

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38522-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH ALLEN HARVILL

Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF
GRAYS HARBOR COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00223-6**

BRIEF OF APPELLANT

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

STATE OF WASHINGTON,

Respondent,

vs.

KEITH ALLEN HARVILL

Appellant.

NO. 38522-8-II

OPENING BRIEF OF APPELLANT

I. ASSIGNMENT OF ERROR

- A. The trial court erred when it denied Mr. Harvill's motion to suppress.**
- B. Mr. Harvill did not receive effective assistance of counsel as required by the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington Constitution.**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the trial court err when it denied Mr. Harvill's motion to suppress evidence found as the result of an illegal search and seizure?**
- B. Did Harvill receive ineffective assistance of counsel when counsel opened the door to irrelevant and prejudicial information, and when counsel introduced evidence of Harvill's guilt, only to argue to the jury's emotion?**

III. STATEMENT OF THE CASE

Keith Harvill was charged by information filed in the Superior Court for Grays Harbor County with one count of Possession of a Controlled Substance (methamphetamine) in violation of RCW 69.50.4013(1) and one count of Unlawful Possession of a Firearm in the First Degree in violation of RCW 9.41.040(1)(a) on April 21, 2008. CP 1. On July 10, 2008, a CrR 3.6 hearing was held, and the motion to suppress was denied. CP 41. On July 14, 2008, Findings of Fact and Conclusions of Law were filed. CP 44. The case was tried to a jury of twelve on August 5, 2008, and Harvill was found guilty on both counts. CP 55-56. On November 3, 2008, based on an offender score of 9, the Court sentenced Harvill to the maximum sentence on both counts to run concurrently. CP 75. Harvill timely appealed. CP 78.

IV. SUBSTANTIVE FACTS

A. CrR 3.6 Motion to Suppress Hearing, July 10, 2008

At the CrR 3.6 hearing on July 10, 2008 Deputy Sean Gow testified that he and a civilian ride along, Jeff Owen, were traveling northbound on State Route 109 about 7:30 p.m. on April 20, 2008. RP 2. While doing so, Gow observed a large construction type van parked in a field. RP 3. The vehicle was parked about 200 feet off the roadway in plain sight where anybody could have seen it. RP 17. Gow did not know who owned the property, but recalled that the landowner was involved in a federal lawsuit. RP 4. RP 17. Gow initially thought that the person might be involved in dumping. RP 18. However, other than being there, Harvill was not doing anything suspicious. RP 20. Gow, upon finding the entrance to the property, noted that the access appeared to be blocked off by a

ditch and debris. RP 6. Gow was not aware of any other entrance. RP 8. Gow did not observe any signs saying “no trespassing.”

Gow approached the vehicle and parked 25 to 30 feet behind the van. RP 8. Gow did not observe any evidence of dumping. RP 18. Gow did observe a man sitting on a motorcycle in the back of the van. RP 9. The motorcycle was facing the front of the van, but the man was facing the rear of the van. RP 9. Gow did not use lights or sirens, nor did he pull a gun as he approached the man, later identified as Harvill. RP 9. Harvill stepped out of the van during the course of the conversation. RP 10. Gow and Harvill stood a foot or two from the back of the van. RP 10. Because the patrol vehicle was parked behind the van and blocking it, Harvill would not have been able to leave without hitting the patrol car. RP 19.

In response to Gow’s questions, Harvill admitted that he did not own the property or know who did own the property and that he was just riding his motorbike. RP 10. When asked for ID, Harvill stated he did not have his ID on him. He, however, provided his full name and date of birth and volunteered that there was a warrant for his arrest. RP 11. Gow ran Harvill’s name through dispatch to confirm warrant status. RP 12. While doing so, Harvill was not handcuffed, but remained outside of the van. RP 12. Deputy Gow did tell him to stay out of the van. RP 21. After a few minutes, the warrant was confirmed and Gow returned to Harvill and placed handcuffs on him and arrested him. RP 14. Harvill was standing by the rear of the van. Harvill was handcuffed and searched incident to arrest. RP 14. Harvill was then placed in the back of the patrol car and read his Miranda warnings. RP 15. Deputy Gow then searched Harvill’s van. RP 34.

The only issue argued was whether Harvill was illegally seized. The Court held that it was not material to the decision in this case whether the defendant was free to leave or not at the time the deputy pulled up behind him. RP 46. The Court also found that Harvill was not detained under the facts of this case. RP 47.

B. Trial Testimony, August 5, 2008

Upon confirming the warrant status of Harvill, Deputy Gow placed him under arrest and searched his person incident to arrest. RP 26. In Harvill's top right breast pocket a glass pipe was located and in his right coin pocket a small plastic baggie was located. RP 27. Based on lab tests, the contents of the baggie was methamphetamine. RP 18.

Gow then placed Harvill in the vehicle and asked him if there were weapons or needles in the vehicle because he was going to search it. RP 30-31. Harvill simply stated they were his fathers but refused to explain further at the time. RP 31. Gow then searched the vehicle incident to arrest for evidence. RP 31. A loaded revolver style pistol was found in the rear of the van. RP 32. Gow then contacted Harvill and asked him if he was willing to speak with him. At that time Harvill advised that there was a rifle inside the vehicle. RP 33. He stated that the firearms belonged to his father. RP 33.

On cross-examination, Defense Counsel elicited from Gow that the gender of the pants the meth was found in was female. RP 35. This prompted the State on re-direct to further inquire into what Harvill was wearing. Gow stated that Harvill had been wearing other female clothing, appeared to have breasts, and was wearing lipstick. RP 37.

Defense Counsel provided an opening statement after the state rested. Counsel informed the jury that Harvill would admit to getting the guns from his deceased father's bedroom to take to his stepmother at her request. Harvill did not know the weapons were in the home until that time. RP 39. Harvill was on his way to his stepmother's house for a niece's birthday party and would take the guns to her at that time. RP 39. On the way to the party, he stopped to ride his motorcycle. RP 39. Harvill would further testify that he had purchased the methamphetamine that was in his pocket, but wasn't aware it was actually in the pocket at the time. RP 39.

Harvill did in fact testify to these things. RP 42-44, 46. Harvill also testified that he had nine brothers and sisters but they did not come to the house or help out at all. RP 45. Although his mother was in good health and drove, she did not want to go to the house because his father had died in the house. RP 48-50.

The State had included proposed instruction number 11 concerning unwitting possession. The State objected to that instruction based on the testimony that Harvill had purchased the methamphetamine, and Defense Counsel concurred that the instruction was not appropriate in this case. The instruction was removed. RP 53.

In closing argument, Defense Counsel argued that the State did not prove that the firearms were actual firearms because the State had not tested them to prove that they could be fired. RP 58. Furthermore, Counsel argued that Harvill had been honest and admitted everything. RP 60. Counsel then argued that Harvill's decision to take the guns was an emotional decision, based on his emotional status at the time, and not an intellectual analysis of the issue and asked the jury members to look into their souls and

analyze what happened. RP 61-62. On rebuttal, the State argued that it was not reasonable to believe that Harvill was going to his niece's birthday party at 8:00 or 8:30 at night, or that he was going to attend a two-year olds birthday party wearing ladies pants and lipstick. RP 63. The jury convicted Harvill on both counts. RP 65.

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSIONS OF LAW 2 AND 3.

In reviewing findings of facts on a motion to suppress, the Court will only review findings of facts to which error has been assigned. Unchallenged findings of fact are treated as verities on appeal. State v. Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000) (quoting State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). The Court reviews challenged findings of fact for substantial evidence. State v. Holmes, 108 Wn. App. 511, 31 P.3d 716 (2001). The Court reviews conclusions of law in an order pertaining to suppression evidence de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The Fourth Amendment to the United States Constitution made applicable to the states by way of the Fourteenth Amendment, and Art. I, Section 7 of the Washington Constitution, provide that warrantless searches and seizures are per se unreasonable unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Lopez, 70 Wn. App. 259, 268, 856 P.2d 390 (1993), rev. denied, 123 Wn.2d 1002 (1994); *see* State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). In determining whether the exigencies of a particular case permit the police to conduct a

warrantless search and seizure, “[t]he totality of circumstances said to justify a warrantless securing or search... will be closely scrutinized.” State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Under both Art. I, Section 7 and the Fourth Amendment, the State bears the burden of proving that a warrantless seizure is valid under a recognized exception to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 451, 909 P.2d 293 (1996); State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

In the instant case, the trial court entered findings of fact. Harvill challenges not the findings that were entered, but the finding’s missing from the Findings of Fact. Deputy Gow testified that the road was fairly narrow, with alders starting to grow up around the side of the vehicle. He testified that when he parked behind the vehicle there was no way the van could have backed out without striking the patrol car. He further testified Harvill could not leave because he was blocking him in. RP 18-19.

After the hearing the Court entered the following conclusions of law: (2) The initial contact between the defendant and Deputy Gow was not a detention or a restriction of freedom of movement of the defendant. Under these circumstances, Deputy Gow took no acts toward the defendant that a reasonable person would believe to be a detention or significant restriction of his movements. Deputy Gow did not need an articulable suspicion of criminal behavior in order to contact the defendant and speak with him in the

manner that he did; (3) No detention of any kind occurred until the point in time when the defendant was informed that he was under arrest. CP 44.

1. There Was No “Reasonable Articulate Suspicion” To Initiate An Investigative Terry Stop Of Harvill, Thus Harvill’s Seizure Was Unconstitutional With The Result That The Evidence Obtained As A Result Of This Unconstitutional Seizure Should Have Been Suppressed.

The methamphetamine and the firearms found by the police in this case was the fruit of an unreasonable seizure prohibited by the Fourth Amendment and Art. 1, Section 7 of the Washington Constitution.

In the chronology of this police encounter, Harvill contends that he was seized when the officer drove his patrol car up behind his van, blocking any egress. At the time of the seizure Deputy Gow did not possess any articulable reasonable suspicion of criminal activity so as to make his interference with Harvill’s private affairs reasonable and thus legal.

In order to prevail on his appeal of the lower court’s CrR 3.6 ruling, Harvill must establish at what point a seizure of his person occurred, and must convince the Court that the seizure was not supported by reasonable articulable suspicion based on objective facts. State v. Stroud, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), rev. denied, 96 Wn.2d 1025 (1982); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The question whether a seizure has occurred during a citizen-police encounter is a mixed question of law and fact. State v. Rankin, 108 Wn. App. 948, 954, 33 P.3d 1090 (2001). On review of a suppression motion, the appellate court defers to the trial court’s factual findings as to what happened in the encounter, but whether those facts constitute a

seizure of the defendant by the police is a question of law that examined de novo. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). Similarly, the second question of the constitutional reasonableness of the seizure is also a legal determination that is analyzed de novo by the reviewing court, based on the trial court's supported factual findings. State v. Hoffman, 116 Wn.2d 51, 98, 804 P.2d 577 (1991).

In Washington a police officer has not seized an individual merely by approaching him in a public place and asking him questions, if a reasonable person would have felt free to leave. State v. Belanger, 36 Wn. App. 818, 677 P.2d 781 (1984). A seizure occurs, however, if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)). A seizure is reasonable only if an officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." State v. Larson, 93 Wn.2d 638, 644 P.2d 771 (1980) (citing Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979)); see also State v. Kennedy, 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

Here, Deputy Gow believed the property to be private property, and did not know who the property belonged to. He drove out onto the property, property he described as having a ditch dug and debris to block the entrance. Yet he drove out onto this private property anyway. Gow further stopped behind the suspect vehicle preventing its egress. He then exited his vehicle and approached Harvill. This constituted a seizure, initiated on the inadequate basis of seeing the vehicle in the middle of the field where he had not seen

a vehicle before. In State v. Bennett, 62 Wn. App. 702, 705, 814 P.2d 1171 (1991), the Court of Appeals reversed a trial court ruling that no seizure occurred, because two officers and a diagram had indicated that the act of parking the police patrol cars behind the defendant's vehicle actually blocked its egress from the parking lot. State v. Bennett, 62 Wn. App. at 705-09. Similarly here, Deputy Gow testified that he parked directly behind Harvill, and that there was only one way out, and Harvill would not have been able to turn around without hitting the trooper's vehicle. The Court stated that it wasn't material to its decision in this case that the defendant was free to leave or not free to leave at the time the deputy pulled in behind him. RP 46. However, that is exactly what the test is in determining whether a seizure has occurred. A seizure occurs if "in view of all the circumstances surrounding the incident, a reasonable person would not have believed he was free to leave." State v. Aranguren, 42 Wn. App. at 455.

In this case, Harvill was blocked in and was not free to leave, therefore he was seized at the time Deputy Gow drove out onto that field and parked his vehicle behind Harvill's, and approached him. Therefore, because Harvill was seized at the time Gow pulled in behind him, Gow must have had reasonable articulable suspicion that a crime was being committed or about to be committed at that time. He had none. He only stated that he saw a vehicle out on a field and that he had not seen a vehicle out there before. The vehicle was parked in open sight where anyone could see it. Other than being there, Harvill was not doing anything suspicious. Gow had read that the owner was in a federal lawsuit, but did not know that Harvill was not the owner at the time he drove out there. See Stroud, 30 Wn. App. at 399 (stop of an automobile because it was parked in an

industrial area some distance from a retail business which had its own parking lot, at 1:41 a.m. in the morning, was unreasonable, because the officers were unable to articulate specific, objective facts upon which to base a reasonable suspicion that the person in the car was engaged in criminal activity); State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001); State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988). Here, the van was parked in plain sight, out on private property at dusk. Deputy Gow did not know anything more and had no objective facts to base a reasonable suspicion of criminal activity.

“Obviously, once an individual is ‘seized’, no subsequent events or circumstances can retroactively justify the ‘seizure.’” State v. Mendez, 137 Wn.2d 208, 224, 970 P.2d 722 (1999) (*quoting*, State v. Stinnett, 104 Nev. 398, 760 P.2d 124, 126 (1988)). Evidence produced as the result of an unlawful seizure is not admissible against an accused. Mapp v. Ohio, 367 U.S. 643, 655, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961). Therefore, it does not matter that Harvill, after being seized, stated that he did not own the property or know who did own the property.

2. Even If The Initial Detention Was Lawful, The Search Of The Van Was Not A Valid Search Incident To Arrest Under the Fourth Amendment of the Constitution of the United States or Art. 1, Section 7 of the Washington Constitution.

Generally, an appellant may not raise for the first time on appeal an error predicated upon evidence allegedly obtained by an illegal search. State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Under RAP 2.5(a), however, he may raise for the first time in the appellate court a “manifest error affecting a constitutional right.” State v.

McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). However, this exception does not automatically mandate review whenever a criminal defendant identifies some constitutional error not raised below. McFarland, 127 Wn.2d at 333-34. The appellant must show that the alleged error is “manifest” by showing actual prejudice. Id. at 333.

- a. The search of the van was illegal under the Fourth Amendment of the Constitution because Harvill was handcuffed and in the back of the patrol car when the search took place.

Warrantless searches are per se unreasonable subject only to a few specifically established and well delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The exception for a search incident to a lawful arrest applies only “the area within which an arrestee might gain possession of a weapon or destructible evidence.” Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The Chimel rational was applied to the passenger compartment of vehicles in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Most recently, our United States Supreme Court held that [p]olice may search a vehicle incident to the arrest of a recent occupant only if the arrestee is within reaching distance at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception applies. Arizona v. Gant, 566 U.S. ____ (2009).

In Gant, after receiving an anonymous tip concerning drug activity at a particular residence, law enforcement contacted Gant at the residence. They left the residence

and then ran Gant's information and found that he had a suspended license. They watched as he left the area in a vehicle, and then stopped him for driving on a suspended license. Officers then arrested Gant, handcuffed him, and placed him in the back of the patrol car. They subsequently searched his vehicle. The Arizona Supreme Court reversed the trial court's denial of the Gant's motion to suppress, stating that Chimel rationale did not apply once Gant was handcuffed and in the back of patrol car. The U.S. Supreme Court affirmed. Arizona v. Gant, 566 U.S. _____ (2009)

Here, Harvill was arrested based on an outstanding warrant. He was then searched incident to arrest and a small amount of methamphetamine was found in his pants pocket. He was then handcuffed and placed in the back of the patrol car. When asked if there were weapons in the vehicle, Harvill simply stated they were his fathers, but refused to explain further. Gow searched the vehicle incident to Harvill's arrest. Harvill was no longer within reaching distance of the vehicle at the time of the search, and therefore, under the Fourth Amendment and Gant, the search was not valid as the Chimel exigencies did not apply. Furthermore, Harvill was arrested for an outstanding warrant, and therefore it is not reasonable to believe that evidence of that crime would be found in the vehicle. Once Harvill was arrested, evidence of another crime, possession of methamphetamine was found on his person; however, there was no reason to believe further evidence of drugs would be found in the vehicle. The officers did not point to any plain view sightings or any thing else to suggest they thought they would find drugs in the vehicle. Therefore, a warrant was

required to search the van. The search was illegal and the evidence should have been suppressed.

Had the evidence of the firearms found in the vehicle been suppressed, there would have been insufficient evidence to convict him. Therefore, because Harvill has shown actual prejudice, the error is a manifest error that can be considered for the first time on appeal.

- b. The search of the van was illegal under the Art. 1, Section 7 of the Washington Constitution because Harvill was one to two feet from the van at the time he was arrested

The Washington Constitution guarantees that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law. Wash. Const. Art. I, Section 7. The individual right to privacy as guaranteed by the Washington Constitution grants greater protection to individuals against warrantless searches of their vehicles than does the Fourth Amendment. State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008). The Prosecution bears the burden of establishing the “search incident to arrest” exception. Id. at 270. Under the rigorous strictures of the Washington Constitution, a person’s proximity to the vehicle is a necessary element the State must prove in order to establish a valid search incident to arrest. Webb, 147 Wn. App. at 269-70. In Webb, the Court found unconstitutional a search incident to arrest where the record did not show the arrestee’s distance from the car at the time of the search and the arrestee was handcuffed. Id.

Similarly, in State v. Quinlivan, 142 Wn. App. 960, 969, 176 P.3d 605, rev. denied, 164 Wn.2d 1031 (2008), the arrestee parked his truck and locked the door

before he was arrested at the curb. The Court found the truck was not in the defendant's "immediate control" because it was locked and when the police took the car keys, he could not readily access it. Likewise, in State v. Rathbun, 124 Wn. App. 372, 375, 101 P.3d 119 (2004), the defendant ran 40 to 60 feet from his car as he police approached. The Court ruled the car search invalid because the car was not in the arrestee's immediate control at the time of the arrest. The Court also rejected the prosecution's argument that the defendant's flight provided a ground to believe he might access the car. By leaving the car and moving a distance away, "the exigencies supporting a vehicle search incident to arrest no longer exist." Id. at 373.

If an individual "could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest." State v. Johnston, 107 Wn. App. 280, 285-86, 28 P.3d 775 (2001) rev. denied, 145 Wn.2d 1021 (2002); see also State v. Porter, 102 Wn. App. 327, 333, 6 P.3d 1245 (2000) ("At the time the police initiated the arrest, Charles was 300 feet from Porter's van. At such a distance Charles had no opportunity to destroy evidence or obtain a weapon from inside the van."); State v. Perea, 85 Wn. App. 339, 340-41, 932 P.2d 1258 (1997) (where car locked at time of arrest, invalidating search incident to arrest).

The particular requirements of Article I, section 7 underlie the Washington courts' analysis of the scope of the search incident to arrest. In Washington, a search incident to arrest is invalid unless it follows a lawful arrest. State v. O'Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003); Quinlivan, 142 Wn. App. at 967-68. Thus,

the warrantless search's validity is not measured by events transpiring prior to the arrest, but rather, whether, following the arrest, the individual remains in proximity to the vehicle such that the police have appropriate concerns over officer safety and the destruction of evidence as to justify a warrantless search of an arrested person.

Here, Harvill had left the van and was told to stay out of the van prior to his arrest. He was approximately one to two feet from the van, and he was immediately handcuffed as he was arrested. Therefore, Harvill could not reach or lunge into the vehicle at the time he was arrested. Because he was not in the van or within reaching distance at the time of his arrest, the search of the van was not a valid search incident to his arrest.

3. Harvill Received Ineffective Assistance Of Counsel When Counsel Failed to Argue All Issues Not Supported By The Facts At The Suppression Hearing.

A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the defective performance, i.e., there is a reasonable probability that but for the deficient performance, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), rev. 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).

Assuming, arguendo, this Court finds that Harvill waived the errors claimed and argued in the preceding section of this brief by failing to properly raise the issues set forth therein, 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 raise all the issues presented with regard to the suppression hearing when these issues would have resulted in dismissal of the charges.

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 apparent in that but for Counsel's failure to raise all the issues presented with regard to the suppression hearing for the reasons set forth in the preceding section, had Counsel done so, the result would have been different.

B. HARVILL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL PRESENTED IRRELEVANT AND PREJUDICIAL FACTS, ADMITTED HARVILL KNOWINGLY POSSESSED THE INSTRUMENTALITIES OF THE CRIME AND FAILED TO PRESENT ANY DEFENSE.

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Personal

Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). A defendant establishes ineffective assistance of counsel when he shows (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Deficient performance cannot be found if counsel's decision is tactically sound. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007).

1. Trial Counsel was ineffective when on cross-examination he elicited irrelevant and prejudicial facts, which prompted the State to further question the officer concerning those facts, and provided further argument for the State.

Among other duties, Counsel is obliged to conduct a reasonable investigation under prevailing professional norms. In re Personal Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007); State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The presumption of effective counsel can be overcome by showing counsel failed to fully investigate, interview witnesses and otherwise prepare for trial. State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991); State v. Leming, 133 Wn. App. 875, 892, 138 P.3d 1095 (2006), rev. denied, 160 Wn.2d 1006 (2007). The same is true where defense counsel elicits prejudicial testimony that would be otherwise inadmissible under well established evidentiary principles. State v. Saunders, 91 Wn. App. 575, 578-80, 958 P.2d 364 (1998) (defense counsel was ineffective for eliciting on direct examination defendant had drug

conviction where conviction was probably inadmissible under ER 609 and defense was unwitting possession of a controlled substance).

Here, Harvill's trial counsel rendered deficient performance when cross-examining Gow. Counsel explicitly asked Gow what gender the pants were that the methamphetamine was found in. While this could have been a strategy to show unwitting possession of the methamphetamine, Counsel's opening statement suggest that was not the strategy. Counsel in opening statement, stated that Harvill would testify that he had purchased the methamphetamine, but did not know that it was in those pants. Counsel further did not request an unwitting instruction, nor did he try to argue unwitting possession to the jury. After Counsel asked Gow about the gender of the pants, on re-direct the State asked what else the Officer noticed about the defendant. Gow stated that he was wearing female pants, had what appeared to be breasts, and was wearing lipstick. This is evidence that was in the police reports. Counsel should have moved to suppress any testimony concerning this as it was totally irrelevant to the crimes Harvill was charged with, and was highly prejudicial. Not only did Counsel not move to suppress this irrelevant evidence, Counsel actually opened the door to its introduction which allowed the State to further undermine any defense Harvill might have had. Counsel argued that Harvill was distraught and on his way to a niece's birthday party, and was taking the guns to his stepmom. The State, using this irrelevant and prejudicial information, argued the unreasonableness of that. Because Counsel was not planning to introduce this for a strategic reason, unwitting possession, there was no tactical reason to introduce the evidence. Therefore counsel's performance was deficient.

2. Trial Counsel was ineffective when in opening statement counsel stated that Harvill would admit to possessing the instruments of the crimes, and then presented the evidence to support every element of the crimes.

Counsel's performance was deficient when he submitted an opening statement and testimony from Harvill, which basically proved every element of the State's case.

The State presented evidence that Harvill possessed methamphetamine. It was located on his person. The State did not present evidence that Harvill knowingly possessed the methamphetamine. Harvill could have simply testified that he did not know the drugs were in those pants. After all he was wearing female pants, and the argument might have been legitimate. However, Counsel stated in his opening statement that Harvill bought the methamphetamine, and Counsel elicited from Harvill that he had bought the methamphetamine. It was not necessary for Counsel to introduce that knowledge. Simply eliciting testimony that he did not know the drugs were in those pants would have been required. This testimony undermined any possible defense Harvill could have had. There is no tactical reason for Counsel to introduce testimony that takes away a defense, probably the only defense Harvill could have had. The performance was deficient.

Furthermore, Counsel's opening statement was that Harvill would admit to taking the guns out of the house and putting them in the van. He would then take a detour and ride his motorcycle before taking them to his stepmother's house. Basically the defense presented was, okay what he did was wrong, but he had a good reason. Therefore, even though this is what the law is, and he broke the law, you as jurors should not follow the law. It is presumed that jurors will follow the law as presented by the court in jury

instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Counsel's performance was deficient when he basically asked the jury to not follow the law.

The second prong of the Strickland test is that the defendant was prejudiced by Counsel's deficient performance, and that the result would have been different. At a minimum, had it not been for Counsel's performance, Counsel would have been able to argue unwitting possession, and the jury may very well have acquitted of the possession of methamphetamine. Therefore, Harvill received ineffective assistance of counsel, and his convictions should be reversed.

VI. CONCLUSION

Harvill received ineffective assistance of counsel as required by the Sixth Amendment of the U.S. Constitution, and Art. I, Section 22 of the Washington Constitution. For this reason, his conviction should be reversed and remanded for a new trial. However, because the trial court erred when it denied Harvill's motion to suppress, the court should reverse the conviction and remand for dismissal for insufficient evidence.

Respectfully Submitted this 5 day of May, 2009.



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CERTIFICATE OF SERVICE

I certify that on the 5 day of May, 2009, I sent via U.S. Mail the original and one copy of the Brief of Appellant for filing to the Clerk of the Court, Court of Appeals, Div. II, 950 Broadway, Ste. 300, Tacoma WA 98402, and that I sent via U.S. Mail a true and correct copy of this Brief of Appellant to Katherine Lee Svoboda/Gerald R. Fuller, Grays Harbor County Prosecutor's Office, 102 W Broadway Ave., Rm 102, Montesano, WA 98563 and Keith Harvill, Appellant, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

By: April Broussard
April Broussard, Legal Assistant

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