P.3d 37 (2002, *review denied*, 149 Wn.2d 1003 (2003) (citing *Lane*, 125 Wn.2d 838).

Even if the evidence commented upon is undisputed, or ‘overwhelming,’ a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 283 P.2d 254 (1963).

Here, Judge Sullivan interrupted the testimony of Officer Arlie Boggs, who was describing the handling of the air pistol after it was discovered at Maki’s house, and told him: “Would you please turn the weapon so it’s facing toward the window.” 2RP at 60.

During Maki’s testimony, counsel asked Maki if he recognized Exhibit 1—the air pistol—and asked if worked properly. 2RP at 99. The court again interrupted testimony, this time asking: “I just want—I just want to just—there’s a trigger lock on that device; correct?” 2RP at 100. Counsel for the State answered in the affirmative. Judge Sullivan continued his inquiry, asking, “[o]kay. So there’s no way that device can fire; correct?” The State’s counsel said that the pistol cannot be fired, and Judge Sullivan

stated: “[o]kay. I just want that to be on the record so everybody knows that. 2RP at 100.

Whether the air pistol was operable was not at issue; Maki testified that the air pistol could fire, although not in the “rapid fire” manner alleged by the State. The “dangerousness” of the air pistol, however, reflected on its ability to inflict “bodily harm to another person by means of a weapon or other instrument likely to produce bodily harm,” as alleged by the State in Count 1. Instructions 12, 13. CP at 26, 27.

A judge comments on the evidence if statements or conduct convey the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. *State v. Zimmerman*, 130 Wn. App. 170, 174, 180, 121 P.3d 1216 (2005).

"A statement by the court constitutes a comment on the evidence if the court's attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)).

Here, the State cannot establish there was no prejudice. Rather, Judge Sullivan’s questions clearly expressed his opinion regarding his perception of the dangerousness of the air pistol and its status as a weapon or instrument

likely to inflict bodily harm. Based on the foregoing, reversal of Count 1 is merited.

5. **MAKI'S TRIAL COUNSEL AND SENTENCING COUNSEL FAILED HIM IN A VARIETY OF WAYS.**

a. **A criminal defendant is guaranteed the effective assistance of counsel.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. Similarly, Article I, § 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. art. I, § 22.

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson* 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Under *Strickland*, a defendant must satisfy a two-pronged test to sustain a claim of ineffective assistance of counsel: first, a defendant must show that counsel’s performance was deficient, and second, a defendant must show that the deficient performance prejudiced the defense. *Id.*

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.2d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, 107 Wn. App. at 275.

b. Sentencing counsel’s representation fell below an objective standard of reasonableness when he failed to ensure the trial court ruled on the motions for new trial.

The first prong of the *Strickland* test requires “a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Defense counsel’s post-trial representation of Maki fell below an objective standard of reasonableness based on his failure to seek a ruling on the numerous issues raised in the two motions for new trial.

No competent attorney would raise numerous meritorious issues in order to obtain a new trial, argue the motions, and then fail to ensure the trial court issued a ruling on the motions.

c. Maki was prejudiced as a result of his trial counsel’s failure to properly preserve the issue relating to the veracity of the informant in the affidavit for search warrant.

As noted *supra*, a criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *see State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. *State v. Doogan*, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this Court find that trial counsel waived or invited the error claimed and argued in the preceding sections of this brief by failing to properly argue the veracity of the information in the Affidavit for Search Warrant, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to present the argument set forth in Section 1, *supra*. And had counsel done so, the motion to suppress would have been granted under the law set forth therein.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to properly argue that the veracity prong of *Aguilar-Spinelli* was not satisfied by the information in the Affidavit for Search Warrant, the motion to suppress would have been granted for the reasons articulated in the preceding section.

Trial counsel's performance was thus deficient, which was highly prejudicial to Maki, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of both convictions. There was a reasonable probability that, but for counsel's error, the results of the trial would have been different.

d. **Maki was prejudiced as a result of his trial counsel's failure to properly preserve the issue relating to the trial court's improper comment on the evidence.**

The record does not reveal any tactical or strategic reason why trial counsel would have failed to present the argument set forth in Section 3, *supra*.

As previously noted, to establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *Leavitt*, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to properly argue his objection to the court's impermissible comment on the evidence or to make a motion relating to the objection when questioned by the court, the motion would have been granted for the reasons articulated in the preceding section.

Counsel's performance was thus deficient, which was highly prejudicial to Maki, with the result that he was deprived of his constitutional

right to effective assistance of counsel, and is entitled to reversal of his convictions.

F. CONCLUSION

For the foregoing reasons, Paul Maki respectfully requests that this Court reverse and dismiss with prejudice his convictions.

DATED: February 8, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Paul Maki

A

AFFIDAVIT FOR SEARCH WARRANT

STATE OF WASHINGTON

SS.

PACIFIC COUNTY

Comes now Chief Kenneth J. Boyes who being duly sworn, upon oath, complains, deposes and says:

I have been a law enforcement officer for the past twelve years. During this time I have completed the Basic Law Enforcement Academy, where I was taught crime scene, assault and sexual assault investigations. I have received ongoing in-service training including but not limited to Interview and Interrogations, Homicide Investigation, Crime Scene Analysis, Child and Adult Sexual Assault, and numerous other trainings related to criminal investigations and the recovery of evidence from crime scenes and other locations.

On March 29th, 2006, I received a call at my residence reference an assault with an air pistol of some type in the Riverdale area of Raymond. Upon arrival at the scene I was told by Officer Charles Gailey who was first on scene that the victim was not seriously injured and had chased the suspect to a residence located at 1235 Cedar St. The victim advised the subject had told him he was going to kill him, shot him twice in the chest with what appeared to be an air pistol, and fled on a bike and rode to the residence and entered. When officers arrived they went to the door and knocked. A male individual answered verbally, ^{470 the name of Paul} and refused entry to Law Enforcement. The residence has been under constant observation since the suspect entered.

Raymond Police Department officers have had contact in the past with an individual known as Paul, at this residence. The victim also indicated the suspects name was Paul.

Therefore I am respectfully requesting a search warrant for a single story white house located at 1235 Cedar St., for the purpose of identifying and arresting the subject within, and to search for any weapons and ammunition associated with this assault.


Chief Kenneth J. Boyes / 2R01

Sworn before me March
29, 2006 @ 10:31 p.m.

Judge

SUPERIOR CT. PACIFIC CO. WA		
NO. 06-1-00052-6		
IDENT.	EXHIB.	
P	A	A
State vs Maki		
DATE 6/14/06		

SUBSCRIBED AND SWORN to before me this 29th day of March, 2006.

10:31 a.m.

M. J. Sullivan

Judge / ~~Commissioner~~, state of Washington,
Superior Court for Pacific Co.

AFFIDAVIT FOR SEARCH WARRANT

STATE OF WASHINGTON }
PACIFIC COUNTY } SS.

COMES NOW Ken J. Boyer, Chief
(name of person requesting warrant)

Who being first duly sworn, upon oath, complains, deposes and says:

That he has probable cause to believe and in fact does believe that evidence of a crime, or contraband, the fruits of crime, or things otherwise criminally possessed or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, particularly described as follows:

(SPECIFY ITEMS SOUGHT)
Weapons (Firearms) and ammunition

and all related records, documents, and/or papers that are located in, on, or about certain premises, vehicle(s) and/or person(s) within Pacific County, Washington, designated and described as follows:

(SPECIFY LOCATION, VEHICLE(S) AND/ OR PERSON(S) TO BE SEARCHED)
1235 Cedar St. and detached garage at Rear of Residence

That affiant's belief is based upon the facts and circumstances as set forth in the numbered affidavits, written or typed statements, and/or attachments hereto, which are incorporated herein by this reference.

[Signature]
(Signature of person requesting warrant)

SUBSCRIBED AND SWORN to before me this 29 day of March 2006 10:31pm

[Signature]
JUDGE/COMMISSIONER, Pacific County Court

AFFIDAVIT FOR SEARCH WARRANT

Page 3 of 4 Pages

Page 3 of 4

In the State of Washington

Pacific County Superior Court

BEFORE Michael J. Sullivan, JUDGE/COMMISSIONER

STATE OF WASHINGTON

PACIFIC COUNTY

} SS.

SEARCH WARRANT

STATE OF WASHINGTON: TO ANY PEACE OFFICER IN PACIFIC COUNTY:

WHEREAS, upon the sworn affidavit made and filed in the above entitled court, the undersigned judge finds that there is probable cause to believe that evidence of a crime, contraband, the fruits of crime, things otherwise criminally possessed, weapons and/or other things which have facilitated a crime or which are likely to facilitate a crime in the near future, located in, on, or about certain premises, vehicle(s) or person(s) within Pacific County, Washington, hereinafter designated and described;

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, you are hereby commanded with the necessary and proper assistance to search for and seize the following property: (SPECIFY ITEMS SOUGHT)

Weapons (Firearms) and Ammunition.

and all related records, documents, and/or papers that are located in, on, or about the premises, vehicle(s), and/or person(s) within Pacific County, Washington, designated and described as follows:

(SPECIFY LOCATION, VEHICLE(S), AND OR PERSON(S) TO BE SEARCHED)

1235 Cedar St and detached garage
at rear of Residence.

Said property is to be safely kept and the return of this warrant shall be made within ten (10) days following issuance to the undersigned judge, showing all acts and things done thereunder, with a particular statement of all property seized. A copy of this warrant shall be served upon the person(s) found in actual or constructive possession of such property, and if no person is found in actual or constructive possession thereof, a copy of this warrant shall be conspicuously posted upon the premises or vehicle where the search took place.

Dated this 29 day of March 2006

Michael J. Sullivan

JUDGE/COMMISSIONER, State of Washington

Superior Court for Pacific County

[Signature]

Return of Inventory & Receipt for Property

I received a Search Warrant on the 29th day of MARCH, 2006 and pursuant to the command contained therein, I made due and diligent search of the property and premises, vehicle(s), and/or person(s) described therein and found the following:

1 Cross Bow Pistol + DART, 1 Daisy Power/air 856 DD
1 Daisy Pistol model 188 BB, Box 1500 BB's, Belt w/ 39
Pellet R. Hz, 22 Rifle ser# 23525949, 1 22 Rnk 22R
Ammo Box w/ misc. Ammo. Belt w/ 7 Rnk's Ammo
more 22 Ammo, 2 cont. BB's

The following items have been seized:

Same as above

The name of person(s) found in actual or constructive possession of seized property is as follows:

Residence of Paul MAKI

The name of person(s) served with true and complete copy of the Search Warrant is as follows:

Paul MAKI

The description of door or conspicuous place where a copy of the Search Warrant was posted is as follows:

The seized property is being kept at the following location:

Raymond PD Evidence

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

Dated this 29 day of MARCH 2006

at Raymond

Washington

[Signature]

Signature

Ken J. Boyer

Printed Name

B

IN THE SUPERIOR COURT OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,
vs.
PAUL D. MAKI,
Plaintiff,
Defendant.

NO. 06-1-00052-6
TRANSCRIPT OF RECORDING DURING
EXECUTION OF SEARCH WARRANT

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SUPERIOR COURT OF PACIFIC COUNTY, WA		
NO. 06-1-00052-6		
D	2	2
DATE 7/28/06		

Maki – What for?

(Unintelligible)

Maki – You want to slide the warrant under the door?

(Unintelligible)

Maki – Why?

(Unintelligible)

Maki – Oh, you can't slide the warrant so I can see it?

(Unintelligible)

Maki – You won't slide the warrant so I can see it for a fact that you're not a liar?

(Unintelligible)

Maki – I don't know, everybody's fucking lying to me lately.

(U)

Maki – Yeah, well you know how many of you all is coming in?

(U)

Maki – How many is that?

(U)

Maki – What? What?

(U)

Maki – Somebody said it's going to be about 10?

(U)

Maki – Ohhhh

(U)

Maki – Why don't you just show me the warrant?

(U)

Maki – Why don't you slide the warrant through the door and put it up to your God damn face?

Alright

Maki – You can slide it right underneath the God damn door.

(U)

Maki – Put it on the door

(U)

Maki – Who is Sullivan?

(U)

Maki – No shit.

(U) count to five or I'm going to kick your door in. One two three four... Open the door. Right here is your warrant.

Maki – May I look at it please?

(U)

Maki – I have the right to look at the warrant.

Officer Boyes – Hey, I am not going to put any of these guys in jeopardy until you open this door so we can see what's going on.

(U)

Maki – Get that fucking thing off me.

Back up

Maki – Get that thing off of me.

Back up (U)

Maki – Get that thing off me you can see my hands are bare.

Officer Boyes – Take him into custody right now just take him into custody. Notify...

(U)

Maki – I ain't playing nothing. What did I do? What the fuck did I do asshole? Huh? What the fuck did I do?

(U)

Maki – What did I do?

(U)

Maki – What have I done?

(U) Are you the only one in here (U)

Maki – What have I done?

(U)

Maki – This is all my property God damn it. It belongs to me you have no ID. Who are you?

Officer Davis – Officer Davis. Who are you?

Maki – I don't know you.

(U)

Maki – I don't know (U) I don't know you from no where. Do you know me?

No sir.

Maki – I've lived here for years. I don't know you.

(U) get off anything that (U) tonight okay?

Maki – May I see the search warrant now Mr. Boyes?

Officer Boyes – Just as soon as we get the pleasure for you to shut up. You need to settle down. You're just making this thing a lot worse than it really is.

Maki – Look nobody has a right to be in my fucking home.

Officer Boyes – I got a paper here that says I do have a right. Settle down.

Maki – OK. I'm going to remember you.

(U) Woman in background speaking unintelligible

That's good. I'll remember you, too. Trust me, I will.

(U) Woman in background speaking unintelligible

Maki – I didn't do nothing to you, or you Mr. Boyes, or you Mr. Johnson.

Officer Boyes – We got a whole lot more time than to play games with you. Alright?

Maki – Play games? What you want my house?

Officer Boyes- (Laughing) You told us to go get a search warrant. That's what I did.

Maki – That's right.

Officer Boyes – You want to play? We'll play.

Maki – Go ahead.

(hitting sound)

Officer Boyes – Shut up. (can't hear rest of what Boyes says as Maki's too loud over him)

Maki – (U) After what you done to my family?

Officer Boyes – Me?

Maki – No, your officers.

Officer Boyes – Oh, OK.

(U)

Maki – I've talked to you before Ken Boyes.

Officer Boyes – Yeah and you'll talk to me again, too.

Maki – Why are you breaking up my house? Let go of me.

No. Just sit down.

Maki – I am hand cuffed in my own house.

Sit there.

Maki – Is that good enough for you?

It's great, you just cooperate and you'll be OK.

Maki – I'm in my own house. I am a citizen of the United States. I am not no fucking Iraqi.

(U) There's another gun in (U) bedroom, too. I didn't look at it (U)

Maki – Oh, you. Got your job back, huh?

Officer Davis – Yeah.

Maki – Yeah and you're treating me like an asshole? I pay your wages.

Are you going to cooperate?

Maki – I've never done nothing to you. I've never done nothing to you, or you.

(U) Let's just continue that record, okay? Let's continue your track record, sir.

Maki – May I see the search warrant?

Officer Boyes – It's right here on the table. As soon as you calm down, I'm going to let you look at it.

Maki – Ok, bring it here Mr. Boyes...

Officer Boyes – No.

Maki – and let me look at it.

(U)

Officer Boyes – When you settle down

Maki – I'm perfectly capable of looking at it.

Officer Boyes – When you settle down.

Maki – I'm never settled down. This is as settled down as I get. I'm handcuffed. What the hell else do you want?

For you to cooperate.

Maki – I will cooperate if you let go of me. Let go of me.

(U) No sir. That's not the way it works. You cooperate first.

(Another officer) No, you cooperate first.

Maki – Why? Im in my own fucking home.

You cooperate first.

Maki – You're hurting me.

I'm not hurting you

Maki – You're hurting my fucking wrist and you both got a hold of me.

Woman – Don't hurt my baby.

Maki – You're pointing a God damn taser in my face. When I opened the door for your search warrant. Just as Mr. Boyes asked for.

Woman – Please don't hurt him.

Woman – Oh baby.

Maki – May I see a search warrant Mr. Boyes?

Officer Boyes – Uh ya, are you chilled out enough to be able to look at it?

Maki – Yes, I'm chilled out enough to read a search warrant and I have handcuffs on.

If you...

Maki – How much damage do you think I can do? Come on, be real.

Officer Boyes – I'm... I'm not worried about damage

Maki – Be real.

Officer Boyes – You have mouthed...

Woman – Who is he?

Maki – (U) Be real. You guys all got guns and I'm sitting here by myself.

Woman – Will someone please tell me who's here?

(U) Someone reading warrant in background....police department

Maki – God damn it all my life I have never been treated so poorly even by the meanest people I've ever met.

(U) implicated in shooting a pellet pistol, an air pistol at somebody earlier this evening

Maki – There is a pellet pistol hanging in the back room. You want it?

(U) Okay, where at? We're going to take it.

Maki – You want it? It's in the back room hanging up next to the fucking door.

(U) We want (U) he would not come to, he would not open the door

Maki – I have a rifle but it hasn't moved and there's a pistol hanging up by the door and it hasn't moved either... (U) You want it? There it is.

(Woman talking in the back ground) And I don't know (U)

Maki – Hanging up by the God damn hanger

(U)

Maki – You look at it.

(Woman talking in the back ground) I know Miller very well.

Maki – It's a daisy.

This is Charlie Gailey with the Raymond Police Department

(U)

Maki – It's a fucking daisy, god damn it. You guys got 9mm and you're killing me. I'm bad?

You want to read this?

Maki – Yes, sir, I would like to read it.

Woman – (U) giving me a chicken.

Can you see that?

Maki – Am I under arrest? Am I under arrest, sir?

Officer Boyes – You sure aren't free to go.

Maki – Am I under arrest?

Officer Boyes – You're sure not free to go.

(U) That's a tape.

What?

Maki – That's all junk you guys. The bb pistol is in the back. There's a bb pistol and bb rifle right by the back fucking door. You want it, you can have it. God damn it I haven't done a thing wrong and I have not hurt one person on the face of this earth. Yet.

Yet?

Maki – Yet

Officer Boyes – Is that a threat?

Maki – No that is the truth Mr. Boyes. I have been hurt plenty in my life and I have hurt no one and that is a fact.

Woman – Whose the doctor?

(U) There's no doctor here

Woman – Someone told me they were doctor somebody

Nobody said that, no.

Woman – Who is he?

Officer Davis

(U)

Maki – He's new to me.

Maki – How long have you worked for Raymond?

Officer Davis – Uh, you want my history?

Maki – No how long have you worked for the Raymond Police? How long have you been paid by the city of Raymond?

First time 69 and 71 and then

Maki – Oh, you know Howard Funkhouser?

He was my chief.

Maki – Yes I briefly (U) at the Red Rooster. I worked for his mill, too, as a matter of fact.

Maki – Do you know Howard Funkhouser?

(U)

Maki – Howard's dead?

(U) Yeah, he died of cancer.

Maki – I lived in Ashford Prairie. I drink with him at the Red Rooster. I'm sorry I didn't know that either. I didn't even know James Duree was dead, god damn it. The only lawyer I ever paid in my life.

Who was the bearer of bad news, they told you about Duree today too?

Maki – Well he didn't do me much good but I paid him every fucking penny I owed him. Only lawyer I ever paid in my life.

Maki – There's a pistol, a pellet pistol hanging up by the god damn back door. There's another one there. But god damn it, they haven't left this fucking house.

(U)

Maki – Now...

Woman – I've got to get off my feet.

Maki – What does it say you are going to seize here?

Maki – Oh, firearms and ammunition. Son of a bitch.

Maki – Well, good luck.

Maki - You are going to get some really bad heads up right here, huh? Son of a bitch.

Maki – There's a scoped rifle hanging up right there in the back fucking room.

(U) woman in background (U)

(U) Where at sir? (U) where you said?

Maki – If you look at the back door and you look up, hanging up, there is a ...

Got it.

Maki – ... scoped pellet rifle. 177 caliber rifle, you see it?

Do you have a 22 rifle, sir?

Maki – Yes, sir.

Where would that be?

Maki – That is in my closet.

Okay.

Maki – Right there.

Maki – It hasn't been fired in a long time.

You can see. (U)

Whatever.

Maki – Now, could you take the cigarette out of my mouth?

Umhmm.

Maki – Would you put one in my mouth and light it for me? Please, sir.

Will it calm you down then?

Maki – Yes, cigarettes do calm me down, especially in this situation here. See, I'm not used to this happening and I cannot believe a search warrant could possibly be signed by anybody in this situation.

(U) When was (U) Is that the last cigarette?

Maki – Umhmm.

(U) You suck. (laughing)

Excuse me.

Where's the light?

Maki - Uh, I don't know, I think you all took it out of my pocket.

(U) Yeah, it's down on the floor, sir.

Thanks.

Maki - (U) Look in my front pocket, back pocket, I (U).

(U) one of you guys aren't (U) or anything like that.

Maki - That's not a lighter, that's uh (U) fucking pepper spray.

Pepper spray?

Maki - You guys want to spray me go ahead and taser my ass God damn it. (U) fucking world, okay?

(U)

Maki - Wish you all would helped me when my old lady was raped and shit too. I wish you'd all help me. A lot. But nobody helps. So I have no respect for you all. None, zero.

(U)

Maki - Yeah the report was there. Check the sheriff.

(U)

Maki - Somebody took my stuff out of my pocket and threw it. I don't know, is it still in my front pocket?

I don't know, it ain't there.

Maki - (U) God damn it. Somebody threw it somewhere. You guys threw my shit around.

We put it all on the table.

Maki – You know when you come in here with a search warrant, you all could do it a little bit more peacefully. Because if I had a search warrant I know then it's legal, even though I don't believe it is a legal warrant.

It is.

Maki – I don't know how you talked Sullivan into this shit.

Judge Sullivan signed this.

Maki – Oh damn it. May I stand up? In my own house. My lighter is right here somewhere. Did you look right there?

Sit back down.

Maki – There's my keys, it's laying there on the floor somewhere.

Okay, sit back down.

Here you go.

Maki – Thank you, sir. That would be my lighter. There's a little sticker on it. Thank you.

(U)

Maki – Yep, that's it, that's mine, I own it.

I don't want (U)

Maki – Do not move nothing that you do not own and that film is mine. I was on the phone to my family and you're all recorded.

Okay

Hey, Arlie?

Yeah.

Can you go in there and see if the doors (U) been there at all?

Maki – What?

(U)

Maki – What?

(U)

Maki – Could you tell me what's happening?

Well apparently they're conducting the search, sir.

You got into an altercation with a gentleman earlier.

(U) woman in background.

Maki – I've been in no altercations with anyone, yet.

(U) woman in background

What do you mean by that?

Maki – What I said. I've been in no altercations with anybody, except for unless you call altercation you guys shoving me down here and putting these handcuffs on me.

You said yet, what do you mean by yet?

Maki – I haven't yet been in any altercation except for you guys throwing me around.

Are you implying that there's gonna be an altercation?

When you say yet, that means something is coming.

Maki – Well, I don't know what you think, but when you treat people poorly, do you expect that nothing will happen about it?

(U) It would have been a lot simpler if would have come to the door when asked you to.

Maki – And opened the door and had this happen before?

It would have been a lot more civil before I would imagine.

Maki – Were you there when uh my nephew got his ribs broken?

Who's your nephew?

Maki – Eric (U) Maki.

I don't know him.

Maki – Oh. There was no cause for arrest either.

I don't know.

Maki – The boy was taken to the hospital with broken ribs

(U)

Maki – No cause for arrest. That's why I don't open my door.

You're good.

Maki – After what happened to him and a few of my friends. That's my last paper towel, God damn it.

Officer Boyes – Well if you wouldn't have oiled up that pistol, I wouldn't need em.

Maki – I didn't do that.

Officer Boyes – Okay. I just assumed it was yours. I'm sorry, I was wrong.

Maki – It is mine, but I did not put the oil on there. And I would like to find out who god damn tried to wipe (U) that son of a bitch was dripping with thirty weight and I don't understand who did that.

When did...

Maki – That happened weeks ago.

So, it's been hanging there ever since?

Maki – No, I wiped it down a week ago and hung it there. It's been hanging there for some time. But it kept dripping and dripping oil and I don't know why anybody would want to oil a god damned bb pistol that fucking much.

That doesn't make any sense to me.

Maki – No it didn't make any sense to me, that's what I was saying. I said god damn son of a bitch. I was wondering why somebody did that.

(U)

Maki – It was hanging there, minding it's own business and somebody oiled it. There are several many people friends of mine that may have done that, but that was done a long time ago.

(U)

(U) Woman in background

Maki – You better not touch me.

(U)

Maki – Am I under arrest?

Not at this time, sir.

Maki – I am in my own home (U)

We have a search warrant to search your premises.

Maki – Yes, and I am not violating any law.

(U)

Maki – (U) exactly. Exactly that.

(U)

Maki – I hope that clears (U)

(U) clears (U)

Maki – I ain't no bad guy.

(U)

Maki – I've been treated like a bad guy.

(U)

Maki – There's a lot of people you could be treating like bad guys around here. An awful lot. We got rapists, we got arsonists, we got murderers running around here.

(U)

Maki – And, uh, (U) that's what you do.

(U) Well, you don't get in an altercation with somebody and you don't get this kind of treatment

Maki – Altercation with somebody?

Umhmm.

Maki - I've been in no altercation, I have touched or harmed no one.

(U)

Maki - That's fact.

(U)

Maki - That's fact.

(U)

Hey Paul, do you have a 30-30?

Maki - No, I had a 30-30 ten years ago.

Okay.

Maki - A single shot H&R topper.

How about a shotgun?

Maki - I had a shotgun years ago. I've had 12 gauges, 20 gauges, I've had all kinds of rifles. I have a 22 left.

(U)

Maki - That is it.

The 22 is loaded, did you know that?

Maki - Yes, sir.

(U)

Maki - Is your weapon loaded?

Uh, yeah.

Maki - Yeah, okay.

(U)

Maki – Okay, now you think my little 22 is a match for your shit? No, I don't think so. I am here alone with her and she cannot defend herself. You think that's a bad idea? Or should I say wait before you come in here...

Got a problem (U)

Maki – ... (U) happen before when Angie Williams came and knocked her down to steal her drugs and you did nothing Ken Boyes. You did nothing Ken Boyes, remember?

Officer Boyes – No.

Maki – You watched from underneath the apple tree. That's my fucking box, leave it alone.

(U)

Maki – There is nothing there for you to evidence.

(U) Don't even think about it.

Maki – I can't believe they even have a warrant.

(U) I got that one (U) rifle (U)

Maki – That's my rifle Arlie.

(U)

Maki – They had no right to take that rifle.

(U) Woman in background

Maki – Do you even care?

(U) Woman in background

Maki – Do you care I am getting stolen from?

(U) Woman in background

(U) weapons, firearms and ammunition

Maki – Am I under arrest?

Maki – Am I under arrest?

Don't know, it's not my case.

Maki – Then why are you stopping me?

(U) Sit down.

Maki – Am I under arrest mother fucker?

Hey (U) get down on the floor (U)

Maki – Am I under arrest?

You are now.

Maki – Why are you stealing my property?

To the car. Take him. (U) Let's go.

Maki – (U) For what?

Assault 2nd Degree.

(U)

Woman – No, No.

Son of a bitch.

Maki – I'm not a son of a bitch. My mother is about dead you cocksucker.

Use your taser if you have to.

He's all right, Della.

He's got one.

Della crying in background.

He's going to sit in the car to mellow out a little bit.

Dummy.

Della – (U) taking him away?

Yeah, he's going to go sit in the car so he can mellow out for a few minutes.

Della – (U) you're taking him away?

No, he's going to jail.

(U)

Officer Boyes – He just won't settle down. He's not getting it. So he can get it at Pacific County jail, I don't care. I'm not gonna play games with him anymore.

Della – I don't blame him, I don't blame him.

Officer Boyes – (laughing) We're just trying to do our thing here, and that's it.

Della – (U)

Do you know if there are any other rifles he has hidden around here?

Officer Boyes – How many of those little bottles of whiskey in your fridge or whatever it is has he had tonight?

Della – Oh, they come in ten, he doesn't, that's all they were.

Officer Boyes – So he drank ten of those?

Della – No.

Mike?

Della – Me and my girlfriend, we shared one.

Officer Boyes – Oh, okay.

What brought this on? Does he have any other weapons?

Della – No...

You don't want this to happen again from where you're at

Della – No (U) he doesn't.

Della – I got a rock, you want that?

(U)

Della – Or dime

Della – (U)

If you have the money

Della – Well, you can have the spirit

Okay

(U)

Della – How long he's going to in jail?

Well he's being booked on a felony charge, so (U)

Della – Against you?

No, against a neighbor guy I guess.

Della – Just overnight, or what?

I don't have any idea, ma'am.

Della – Yes, you do.

No, I don't. I mean, I know he'll be there overnight but beyond that I don't know. It's going to be a felony charge so he'll be having to post bail. Depends on how soon he can post bail. But you don't point one of these at some guy's chest and pull the trigger two times and then think it's a big joke, it's not funny.

Della – No.

If I had seen him on the street with this, I would have killed him, because that looks like a gun to me.

Della – Will he get back that gun back? That rifle?

That's gonna be up to the court.

Della – He doesn't use that for anything but going out in the woods and shoot. That's it.

Della – He's had it for a long, long time.

Della – He's never hurt nobody. He's never shot at nobody.

Well he did tonight. (U)

That's why we (U)

We try to help him stay out of trouble but he just didn't listen.

We want you to help us to help him

It's silly.

Della – Well, he's not going to think I helped him.

You know, the faster you tell us where they're at, the faster we can get out of here.

Della – Well, I don't know.

Okay.

Della – What did you do to him?

Della – Why was he hollering?

Della – What did you do to him?

I didn't do anything to him.

Della – Which one did?

Nobody did anything, he was hollering because he was mad. He was hollering just like he's been hollering all night. He's carrying on like a sixth grader. He wants to act like an animal, then we'll take him up and put him in a cage. You know, I tried and tried and tried to talk to him and let him know that all we needed to do was take care of some stuff and we'd get out of here. He talked himself right into jail. That's it, you know, can only put up with so much.

Della – I'm very sorry.

I'm sorry that you're in the middle of this. It's kind of silly.

(U) Is this a pellet gun?

I know, but (U)

Is this the pellet gun? Is it the only one?

(U)

Do you got the key to the back pad lock so I don't have to um kick the door in?

Della – No, I don't.

Would know where it's at?

Della – (U)

Do you guys have a key?

(U)

Della – The keys are either on him or (U)

I don't know where his stuff went.

(U)

Find out (U)

Della – Where's he at?

He's sitting out in the car right now.

Della – That one?

Uh, I don't know.

Do you know his date of birth, Della?

Della – Yeah.

What's his date of birth?

Della – It's 9-21-57.

Let me try (U)

(U)

Della – Which car is he in?

I don't know.

They might have (U)

Della – Why don't you know?

Last Mary Adam ki, first Paul

They might have taken him to the police department.

Middle D David, dob 092157.

Della – Well how many cop cars are here?

Uh, seven.

Della – Well I hope (U)

What was he saying to you when he were outside wanting to talk to him?

Did he say why?

Corrected birth would be 1956.

Della – 57.

(U) Says on here.

Della – It is?

Yeah.

Did he say anything like that? Why he wouldn't come talk to us?

Della – Where's my husband?

He's out in the car.

Della – He's not my husband. Which car?

Why?

Della – Because I'd like to (U) up to him.

You can't see him.

Della – Why, you think I'm going to run out here like that?

No, I was coming in here to talk to the officers. And you asked me a question.

Okay.

(U)

Did anyone look in all this doors to see if

(phone ringing)

Della – Hello?

Della – Um can you come over?

So what you're saying is...

Della – (U) Can you come over, Bobby?

(U)

Della – They've hauled him off and I've still got cops here and (U)

(U)

Della – Okay. When they go, I'll call you. Bye.

Della – She won't come over unless you guys leave.

We'll be awhile I'm sure.

(U)

Della – (U)

Della – See, he quit drinking for six years.

Yeah, he made the mistake when he started again, didn't he?

Della – He just started a week ago. Six seven years.

Hey, Della?

Della – What?

Who actually owns the house, or are you renting or what?

Della – I'm renting (U)

No, that's okay, I just need (U) the door

Della - (U) called

(U)

End of tape.

COURT OF APPEALS
DIVISION II

07 FEB 12 AM 10:25

STATE OF WASHINGTON
BY yn
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAUL D. MAKI,

Appellant.

COURT OF APPEALS NO.
35243-5-II

CERTIFICATE OF HAND
DELIVERY / MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were hand delivered to the Court of Appeals, Division 2, and copies were mailed to Paul D. Maki, Appellant, and David J. Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on February 8, 2007, at the Centralia, Washington post office addressed as follows:

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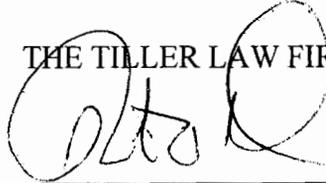
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