

NO. 40488-5-II

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DWAYNE CLARK, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 09-1-03473-9

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

RECEIVED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
JAN 14 2010  
TACOMA, WA

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Does defendant’s failure to seek suppression of evidence at trial preclude him from raising the issue on appeal?..... 1

    2. Considering that totality of the representation, did defense counsel properly and effectively represent defendant? ..... 1

B. STATEMENT OF THE CASE. .... 1

    1. Procedure..... 1

    2. Facts ..... 2

C. ARGUMENT..... 7

    1. THE COURT SHOULD NOT CONSIDER DEFENDANT’S REQUEST TO SUPPRESS EVIDENCE ON APPEAL SINCE HE MADE NO MOTION DURING TRIAL. .... 7

    2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFICIENT ASSISTANCE OF COUNSEL ..... 11

D. CONCLUSION. .... 21-22

## Table of Authorities

### State Cases

<i>Hudson v. City of Wenatchee</i> , 94 Wn. App. 990, 996, 974 P.2d 342 (1999) .....	14
<i>Maitlen v. Hazen</i> , 9 Wn.2d 113, 124, 113 P.2d 1008 (1941) .....	14
<i>State v. Acrey</i> , 110 Wn. App. 769, 773, 45 P.3d 553 (2002) .....	14
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998) .....	9, 10
<i>State v. Crane</i> , 116 Wn.2d 315, 335, 804 P.2d 10 (1991) .....	12
<i>State v. Kealey</i> , 80 Wn. App. 162, 173, 907 P.2d 319 (1995).....	14, 15, 16
<i>State v. Kinzy</i> , 141 Wn.2d 373, 393, 5 P.3d 668 (2000) .....	18
<i>State v. Ladson</i> , 138 Wn.2d 343, 359, 979 P.2d 833 (1999) .....	18
<i>State v. Littlefair</i> , 129 Wn. App. 330, 119 P.3d 359 (2005).....	9, 10
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) .....	7, 8, 9, 10, 11, 12, 13, 17, 21
<i>State v. Nichols</i> , 161 Wn.2d 1, 14, 162 P.3d 1122 (2007).....	12
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) .....	8
<i>State v. Roberts</i> , 2010 WL 4226617, *3, ___ P.3d ___ (Oct. 25, 2010).....	7, 8, 10
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	11, 17
<i>State v. Valladares</i> , 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983) .....	10
<i>State v. Warner</i> , 125 Wn.2d 876, 889, 889 P.2d 479 (1995).....	18
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) .....	7, 8

**Federal and Other Jurisdictions**

*Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523,  
37 L.Ed.2d 706 (1973).....13, 14

*Nix v. Williams*, 467 U.S. 444, 104 S. Ct. 2501,  
81 L.Ed.2d 377 (1984).....18

*U.S. v. Jordan*, 544 F.3d 656, 666 (6th Circ., 2008).....8

*U.S. v. Rose*, 538 F.3d 175, 177 (3d Circ., 2008).....8

*United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980) .....19

**Statutes**

RCW 10.79.050 .....15

**Rules and Regulations**

FRE 12(e) .....8

RAP 2.5(a).....7

RAP 2.5(a)(3) .....7, 11, 21

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does defendant's failure to seek suppression of evidence at trial preclude him from raising the issue on appeal?
2. Considering that totality of the representation, did defense counsel properly and effectively represent defendant?

B. STATEMENT OF THE CASE.

1. Procedure

On July 23, 2009, the State charged defendant with kidnapping in the first degree (count I), child molestation in the third degree (count II), indecent liberties (count IV, originally count III), and assault in the second degree (count V, originally count IV). CP 1-2.

The State amended the charges against defendant on January 11, 2010, adding a second count of kidnapping in the first degree (count III). CP 13-16. The State also filed a motion *in limine*, seeking exclusion of prejudicial evidence concerning victim criminal background, personal history, and some specific hearsay evidence regarding the opinions of law enforcement personnel and prosecutors. CP 17-19.

Proceedings began on January 25, 2010. RP 3. The court first heard arguments over the motions *in limine* followed by a CrR 3.5 hearing. RP 10-23; 43-52.

On February 1, 2010, the jury found defendant guilty of two counts of kidnapping in the first degree (count I, III), one count of child molestation in the second degree (count II), and one count of indecent liberties (count IV). CP 64-70. The jury found defendant not guilty of assault in the second degree (count V). CP 71.

The sentencing hearing commenced on March 19, 2010. CP 108; RP 410. The court sentenced defendant to a standard range sentence of 67 months of confinement for count I, 41 months for count II, 51 months for count III, and 98 months for count IV. CP 116. The kidnapping charges, counts I and III, carried a sexual motivation enhancement which added 24 months to each sentence. CP 113,116. The court sentenced count I and count III consecutively, resulting in a total sentence of 166 months confinement. CP 117.

Defendant filed a timely notice of appeal on March 19, 2010. CP 126.

## 2. Facts

At approximately 2:30 pm on May 16, 2007, fifteen year old A.P.<sup>1</sup> walked alone to the local library in Spanaway. RP 55-56. A.P. testified that he encountered defendant standing by his truck. RP 57. Defendant and A.P. spoke about the military. RP 58-59. Defendant told A.P. to

---

<sup>1</sup> Consistent with defendant's brief, victim A.P., a minor at the time of the crime in question, will be referred to by his initials.

come over to the truck to review some paperwork regarding the Army. RP 59. A.P. testified that when he got near the truck, defendant forced him into the passenger seat of the vehicle and shut the door. RP 59-60. A.P. explained at trial that he could not open the door to escape. RP 60.

A.P. testified that defendant sat in the driver's seat of the truck and drove off. RP 61. Defendant and A.P. drove around Parkland and Tacoma for several hours. RP 61-62. A.P. testified that defendant used his cell phone to take photos of him. RP 61. While driving, defendant ordered A.P. to remove his pants. RP 62. Defendant then fondled A.P.'s genitals. RP 62-63. Defendant also ordered A.P. to masturbate. RP 64-65. After defendant told A.P. to masturbate, he asked A.P. for a location for them to go and continue the molestation. RP 66. A.P. testified that he told him to go to Spanaway Lake Park, a location near his residence. RP 66. A.P. testified that during the encounter, defendant gave A.P. a piece of paper with his telephone number on it. RP 65.

When they arrived, defendant left the truck and stepped into a portable toilet. RP 67. At this time, A.P. found a way to force the truck open, escape from the vehicle, and run to his home, taking defendant's cell phone with him. RP 67-68.

A.P. testified that he ran to his home and explained to his brothers what had happened. RP 69-70. They contacted their father, Wade O'Hara, who came home shortly afterward. 69-70. Mr. O'Hara contacted the police who responded to the residence. RP 70.

A.P.'s stepfather, Wade O'Harra, testified that when he arrived, A.P. was agitated. RP 100. Mr. O'Harra also confirmed that A.P. had a cell phone which he turned over to law enforcement. RP 100. He testified that the cell phone battery had discharged and it would not start. RP 102. When Pierce County Sheriff's arrived, Mr. O'Harra gave them a charger he had for the same model of cellular phone; they used it to charge the battery. RP 102.

Pierce County Sheriff's Deputy Vickie Kimbriel testified that she arrived in the early afternoon hours of May 16, 2007, at the scene to assist with the investigation. RP 107. She examined the phone's contents, attempting to locate the proper owner. RP 111-112. Deputy Kimbriel found a phonebook entry labeled "mom." She contacted the number associated with "mom" and spoke to a woman named Claudette Clark who indicated she was the mother of defendant. RP 113-115.

Marty Conrad, 911 operator, testified that defendant contacted 911 at approximately 6:00 pm on May 17, 2007, to report the theft of his cell phone and credit card. RP 150. Defendant provided a specific description of the cell phone, describing it as black, Motorola flip style phone insured by USAA. RP152. Defendant reported that the items had been taken from his unsecured vehicle in Spanaway Park from 4:00 pm to 4:02 pm on May 16, 2007. RP 151. Mr. Conrad also testified that defendant gave details of his automobile as part of the report, describing it as a maroon or burgundy Ford F-150 pickup truck. RP 153.

Detective Timothy Donlin of the Pierce County Sheriff's Department testified that he began investigating the case in the middle of May 2007. RP 119-120. He reported that he matched the name provided from Deputy Kimbriel with the 911 report taken by Mr. Conrad. RP 121. Detective Donlin contacted the Department of Licensing and obtained a photo of defendant along with several similar photos for a photomontage. RP 122. Detective Donlin testified that he showed the photomontage to A.P., who identified defendant's photo. RP 123, 126-127.

Detective Donlin testified that he attempted to contact defendant at his listed address in Lakewood, but determined that defendant no longer resided there. RP 131-32. He also attempted to contact defendant using the phone number reported to 911 with no success. RP 132.

On the afternoon of July 22, 2009, eighteen year old G.H.<sup>2</sup> went swimming in the American Lake area with friends. RP 265. He testified that after injuring his knee on the dock, he began walking to a friend's nearby apartment. RP 268. Defendant pulled up to G.H. in his truck and offered to give G.H. a ride home. RP 269-270. G.H. testified that he refused to accept the offer because he did not know defendant. RP 273.

---

<sup>2</sup> Consistent with defendant's brief, victim G.H. will be referred to by his initials.

G.H. testified that defendant withdrew a large knife and threatened him, ordering him to get into the vehicle. RP 273-274. G.H. got into the passenger side of the truck. RP 275. Defendant drove several blocks and pulled off to the side of the road. RP 279.

G.H. testified that once the vehicle stopped, defendant reached for G.H.'s belt buckle. RP 280. G.H. told defendant not to touch him and attempted to escape the vehicle. RP 280-81. Defendant continued his attempt to unfasten G.H.'s belt. RP 281. G.H. testified that he escaped by striking defendant in the jaw and forcing the truck door open. RP 281-82. G.H. fled to his friend's nearby apartment. RP 285-86. G.H. testified that when he arrived at his friend's apartment, he asked his friends there to contact the police. RP 286-87.

Lakewood Police Officer Tenney testified that he received a dispatch regarding G.H. at 3:00 pm. RP 192. Officer Tenney reported to the scene and contacted G.H., who appeared frightened and shaken. RP 193-94. As G.H. provided a description of the man that attacked him, he informed Officer Tenney that he saw defendant on the other side of the street. RP 199-200. G.H. positively identified defendant as his assailant, who smiled and waved at G.H. RP 201-02. Officer Tenney testified that he requested another officer make contact with defendant. RP 201.

Officer Michael McGettigan testified that he responded to dispatch and found defendant walking on Union Ave. RP 242. Officer McGettigan stopped his patrol car near defendant and asked him to stop. RP 243.

Officer McGettigan testified that he detained defendant so Officer Tenney and G.H. could drive by and see defendant, allowing G.H. to make a positive identification. RP 248-49. Officer McGettigan testified that once he received word of defendant's positive identification, he arrested defendant. RP 250.

C. ARGUMENT.

1. THE COURT SHOULD NOT CONSIDER DEFENDANT'S REQUEST TO SUPPRESS EVIDENCE ON APPEAL SINCE HE MADE NO MOTION DURING TRIAL.

Generally, a party may not raise a claim on appeal that was not raised at the trial level. RAP 2.5(a). However, RAP 2.5(a)(3) allows an appellant to raise a claim of manifest error affecting a constitutional right for the first time on appeal. This manifest constitutional error exception provided by RAP 2.5(a)(3) narrowly defines a subset of issues which a party may raise on appeal. *State v. Roberts*, 2010 WL 4226617, \*3, \_\_\_ P.3d \_\_\_ (Oct. 25, 2010) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)). "RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The court must examine issues raised by appellants first on appeal to determine whether they fall within the narrow exception provided by RAP 2.5(a)(3).

The fact that defendant did not raise an objection or motion to suppress at trial weighs heavily since “[w]ithout a developed record, the claimed error cannot be shown to be manifest.” *WWJ Corp.*, 138 Wn.2d at 603. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). Both *Roberts*, 2010 WL 4226617, and *McFarland*, 127 Wn.2d 322, involve a defendant who attempted to suppress evidence for the first time on appeal. Defendants in both cases made no motion to suppress evidence during trial. In both cases, the court rejected the appeal due to the insufficiently developed record<sup>3</sup>. *Roberts*, 2010 WL 4226617 at \*5; *McFarland*, 127 Wn.2d at 333. Here, as in *Roberts* and *McFarland*, defendant made no motion to suppress evidence, leaving no record to show prejudice to defendant regarding the evidence in question.

Defendant presented no motion to suppress evidence obtained from his cell phone. Furthermore, he made no suggestion or comment at trial that he considered the evidence improperly obtained. The only element in the record pertaining to the search comes from the testimony of Pierce

---

<sup>3</sup> Federal circuits generally refuse review of suppression motions appearing first on appeal. *U.S. v. Rose*, 538 F.3d 175, 177 (3d Circ., 2008). Referencing the waiver given in FRE 12(e), the court is “categorically without jurisdiction to hear appeals of suppression issues raised for the first time on appeal.” *U.S. v. Jordan*, 544 F.3d 656, 666 (6th Circ., 2008).

County Sheriff's Deputy Vickie Kimbriel. When asked as to why she searched through the contact information on defendant's cellular phone, Deputy Kimbriel explained the purpose of her search as "[t]o locate the owner of the phone." RP 111. No other details of the search appear in the record.

Defendant argues that Deputy Kimbriel determined the owner of the cell phone through an illegal, warrantless search. App. Br. at 12. At trial, nobody questioned Deputy Kimbriel as to whether or not a warrant was obtained prior to the search, nor did she volunteer any testimony to that effect. RP 106-118. When Deputy Kimbriel arrived, Deputy Hultman had already arrived on the scene; she obtained the cell phone from Deputy Hultman after she arrived. RP 107-108. The record is ambiguous as to whether or not there was a warrant to search the cell phone. Because defense counsel did not raise the issue at trial, fundamental elements important to determining whether the court should suppress evidence did not come to light.

Defendant cites *State v. Contreras*, 92 Wn. App. 307, 966 P.2d 915 (1998), and *State v. Littlefair*, 129 Wn. App. 330, 119 P.3d 359 (2005), as determinative for the case at bar, attempting to distinguish from the rule in *McFarland*. App. Br. at 11. The Court of Appeals held that *Contreras* differed from *McFarland* in that "the record is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied[.]" 92 Wn. App. at 314. Similarly, the Court

of Appeals in *Littlefair* deemed the record adequate for review because a pretrial hearing had been held to determine the admissibility of evidence taken from an allegedly unlawful search warrant. 129 Wn. App. at 338.

However, the rule established by Division 2 of the Court of Appeals in *Contreras* and *Littlefair*, not followed by either Divisions 1 or 3 or the Supreme Court, incorrectly deviates from the standard set in *McFarland*. “[B]ecause *no motion to suppress was made*, the *record does not indicate* whether the trial court would have granted the motion.” *McFarland*, 127 Wn.2d at 334 (emphasis added). In *Roberts*, Division 1 reiterated that “[b]ecause the defense did not file a CrR 3.6 motion to suppress the cocaine seized from the car, the *record is not sufficient to determine the merits* of Roberts’ claim[.]” 2010 WL 4226617, \*5. See *State v. Valladares*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983) (defendant who withdraws motion to suppress evidence cannot then raise the issue on appeal). In the case here, like *McFarland* and *Roberts*, defendant did not move to suppress evidence at trial, and the trial record does not provide relevant information regarding the admission of evidence for the court to review.

Since the trial record does not contain sufficient information regarding the collection of the contested evidence, the appellate court can not correctly review it for error, “the asserted error is not ‘manifest’ and

thus is not reviewable under RAP 2.5(a)(3).” *McFarland*, 127 Wn.2d at 334. The Court should not respond to defendant’s appeal for evidentiary ruling.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFICIENT ASSISTANCE OF COUNSEL.

“To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). A defendant must show both elements of the test to demonstrate ineffective assistance of counsel against the presumption of proper representation. Here, defendant has demonstrated neither.

- a. Defense counsel zealously and effectively represented defendant during trial.

In considering claims of deficient assistance of counsel, the court maintains a strong presumption that “counsel’s representation was effective.” *McFarland*, 127 Wn.2d at 335. A claim of ineffective assistance of counsel must be based on the trial record below. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991).

Defense counsel made no attempt to suppress the evidence acquired from defendant’s cell phone. “Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336. Further, “[t]here may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.” *Id.* “[The Supreme Court] rejected the premise that failing to move to suppress any time there is a question as to the validity of a search or seizure is per se deficient performance.” *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007) (citing *McFarland*, 127 Wn.2d at 336-37). Since counsel did not make any motion to suppress evidence, the record does not reflect whether counsel made the decision as part of a legitimate trial strategy. It cannot be determined if the choice represented a reasoned decision by counsel or a sign of ineffective assistance. Due to the uninformative record, defendant has not

presented a rebuttal of the “strong presumption” of effective representation.<sup>4</sup> *McFarland*, 127 Wn.2d at 337. Defendant has not met the requirements of the first part of the ineffectiveness test.

Moreover, defendant cannot show that the motion would have been meritorious had it been raised in the trial court. Even assuming there was no warrant allowing a search of the contents of the phone, defendant has not demonstrated that the search was unlawful. The court has recognized that law enforcement has duties beyond that of merely enforcing the law, including the duty of “community caretaking,” actions “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973).

In *Cady v. Dombrowski*, law enforcement personnel in Wisconsin had a Chicago police officer’s personal automobile towed to a private garage after taking him to the hospital following an automobile accident. *Id.* at 435. Believing that Chicago police officers carried their service revolvers with them at all times, the Wisconsin police searched defendant’s automobile to secure the weapon. *Id.* at 436. In the car, they

---

<sup>4</sup> In *McFarland*, the court noted that “[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.” 127 Wn.2d at 335. Here, defendant did not supplement the record with information outside the record on review. Thus, it remains unclear whether the search was done with or without a warrant.

found a number of items covered with blood. *Id.* at 437. Defendant, when confronted with these items, requested counsel and later gave the location of a body which matched the blood found on the items in defendant's trunk. *Id.* The Supreme Court of the United States, acknowledging the importance of law enforcement's role as community caretakers, upheld the admission of evidence found in the warrantless search. *Id.* at 450.

The courts of Washington have deemed that a variety of activities fall under community caretaking, "including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." *State v. Acrey*, 110 Wn. App. 769, 773, 45 P.3d 553 (2002) (quoting *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 996, 974 P.2d 342 (1999)). When Deputy Kimbriel searched defendant's cell phone, she did so in effort to find the identity of its owner, an inferable duty of law enforcement personnel as part of community caretaking. Specifically, she attempted to discover the cell phone owner's identity, comporting with the duty to return lost, misplaced, and stolen property.

When considering the expectation of privacy and how it relates to lost or misplaced property, the court held that "the finder/bailee has an obligation to seek out the owner of the goods and to try to return them." *State v. Kealey*, 80 Wn. App. 162, 173, 907 P.2d 319 (1995). *See Maitlen v. Hazen*, 9 Wn.2d 113, 124, 113 P.2d 1008 (1941). This obligation implies authority to search for identity of the owner and safely return of

the property. In *Kealey*, police officers took custody of a misplaced purse at a department store. 80 Wn. App. at 176. In an effort to determine the identity of the owner, they searched the purse and found small bags of marijuana and white powder believed to be methamphetamines. *Id.* The Court of Appeals held that, given the duty to return lost or misplaced property, “the owner's expectation of privacy is diminished to the extent that the finder may examine and search the lost property to determine its owner.” *Id.* at 173.

Defendant distinguishes *Kealey* by describing the cell phone as stolen, and not mislaid, property. App. Br. at 19. This distinction does not undermine the legal analysis. RCW 10.79.050 states that “[a]ll property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his or her rights to such property; and it shall be the duty of the officer who shall arrest any person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he or she shall be answerable for the same, and shall annex a schedule thereof to his or her return of the warrant.” RCW 10.79.050. The statute requires that law enforcement shall take charge of stolen property and that the property shall be returned to the proper owner. Using the analysis of *Kealey*, it can be readily inferred that law enforcement personnel have the authority to take measures to identify the proper owner of stolen property. Here, the search conducted by law

enforcement personnel, having only been used to determine the name of defendant, did not exceed the authority necessary to carry out the statutorily mandated duty.

No substantive trial record exists regarding defendant's cell phone and the examination conducted by law enforcement. The little information provided shows law enforcement personnel acting within their duties as community caretakers, searching the phone only so much as to determine the identity of its owner. Consistent with statute and *Kealey*, Deputy Kimbriel's examination does not violate the protections of the Washington state constitution nor the federal constitution. Law enforcement personnel lawfully examined the cell phone to determine the owner's identity.

Contrary to defendant's claim, the trial record only supports the presumption that defense counsel actively and effectively represented him during trial. Defense counsel objected numerous times to testimony he believed to be inappropriate. RP 114, 128, 135, 201-02, 230, 302. Counsel also zealously argued against the State's motions *in limine*, convincing the court to reject one of the six motions presented. RP 13-23. In part as a result of counsel's representation, the jury found defendant not guilty of assault in the second degree. CP 71. At the sentencing hearing, the court observed that defendant "[was] very ably represented by [his] attorney," commending counsel's forthrightness and advocacy for defendant. RP 422. Furthermore, the trial court attributed the low-end

recommended sentence from the State to defense counsel's able representation, a recommendation that strongly influenced the court's sentence. RP 422. The record shows that defendant had adequate representation during trial and he has failed to demonstrate evidence sufficient to override the "strong presumption" of effective representation.

- b. Outcome of trial would have been unchanged even if defense counsel moved to suppress evidence.

It is insufficient that defendant show that defense counsel's performance was deficient. Defendant must show that, based on the trial record, "that the result of the proceeding would have been different but for counsel's deficient representation." *McFarland*, 127 Wn.2d at 337 (citing *Thomas*, 109 Wn.2d at 225-26). Defendant has not sufficiently demonstrated that by suppression of the evidence gathered from his cell phone, the outcome of trial would have been different.

Nothing in the trial record suggests that a motion to suppress, if made, would have resulted in the suppression of defendant's name, the only relevant evidence gathered from the cellular phone. Law enforcement personnel, as community custodians, have a legitimate purpose in determining the owner of stolen, lost, or misplaced property that limits a person's privacy interest in the property. The likelihood that the trial court would have suppressed the evidence is not substantial. Since it is not likely that the court would have suppressed the discovery of

defendant's name by Deputy Kimbriel, the trial would not have been substantively different had counsel acted to suppress the evidence.

However, even considering the possibility that the court would suppress the evidence obtained from defendant's cell phone, specifically his name, A.P.'s identification of defendant would likely still have occurred since defendant's 911 call, giving details easily correlated to A.P.'s account, provided an avenue for inevitable discovery.

When the court suppresses evidence obtained from an illegal search or seizure, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)). However, exceptions to this rule exist. "[T]he 'fruit' of the incriminating [search] will be admissible if the prosecution can show that the evidence inevitably would have been discovered absent the incriminating [search]." *State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995)<sup>5</sup> (citing *Nix v. Williams*, 467 U.S. 444, 104 S. Ct. 2501, 81 L.Ed.2d 377 (1984)). Furthermore, the prosecution need not demonstrate absolute inevitability of the discovery; instead, the

---

<sup>5</sup> In *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995), a juvenile defendant ordered into a sex offender treatment program later admitted to five separate instances of child rape. When defendant turned eighteen, the State charged him with the other counts of child rape. The Supreme Court determined that, given the statutory time limits associated with the charges, information regarding the defendant's acts would have come to light independent of his admission in counseling.

prosecution need only show “a reasonable probability that evidence in question would have been discovered other than from the tainted source.” *Id.* (citing *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980)).

Even if the trial court had suppressed evidence gathered from the cell phone, defendant’s identification as the owner of the phone would have occurred. Law enforcement learned only defendant’s name from his cell phone when they spoke with his mother. RP 113-15. However, defendant, on the day after the kidnapping, contacted 911 and reported having had his cell phone stolen at a time and place specific to A.P.’s escape. RP 150-52. Furthermore, he provided a description of his automobile and cellular phone to the 911 operator. RP 153. A.P.’s identification of defendant did not occur until after the 911 call, when Detective Donlin matched the information provided by A.P. and defendant’s name acquired by Deputy Kimbriel to the 911 report made by defendant. RP 121-22. Detective Donlin used the information from the 911 call to assemble the photomontage which he presented to A.P. RP 122-23.

Although Detective Donlin used the name acquired via defendant’s cell phone, it only provided a link to defendant’s 911 call. The information given by defendant to the 911 operator provided sufficient detail to allow Detective Donlin to eventually match it to A.P.’s account of events. He provided the time and location of the robbery along with

details regarding both his automobile and the phone in question. RP 151-53. The information acquired from defendant's cell phone may have expedited A.P.'s identification of defendant, but there is a reasonable probability that law enforcement would have discovered his name through alternative means.

Even if the court would have chosen to suppress evidence taken from defendant's cell phone, limited to his name, the inevitable discovery of it would not motivate suppressing his name and later identification by A.P. Detective Donlin had the information from the 911 call, a source independent to the contents of the cell phone, with which he could determine defendant's identity and create a photomontage. The information received in the 911 phone call was not tainted by any of the prospective issues with evidence gathered from defendant's cell phone by Deputy Kimbriel.

Assuming that defense counsel ineffectively represented him, it is unlikely that the outcome of the trial would have been different. It is unlikely that the court would have granted the prospective motion to suppress evidence. Furthermore, suppression of the evidence in question would not have eliminated the independent source of information, the 911

call, allowing law enforcement to determine defendant's identity and generate a photomontage. Therefore, defendant was not prejudiced by his counsel's representation.

The test for ineffective assistance of counsel requires that a defendant makes a sufficient showing that rebuts the presumption of effective representation and, further, that the defective representation prejudiced the outcome of trial. Here, defendant has demonstrated neither element of the test.

D. CONCLUSION.

Defendant made no motion to suppress evidence during trial, making any assessment of the trial court's decision on such a motion speculative. With the standard set in *McFarland*, defendant cannot show prejudice with an undeveloped record, leaving the court unable to review the issue under to RAP 2.5(a)(3). These factors, coupled with numerous examples of zealous and effective representation by counsel during trial,

demonstrate the inadequacy of defendant's claim of ineffective assistance of counsel. For the reasons argued, the State respectfully requests that defendant's sentence be affirmed.

DATED: November 9, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



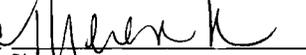
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

---

Andrew Asplund  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/9/10   
Date Signature

