

NO. 36539-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN WILLIAMS,

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 07-1-00440-6

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the police properly entered the hotel room without a warrant where they were responding to a 911 call that Williams's co-occupant had been the victim of a domestic assault and wanted Williams removed from the room, and whether, while there the police permissibly asked Williams to be seated while they ascertained his identity?

2. Whether Williams fails to show that counsel was ineffective for failing to object to the amendment of the information?

3. Whether the entry of three verdicts on multiple acts constituting the same offense violated Williams's double jeopardy rights where only a single conviction, judgment, and sentence were entered by the judge?

4. Whether this Court has already determined that the community caretaking exception to the warrant requirement does not violate article 1, section 7 of the Washington State Constitution?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

John Williams was charged by information filed in Kitsap County Superior Court with possession of cocaine. CP 1. The information was subsequently amended, first by adding a second count of possession of

cocaine, and then by adding a third count of the same offense. Although all the offenses were alleged to have occurred on the same date, in the amended informations each count referred to cocaine found in discrete locations. CP 199-212.

The trial court denied Williams's motion to suppress after a hearing. CP 19, RP (5/9).

After a trial the jury found Williams guilty as charges as to all three counts. CP 84. Williams thereafter moved to vacate two of the counts on the grounds that all three instances of possession constituted a single criminal offense. CP 86. Although the State and the trial court agreed that only one offense had been committed, the motion was denied because only one conviction was to be entered by the court. CP 92, 4RP 10. Williams's motion for reconsideration was also denied. CP 122, 6RP 9.

The trial court then entered judgment on one count of possession of cocaine and sentenced Williams accordingly. CP 171.

## **B. FACTS**

The follow testimony was adduced at the CrR 3.6 hearing.<sup>1</sup>

Port Orchard Police Detective Marvin McKinney and Sergeant

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<sup>1</sup> The trial testimony is not particularly germane to the issues presented on appeal. The State will therefore accept the statement of facts at trial presented Williams's brief, but solely for the purposes of this appeal.

Dennis McCarthy received a dispatch regarding an “unwanted subject” at the Comfort Inn.. RP (5/9) 5, 19, 21. When McCarthy arrived at the hotel, he was immediately approached in the parking lot by Cledale Graham. RP (5/9) 6. McCarthy and Graham were speaking in the valet area of the hotel when McKinney arrived. RP (5/9) 21.

Graham asserted that the room was registered to him and that he wanted the police remove Williams from his room. RP (5/9) 6, 12, 21. Graham stated that his nephew, John Williams, was being violent with him. RP (5/9) 6, 22. Graham stated that Williams had assaulted him and taken his money all the way from California. RP (5/9) 6.

McCarthy testified that the police purpose in responding to a domestic violence call is first to secure the scene, to prevent any further violence to the victim or to themselves. RP (5/9) 16. McKinney concurred, explaining that they had a legal responsibility when they received a domestic violence call to make sure the household was safe as part of their “community caretaking” function. RP (5/9) 30. That was why they contacted Williams. RP (5/9) 31. They wanted his name to try to establish what was going on between Williams and Graham. RP (5/9) 52.

After Officer Walker arrived, they escorted Graham back to his room. RP (5/9) 7, 22. Graham knocked on the door, and after several minutes,

Williams opened the door partially, concealing part of his body behind the door. RP (5/9) 23. When he opened the door, Williams had his left hand concealed behind the door. RP (5/9) 7. This made the police concerned. RP (5/9) 23. McCarthy asked him to show his hands, but Williams paused for a few moments before slowly moved his hands from behind the door. RP (5/9) 7. They were concerned because there was a report of possible domestic violence in the room, and possibly a robbery. RP (5/9) 7. The request was for officer safety. RP (5/9) 7.

Just before Williams opened the door all the way, McKinney heard an unusual sound, like something dropping or hitting the wall behind the door. RP (5/9) 23. Graham went in first, and McCarthy asked Graham if it was okay if they came into the room. RP (5/9) 34, 25. Graham invited them in. RP (5/9) 25. Williams did not object to Graham entering the room. RP (5/9) 43. Graham said, “sure” when they asked if they could enter the room, and then went and sat on the bed. RP (5/9) 43.

They had Williams sit in a chair. RP (5/9) 24. When McKinney asked Williams his name, Williams replied, “Leo.” RP (5/9) 8, 25. Williams and McKinney “went back and forth” a “couple of times,” and McKinney finally told Williams that it was obstructing to lie to an officer. Williams nevertheless told him he was wanted to continue with the name Leo. RP (5/9) 8.

McKinney also asked for his date of birth to try to identify him. RP (5/9) 8, 27. Williams did not give a complete birth date. RP (5/9) 8, 27. McKinney continued to question him about his name, and told him that he knew he was lying. He ran the name Williams gave him, but it came back no record. RP (5/9) 27. He ran John Williams. RP (5/9) 27. It came back with a California criminal history. RP (5/9) 28.

After they again went back and forth a few times, McKinney informed Williams that he was under arrest and handcuffed him. RP (5/9) 8. Williams did not give his real name until after his arrest. RP (5/9) 15.

They then searched the area around Williams. The basis for the search was incident to arrest. RP (5/9) 13. They recovered a glass tube for smoking crack behind the door. RP (5/9) 29. It was apparently the object he had dropped when he opened the door. RP (5/9) 29. They found \$1700 in cash. RP (5/9) 29. They also recovered 13 rocks of cocaine. RP (5/9) 30.

Graham told McCarthy that Williams had assaulted him and broken his jaw. RP (5/9) 9. Graham's jaw appeared swollen. RP (5/9) 9. McCarthy had no question at the time he went into the room that Graham had said that Williams had been assaulting him for some time during the trip from California, and that it had occurred again that evening, in Port Orchard. RP (5/9) 17.

When Port Orchard Police Officer David Walker arrived, the other two officers were already in the room speaking with Williams when Walker arrived. RP (5/9) 46. Walker transported Williams to the jail. A second crack pipe was found when his jacket was searched at the jail intake. RP (5/9) 47. Once at the jail, Walker was able to verify his identity as John Williams. RP (5/9) 47.

### III. ARGUMENT

**A. THE POLICE PROPERLY ENTERED THE HOTEL ROOM WITHOUT A WARRANT WHERE THEY WERE RESPONDING TO A 911 CALL THAT WILLIAMS'S CO-OCCUPANT HAD BEEN THE VICTIM OF A DOMESTIC ASSAULT AND WANTED WILLIAMS REMOVED FROM THE ROOM, AND WHILE THERE THE POLICE PERMISSIBLY ASKED WILLIAMS TO BE SEATED WHILE THEY ASCERTAINED HIS IDENTITY.**

Williams argues that the trial court should have ruled that the police entry into the victim's motel room was unlawful because the entry did not meet the criteria for the community caretaking exception to the warrant requirement. He further argues that the police were without authority to briefly detain Williams to ascertain his identity. These claims are without merit because the police were called to the scene and invited into the room by the victim, who had reported that Williams was unwanted guest in his room who had assaulted him.

In reviewing findings of fact on a motion to suppress, this Court will review only those facts to which error has been assigned. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Where, as here, the appellant has not assigned error to the findings of fact, this Court treats them as verities on appeal. *Id* This Court reviews conclusions of law in an order pertaining to suppression of evidence de novo. *Id*.

**1. Community Caretaking**

Local police have multiple responsibilities, only one of which is the enforcement of criminal law. *Acrey*, 148 Wn.2d at 748. “[C]itizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid.” *Id*. The Community caretaking exception applies when (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched. *State v. Gocken*, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993).

When police officers are engaged in community caretaking functions, whether their actions are constitutionally permissible depends not on the presence of probable cause or reasonable suspicion, but rather on a balancing

of the competing interests involved in light of all the surrounding facts and circumstances.” *Acrey*, 148 Wn.2d at 748. The competing policies are (1) allowing police to help people who are injured or in danger, and (2) protecting citizens against unreasonable searches. *State v. Johnson*, 104 Wn. App. 409, 418, 16 P.3d 680 (2001), *review denied*, 143 Wn.2d 1024 (2001).

The United States Supreme Court first enunciated the “community caretaking function” exception to the warrant requirement in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). In *Cady*, the Court held that Wisconsin police officers who had arrested a Chicago police officer for driving while intoxicated did not violate the Fourth Amendment in searching the suspect’s automobile for a service revolver which the arresting officers believed Chicago police officers were required to carry at all times. The Court concluded the warrantless search of the disabled vehicle was “constitutionally reasonable” because it was incident to the community caretaking function of the arresting officers to protect “the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.” *Cady*, 413 U.S. at 447. In Washington, the “community caretaking function” applies not only the search and seizure of automobiles, but also situations involving either emergency aid or routine checks on health and safety.” *Acrey*, 148 Wn.2d at 749.

Below, the parties primarily disputed whether the community

caretaking function as discussed in *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000), applied to the facts of this case. RP (5/9) 64-71, 74-75. In *Jacobs*, the police entered a residence over the objection of the victim, who had called 911. *Jacobs*, 101 Wn. App. at 82-84.

On appeal, Williams argues *Jacobs* is not applicable because the passage upon which the court and parties below relied was dicta.<sup>2</sup> Brief of Appellant at 15. He further posits that under the case cited in the *Jacobs* dicta, *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994), there was no exigent circumstance justifying entry into the room because the victim was already out of the room in the parking lot when the police arrived.

In *Menz*, an anonymous third party called 911 and reported a domestic violence incident in progress. When the police arrived, no one responded to several knocks, and they entered the residence through the front door, which slightly ajar. *Menz*, 75 Wn. App. at 352-53. In both cases, this Court concluded that the police were justified in entering the homes *in the absence of consent or invitation* to make sure the occupants were safe. *Jacobs*, 101 Wn. App. at 89 n.3; *Menz*, 75 Wn. App. at 355. Although Williams is correct that the alternative holding in *Jacobs* is technically dicta, the holding *Menz* is not.

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<sup>2</sup> This Court ruled in that case that the appellant lacked standing to challenge the search. *Jacobs*, 101 Wn. App. at 88. In a footnote, the briefly addressed community caretaking as an

The facts in the present case differ somewhat in that the uncontroverted testimony was that the victim, Cledeale Graham, called 911 because he wanted Williams, who had assaulted him, removed from his room. Unlike in the victim in *Jacobs*, Graham reaffirmed this desire when the police arrived. He led them to the room, and invited them to follow him into the room.

The State has not located any Washington case that is directly on point. Other courts have applied the community caretaking exception in analogous circumstances, however.

The Fifth Circuit has described community caretaking functions as those actions by police officers that are “totally divorced from the protection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *United States v. York*, 895 F.2d 1026, 1030 (5th Cir.1990) (quoting *Cady*, 413 U.S. at 441). In *York*, officers responded to a call by a houseguest, who complained that their host, York, was drunk and belligerent and was threatening the guest’s children. The houseguests invited the officers inside, where they observed several machine guns. York was later convicted for illegally receiving and possessing the guns. The Fifth Circuit affirmed the conviction, concluding that it was reasonable to expect the guest to ask police

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alternative grounds for affirmance. *Id.* 101 Wn. App. at 89 n.3.

officers to come inside the house to keep the peace. The court noted that the police initially entered only the first room of the house, “where they had a right to be as peacekeepers.” *York*, 895 F.2d at 1030. The police officers in *York* did not have a warrant to enter the house, but were nevertheless found to be lawfully inside in their role as community caretakers.

In a similar case, the Eighth Circuit affirmed the conviction of Jon Nord, who was found by a police officer in his apartment after he was reported missing from work. *United States v. Nord*, 586 F.2d 1288, 1289 (8th Cir.1978). The person looking for Nord first got a key to his apartment from the landlord, and then called the police to come inside with him. Inside the apartment, the officer found Nord, drunk, and also observed guns in plain view. Nord was subsequently convicted of being a felon in possession of firearms. The court concluded that the “police had a right to be on the premises as part of their routine community caretaking functions which include responding to calls to assist persons in need of immediate aid.” *Id.* at 1290.

Here, the police received a 911 report of an unwanted guest in a motel room. The victim, Graham, reported that his nephew, Williams, had been assaultive and he wanted him out of his room. The police met Graham in the motel parking lot and proceeded to the room, where Graham knocked and gained admission from Williams, and then permitted the police to come in.

There is no evidence that the police entered the room with an investigative purpose or as a pretext to search for evidence of any crime. The police did not search the room or Williams's person upon entry. They sought only to identify him, which Williams stymied by giving them a false name. It was only after he repeatedly obstructed their attempts to determine what was going on that they arrested him for obstructing, resulting in the search incident to arrest. Their actions were clearly reasonable under the circumstances.

Williams argues that the exception does not apply because Graham was already outside the room when the police arrived. It is undisputed that Graham had a right to be in the hotel room. Yet under rule of law that Williams argues, he had no right to have the police assure that it was safe for him to reenter his room because he was already safely away from it, or even whether Williams had any right to be in the room himself. Applying such a rule would mean that where a homeowner reported a burglar or a violent guest in his or her home, if the homeowner sought refuge at a neighbor's before the police arrived, the police would be powerless to immediately enter the home at the owner's request to ensure the owner's safe reentry. Such is surely not the law.

Indeed, the Court has rejected similar hairsplitting claims in the past. In *Johnson*, the defendant urged the court to adopt a heightened standard

which would require officers to strongly believe that a specific person within a residence is in actual need of assistance for serious health or safety reasons and require the officers belief to be objectively reasonable, well-founded, and based on specific and articulable facts. *Johnson*, 104 Wn. App. at 417. The Court refused to adopt such a rule. The Court noted that officers should be allowed to help potential victims even if they do not know the specific person in need if they know that something is amiss. *Johnson*, 104 Wn. App. at 418. The proposed test would frustrate the officers' ability to help people whenever they did not know specific details about the person in need. *Id.*

In *Johnson*, the officers were also responding to a report of domestic violence. *Johnson*, 104 Wn. App. at 412. The defendant was walking out of the home as the officers arrived, and he told officers his girlfriend was in the house. After knocking several times, the victim finally came to the door. The officer told the victim to stay in the house and walked inside to talk to her. *Johnson*, 104 Wn. App. at 413. The Court held that the officer was justified in walking through the home to look for other victims, even though he had no information that there were more victims. Further, the court held that the officer was permitted to enter the home for the purpose protecting the victim and keeping the victim away from the defendant, even though the defendant was in custody. *Johnson*, 104 Wn. App. at 420.

Similarly, in *State v. Lynd*, 54 Wn. App. 18, 771 P.2d 770 (1989), the

officers were responding to a 911 call and saw the defendant loading things into a car. The defendant stated that he had committed acts of domestic violence against his wife, but that she was no longer there. The officers did not attempt to obtain a warrant and instead looked inside the house. The officers discovered a marijuana grow when they entered the home. The Court held that the officers were permitted to look inside the home under the emergency exception. *Lynd*, 54 Wn. App. at 22-23

Moreover, the rule advocated by Williams as applied in situations like the present one would be directly contrary to the legislatively enacted public policy of this state, as set forth in RCW 10.99.010:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved

in a relationship.

To effectuate this policy, RCW 10.31.100(2)(c) provides that police *must* make an arrest where:

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

RCW 10.99.020(3) provides that a “family or household member” includes “adult persons related by blood or marriage.” As uncle and nephew, Graham and Williams were clearly family members. Moreover, he alleged an assault that resulted in a swollen jaw. Williams’s contention that if the police had entered with the intent to arrest him it would have been “without the authority of law” is also without foundation. *See State v. Walker*, 157 Wn.2d 307, 138 P.3d 113 (2006) (RCW 10.31.100 provides the “authority of law” to arrest required by art. 1, § 7 of the Constitution.

Since the entry was lawful, it also follows that the brief questioning of Williams to ascertain his identity was also proper, as will be discussed next.

## **2. *Terry v. Ohio***

Williams also argues that he was unlawfully detained by the police once they entered the room. The trial court found that although merely asking for his identity was not a seizure, Williams was detained when the police requested that he be seated.

Under the *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny, police may detain an individual when there exists a reasonable suspicion that criminal activity is afoot. Washington courts apply the following two-part analysis in review of investigatory stops:

First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related *in scope* to the circumstances which justified the interference in the first place?

*State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

The permissible scope of the *Terry* stop is determined by (1) purpose of the stop (2) amount of intrusion, and (3) length of time of detention. *Williams*, 102 Wn.2d at 740. An important factor comprising the totality of circumstances that must be examined is the nature of the suspected crime; a violent felony crime provides an officer with more leeway to act than does a gross misdemeanor. *State v. Randall*, 73 Wn. App. 225, 229-30, 868 P.2d

207 (1994). In determining whether a detention was unreasonably long in duration, courts look at the officer's actions and whether the officer diligently pursued a means of investigation which would likely confirm or dispel his or her suspicions. "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.... But 'the fact that the protection of the public might, in the abstract have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable.'" *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 1575-76, 84 L. Ed. 2d 605 (1985) (citations omitted) (affirming a 30-40 minute long detention).

Individualized suspicion of criminal conduct, focusing on a specific suspect, is a general requirement for a valid detention or stop. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). The scope and degree of detention may be enlarged or prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 332, 734 P.2d 966 *review denied*, 108 Wn.2d 1027 (1987). Furthermore, the officer's experience and knowledge of criminal behavior is a factor to be considered in determining if an investigative stop was reasonable and justified under the circumstances. *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

In evaluating the reasonableness of a detention, courts consider the

totality of the circumstances, including the officer's training and experience, the location of the stop and the conduct of the person detained. *State v. Villarreal*, 97 Wn. App. 636, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008, 999 P.2d 1261 (2000). The inability of a police officer to articulate the exact crime being committed does not preclude an investigative stop, rather, police are encouraged to investigate suspicious situations. *Villarreal*, 97 Wn. App. at 640-41.

In this case, the officers had individualized suspicion that the defendant may have assaulted the victim. The officers may not have known the specific crime that was committed, but they did have information that the defendant was being violent, had threatened the victim, and assaulted the victim. They also, as the trial court observed, had seen his suspicious behavior at the door. This was enough to satisfy the requirement of a reasonable articulable suspicion; thus justifying a short seizure of the defendant as the investigation continued.

Williams argues that *Terry* and community caretaking are mutually exclusive. The State disagrees. Although the initial entry here was motivated by the community caretaking function, that function seriously jeopardized if in its exercise, the police were unable to also use reasonable means of protecting their own safety and that of those they are attempting to assist. Because of this, "[i]n some cases, carrying out the community caretaking

function will lead to detention.” *State v. Kinzy*, 141 Wn.2d 373, 397, 5 P.3d 668 (2000) (Madsen, J, concurring). Here, the defendant’s behavior at the door, in light of the previous information they had about him, justified the extremely minor restraint of being asked to be seated while the police ascertained his identity. This claim should be rejected.

**B. WILLIAMS FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE AMENDMENT OF THE INFORMATION.**

Williams next claims that he was denied effective assistance of counsel because counsel failed to object to the filing of the amended information. This claim is without merit because the record fails to show that counsel’s failure to object was deficient performance, or that Williams was in any way prejudiced.

In order to overcome the strong presumption of effectiveness that applies to counsel’s representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Here the contention is that counsel should have objected to the amendment of the information on the day of trial to add two additional counts of possession of cocaine, pursuant to CrR 8.3(b) and *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997). Because Williams fails to show that such an objection would have been well taken, he fails to show either deficient

performance or prejudice.

Generally, the State may amend the information at any time prior to the verdict or finding so long as there is no prejudice to substantial rights of the defendant. CrR 2.1(d). This court reviews a decision allowing an amendment for an abuse of discretion. *State v. Schaffer*, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993).

Before a court will dismiss charges under CrR 8.3(b), a defendant must show (1) arbitrary action or governmental misconduct, and (2) prejudice to his right to a speedy trial, which includes his right to be represented by counsel who has had a sufficient opportunity to prepare the defense. *Michielli*, 132 Wn.2d at 239-40. However, “Where the defendant fails to ask for a continuance, there is presumed to be a lack of surprise and prejudice.” *State v. Schaffer*, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), *aff’d* 120 Wn.2d 616, 845 P.2d 281 (1993) (*citing State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968)).

Here, there is no *evidence* that counsel was unprepared for trial. To the contrary at the commencement of trial on May 14, 2007, counsel announced, “Defense is ready to proceed.” 1RP 1. Counsel thereafter was clearly prepared to argue the motions in limine presented by both the state and the defense. 1RP 6-29. Before jury selection began that day, the trial

court noted that there were already two pending charges, based on the cocaine in the dresser, and the cocaine found at the jail. 1RP 29; *see* CP 210 (indicating first amended information filed on May 14, 2007).

The next day, the second amended information was filed, adding a count based on the cocaine found behind the door in the hotel room. RP (5/15 supp.) 2-3; CP 199. The prosecutor realized after it was read that there was a typographical error with respect to the dates, and the information was orally amended, and Williams pled not guilty to the charges as orally amended. RP (5/15 supp.) 4. The oral amendment was made with the proviso that a third amended information reflecting the proper date would be filed later. RP (5/15 supp.) 3-4. The third amended information reflecting the correct dates was accordingly filed the same day. CP 203. At no point did either counsel or Williams express surprise at the amendment or suggest they were unprepared for trial.

As Williams notes, the existence of all three items of contraband was clearly known at the time of the CrR 3.6 hearing. Nothing in the record suggests that trial counsel, who was appointed after that hearing was held, was not nonetheless aware of these facts, which are set forth in the findings of fact from the hearing. CP 20 (FOF VI). Nor is there any suggestion that these items, which were all admitted at trial as exhibits 1, 2 and 3, were not properly disclosed during the discovery process. Additionally, nothing from

the trial suggests counsel was unprepared.

The only claim that counsel was unprepared (and the only evidence cited by Williams in his brief) came well after trial, in Williams' declaration in support of his motion for new counsel, filed weeks after the jury found him guilty. CP 152. The trial court declined to consider the merits of that motion, however, . 5RP 8-9, 6RP 2, and as such that allegation remains no more than that: an untested allegation. Notably, counsel did not admit the allegation at the time it was raised. 5RP 2-9.

Moreover, as discussed in more detail, *infra*, with regard to the double jeopardy claim, the multiple counts alleged constituted the same criminal act. As such the additional count(s)<sup>3</sup> were merely a substitute for the procedure set forth in *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The charging language of the original information would have allowed the State to introduce the cocaine found in the dresser, that recovered at the jail, and that found behind the door. As Williams points out, all this evidence was available to the State (and, as noted, presumably also to the defense, since there has been no claim of a discovery violation). Thus had the amendment been disallowed, the State could have proceeded with the same evidence it did at the trial. The only difference would have been that it would have been

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<sup>3</sup> Williams is not clear whether he is objecting to the first amended information, which added the second count, or only the second/third amended information, which added the third count.

required to submit special interrogatories to satisfy *Petrich*. The result would have been the same: the jury would find him guilty as charged and presumably would have answered “yes” to each of the three interrogatories for the dresser, the jail and behind the door. The trial court would have then entered judgment and sentenced Williams on one count of possession of cocaine, which is the outcome that occurred.

In view of the foregoing, the record wholly fails to support the claim that counsel was unprepared for trial. Williams thus fails to meet the prejudice prong of *Michielli* and, it follows either prong of *Strickland*.

Further, Williams also fails to meet the mismanagement prong of *Michielli* as well. The trial prosecutor specifically noted that the purpose of adding the additional counts was to clarify for the record which items of cocaine the jury would find Williams possessed in the event of a guilty verdict. 1RP 29. This was not a case of the State springing new charges of criminal conduct at the last minute. Rather the conduct, and the evidence in support of it, was the same as that charged in the original information. That there was no objection to the amendments only underscores that all parties present were fully aware of the reason for the amendment.

In view of the foregoing it is clear that Williams has failed to meet the elements of a claim under *Michielli*. It follows that he therefore also cannot

show deficient performance or prejudice. This claim should be rejected.

**C. ENTRY OF THREE VERDICTS ON MULTIPLE ACTS CONSTITUTING THE SAME OFFENSE DID NOT VIOLATE WILLIAMS'S DOUBLE JEOPARDY RIGHTS WHERE ONLY A SINGLE CONVICTION, JUDGMENT, AND SENTENCE WERE ENTERED BY THE JUDGE.**

Williams next claims that his purported conviction of three counts of possession of cocaine violated his double jeopardy rights. This claim is based on the false premise that he was *convicted* of three counts. Although the jury returned guilty verdicts on all three counts, the trial court properly entered a *conviction* on only one. This claim is thus without merit.

The state constitutional rule against double jeopardy, Const. art. I, § 9, offers the same scope of protection as its federal counterpart. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The double jeopardy clause of the Fifth Amendment offers three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

*Gocken*, 127 Wn.2d at 100.

In the present context, there is no double jeopardy violation because (1) Williams was not subjected to a second prosecution after acquittal

because the prosecutions were concurrent (and there was no acquittal); (2) he was not subject a second prosecution after conviction, again because the prosecutions were concurrent; and (3) Williams was not subjected to multiple punishments because not only was he not sentenced on the two remaining counts, no convictions were entered, either.

Williams's reliance on *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), is thus misplaced. There, the problem was that although no sentence was entered, convictions were, and although Womac was not punished for them presently, the convictions were "still alive" and would count in any future offender score. *Womac*, 160 Wn.2d at ¶ 25. The entry of judgment was the critical fact:

The State declares ... "[i]t is only when the court enters a judgment and sentence that double jeopardy issues arise and vacation is required." *Id.* at 3-4. But here, the trial court *did* enter judgment on Counts II and III declaring both convictions "valid" while clarifying that imposing separate punishments would violate double jeopardy provisions.

*Womac*, 160 Wn.2d at ¶ 25 (emphasis the Court's). Here, on the other hand, a conviction and judgment was only entered on one count. *Womac* simply does not apply.

Indeed, as *Womac* itself recognizes, absent entry of a conviction, double jeopardy is not implicated where multiple counts are charged and found by the jury: "[i]t is important to distinguish between charges and

convictions – the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated.”<sup>6</sup> *Womac*, 160 Wn.2d at ¶ 28 (quoting *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). The Court also noted that in such a case, no double jeopardy violation flows from the jury’s verdict, so long as only one conviction is entered. *Womac*, 160 Wn.2d at ¶ 31 (citing *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)).

Here, as alluded to in the previous part of this brief, the State sought only to facilitate compliance with *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), by charging three separate counts. That case sets the rules for ensuring the constitutional requirement of a unanimous jury verdict on each element of a charged offense. Where evidence of multiple acts is presented, each of which would support the verdict, there must be record evidence showing which act the jury unanimously found. . *Petrich*, 101 Wn.2d at 572.

One way to meet the *Petrich* requirement is for the State to “elect” the act on which it intends to rely. *Id.* An alternative is to require an instruction to the jury that it must unanimously agree as to the act proven. *Id.* In order to provide for a more clear record on appeal, this Court has expanded on *Petrich* to allow for special interrogatory verdicts: “the State can decide after testimony to elect particular incidents it is relying on for consideration by the

jury and it can request the trial court to submit special verdicts requiring the jury to identify the act or acts upon which it relies for each verdict.” *State v. Heaven*, 127 Wn. App. 156, ¶ 14, 110 P.3d 835, 839 (2005).

Here, as noted above, the State’s intent in charging separate counts was to facilitate the *Petrich* requirement. By presenting the jury with separate counts, each based on a specific and separate act, it avoided presenting the jury with a cumbersome set of instructions. Instead they were simply instructed to consider each count (and act) separately, and render a verdict on each accordingly. Consistent with the purpose of the procedure followed, the trial court only entered a conviction for a single count of possession of cocaine, and sentenced Williams accordingly. The trial court did abuse its discretion in refusing his motion to vacate a non-existent conviction. This claim should be rejected.

**D. THIS COURT HAS ALREADY DETERMINED THAT THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT VIOLATE ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.**

The final portion of Williams’s brief is devoted to a purported analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). However, it is well-settled that absent a briefing on the *Gunwall* factors, an appellate court should decline to undertake an independent state

constitutional claim. *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993). Here, although Williams purports to present a *Gunwall* analysis, he fails to offer any actual analysis. He cites numerous cases, and lists the six *Gunwall* factors, but he utterly fails to offer any explanation why this Court should conclude that the concededly broader scope of Const. art. 1, § 7 should prohibit the community caretaking function of local police.

More importantly, however, it is also well-settled that once the Court has conducted a *Gunwall* analysis and has determined that a provision of the state constitution independently applies to a specific legal issue, in subsequent cases it is unnecessary to repeat the analysis of the same legal issue. *State v. Ladson*, 138 Wash.2d 343, 348, 979 P.2d 833 (1999).

In *State v. Johnson*, 104 Wn. App. 409, 418, 16 P.3d 680 (2001),<sup>4</sup> *review denied*, 143 Wn.2d 1024 (2001), this Court considered and rejected a claim that Const. art. 1, § 7 should impose considerable restrictions on the community caretaking exception. As noted, Williams presents no explanation as to why the *Gunwall* factors favor rejection of the community caretaking exception. It follows that he thus also fails to make any compelling showing that this Court should abandon its previous decision in *Johnson*. This contention should be rejected.

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<sup>4</sup> Curiously, Williams cites *Johnson* in his *Gunwall* argument. He does not, however, suggest it was wrongly decided.

**IV. CONCLUSION**

For the foregoing reasons, Williams's conviction and sentence should be affirmed.

DATED April 15, 2008.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "RAS", with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON  
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