

NO. 43413-0-II

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

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STATE OF WASHINGTON, Respondent

v.

DANIELLE NICOLE NEWTON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-02073-8

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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A. **RESPONSE TO ASSIGNMENT OF ERRORS**

- I. NEWTON IS PRECLUDED FROM RAISING THE SUFFICIENCY OF THE SEARCH WARRANT FOR THE FIRST TIME ON APPEAL.
- II. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE AS THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND WAS NOT OVERLY BROAD.
- III. NEWTON IS PRECLUDED FROM ATTACKING AN INSTRUCTION ON APPEAL THAT SHE REQUESTED AT TRIAL.
- IV. THE UNWITTING POSSESSION INSTRUCTION DOES NOT SHIFT THE BURDEN OF PROOF
- V. NEWTON HAD THE BENEFIT OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
- VI. THE TRIAL COURT PROPERLY RULED THE DEFENDANT COULD NOT ADMIT HER OWN OUT-OF-COURT STATEMENTS.
- VII. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERLY BROAD.

B. **STATEMENT OF THE CASE**

Newton was charged with Possession of Methamphetamine with Intent to deliver and Possession of a Controlled Substance. Methamphetamine by a second amended information. CP 1-2. Newton was tried along with a co defendant, Nathan Gadberry, and a jury convicted Newton of Possession of Methamphetamine with Intent to

Deliver and Possession of a Controlled Substance, Methamphetamine. CP  
3.

The evidence at trial showed that on December 9, 2011 approximately nine to ten police officers were involved with a stop of a vehicle that was being operated by Nathan Gadberry and Danielle Newton. RP Vol. 2, p. 204. Newton was in the front passenger seat of the vehicle. RP Vol. 2, p. 204. Nathan Gadberry was in the driver's seat. RP Vol. 2, p. 206. Another female was in the backseat of the vehicle. RP Vol. 2, p. 206. The vehicle was in a parking lot. RP Vol. 2, p. 317. Police vehicles pulled in behind and blocked the vehicle into the parking spot. RP Vol. 2, p. 310. The officers surrounded the vehicle. RP Vol. 2, p. 205. It was evening and the windows to the vehicle were tinted. RP Vol. 2, p. 206. Detective Sofianos ordered Newton to put her hands up. RP Vol. 2, p. 208. Newton did not comply and had her hands down in her lap and curled up. RP Vol. 2, p. 208. Gadberry was making movements in his lap area. RP Vol. 2, p. 210. Detective Sofianos became nervous due to the non-compliance of both Gadberry and Newton, and used a flashlight to break the window of the passenger side of the vehicle. RP Vol. 2, p. 210. Once the window was broken, Newton raised her hands and was taken out of the vehicle by police. RP Vol. 2, p. 212. Once Newton and Gadberry were removed from the vehicle, from standing outside the vehicle,

Detective Sofianos observed a blue plastic container that appeared to contain methamphetamine. RP Vol. 2, p. 225. The blue plastic container was within reach of both Newton and Gadberry. RP Vol. 2, p. 310. Police found a silver digital weighing scale on Gadberry's person. RP Vol. 2, p. 233, 322. Detective Brent Waddell placed Newton in handcuff and searched her person subsequent to arrest. RP Vol. 2, p. 338. Newton told Detective Waddell that she had a needle in a front pocket. RP Vol. 2, p. 338. A syringe was found on Newton's person. RP Vol. 2, p. 232, 338. Detective Sofianos spoke with Newton who said that the syringe contained methamphetamine. RP Vol. 2, p. 232.

The vehicle was sealed and towed to a secure facility until a search warrant was obtained. RP Vol. 2B, p. 390-91. Detective Sofianos authored a search warrant affidavit and applied for a search warrant for the vehicle. Ex. 62. Upon searching the vehicle, police found a glass smoking pipe, plastic disposable grocery bags commonly used for packaging drugs, a scale, a spoon with cotton on it, several cell phones, and an Apple iPhone that was found on the front passenger seat of the vehicle. RP Vol. 2B, p. 410, 518-25. The police also recovered a blue plastic container that held a crystalized substance. RP Vol. 2B, p. 399-413. Newton's identification was also found in the vehicle. RP Vol. 3A, p. 548.

The scales, the spoon, smoking device, blue plastic container and liquid obtained from the syringe found on Newton's person all contained methamphetamine. RP Vol. 2B, p. 432-35. The blue plastic container of crystal-like substance contained 4.8 grams of methamphetamine. RP Vol. 2B, p. 431.

During cross examination of Detective Sofianos, Newton's defense attorney attempted to elicit a statement that Newton made to Detective Sofianos about the methamphetamine in the blue plastic container inside the vehicle. RP Vol. 2, p. 275. It is clear that this statement was made by Newton after continued questioning by the detective. RP Vol. 2, p. 275. The trial court sustained the State's objection on hearsay grounds. RP Vol. 2, p. 275-283.

Detective Scott Holmes analyzed the data on the iPhone recovered from the vehicle and found photos of Newton and Gadberry both separate and together. RP Vol. 4, p. 796-98. Text messages obtained from the iPhone were also admitted at trial. RP Vol. 4, p. 803. The messages appeared to be requests for drug deliveries. Ex. 75.

Defense counsel for Newton objected to the search warrant at trial and argued at various times that it was overbroad for allowing search of the iPhone recovered from the vehicle in that photographs not depicting

illegal behavior were recovered. RP 82, 93, 157, 171. Newton did not file a motion to suppress pursuant to CrR 3.6.

Defense counsel proposed an instruction on unwitting possession and the court gave this instruction as 17a. Supp. CP 44. The trial court gave a standard WPIC instruction on accomplice liability as instruction 12. Supp. CP 39. Defense counsel did not object to this instruction.

C. **ARGUMENT**

I. **THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND WAS NOT OVERLY BROAD**

- a. As Newton did not file a suppression motion pursuant to CrR 3.6 she is barred from raising this issue for the first time on appeal.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). But if there is a manifest error affecting a constitutional right, it can be raised for the first time on appeal. RP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *State v. Lym*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Not every constitutional error can be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To raise it for the first time on appeal, it must be a “manifest” error. *Id.* (citing *State v. Scott, supra* at 688). To show an error is manifest, actual prejudice must be shown. *Scott*, 110 Wn.2d at 688; *Lym*, 67 Wn. App. at 346.

When a defendant raises a suppression issue for the first time on appeal, he must show the trial court likely would have granted the motion if it was made. *McFarland*, 127 Wn.2d at 333-34. It is not enough that a defendant allege prejudice, he must show actual prejudice from the record. *Id.* at 334.

As in *McFarland*, Newton did not move to suppress the evidence at the trial level. Newton filed no suppression motion or brief in support. The record is therefore scant on the trial court's general ruling on this matter. For the extent that the record shows the court's ruling and how it would have ruled given a properly filed motion, the court ruled in favor of the validity of the search warrant. Therefore, Newton cannot show actual prejudice and in the absence of a showing of actual prejudice, the error is not "manifest" and is therefore not reviewable under RAP 2.5(a)(3). *See McFarland*, 127 Wn.2d at 334.

II. THE SEARCH WARRANT WAS VALID AND THERE WAS NO BASIS TO SUPPRESS EVIDENCE.

Even if this Court finds Newton's assignment of error is properly before this Court, her claim still fails as the search warrant was validly issued and was not overbroad.

Washington Court Rules specifically authorize warrants to search for and seize evidence of a crime, contraband, the fruits of a crime, or things

otherwise criminally possessed, weapons or other things by means of which a crime has been committed or reasonably appears about to be committed. CrR 2.3(b). Case law has held that search warrants are the favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. *U.S. v. Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971); *U.S. v. Ventresca*, 380 U.S. 102, 108-09, 13 L. Ed. 2d 284, 85 S. Ct. 741 (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn. App. 519, 557 P.2d 368 (1976). A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination should be given great deference by a reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). And further, doubt as to the existence of probable cause will be resolved in favor of the warrant. *State v. J-R Distributions, Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). In reviewing the search warrant affidavit and making a determination as to whether to authorize the search warrant, the magistrate is to operate in a common sense and realistic fashion and is entitled to draw common sense

and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

In determining the validity of a search warrant, the court considers whether the affidavit, on its face, established probable cause. *State v. Perez*, 92 Wn. App. 1, 4, 963 P.2d 881 (1998). A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit is sufficient to support probable cause if it contains information from which an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. *Id.* The standard of probable cause is governed by the probability, rather than a prima facie showing, of criminal activity. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 594-95, 989 P.2d 512 (1999) (quoting *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)). The determination of probable cause is given great deference. *Id.* (quoting *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Affidavits are to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the warrant. *State v. Griffith*, 129 Wn. App. 482, 120 P.3d 610 (2005) (citing *State v. Castro*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984)). The

determination of probable cause is reviewed for an abuse of discretion. *Id.* (citing *State v. Estorga*, 60 Wn. App. 298, 303, 803 P.2d 813 (1991)).

In general, the degree of specificity required in a search warrant varies according to the circumstances and the type of items involved. *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992) (citing *U.S. v. Krasaway*, 881 F.2d 550, 553 (8th Cir. 1989)). The particularity requirements of the Fourth Amendment are met if the item to be seized is described with “reasonable particularity” which in turn, is to be evaluated in the light of “the rules of practicality, necessity and common sense.” *Id.* at 546 (citing *State v. Withers*, 8 Wn. App. 123, 126, 504 P.2d 1151 (1972)). Each case should be reviewed on a case by case basis as to whether a search warrant is particular enough is a factual question unique to each search warrant.

Newton argues the search warrant in this case is overbroad because it authorized the search of the entire vehicle. Newton alleges that once the police seized the bowl of methamphetamine that the officers had previously seen in open view, then they should have terminated the search. However, saying an officer can search part, but not all of a vehicle would be akin to saying police would exceed the scope of a search warrant each time they search a particular room of a house. *See State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2002). It is well settled that once there is

probable cause to believe that a motor vehicle may contain specific contraband, a search of any part of the vehicle in which the suspected contraband might be found, including any closed containers, is permissible. *See U.S. v. Ross*, 456 U.S. 798, 809, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *California v. Carney*, 471 U.S. 386, 390-91, 105 S. Ct. 2066, 85 L.Ed.2d 406 (1985).

Newton cites to *State v. Thien*, 138 Wash.2d 133, 977 P.2d 582 (1999) to support her argument that no generalized language can appear in a valid search warrant. However, *Thien* does not hold that no generalized language can appear in a search warrant affidavit. On the contrary, an officer's training and experience and generalizations from that can be considered in determining probable cause, however there must also be evidentiary nexus between the items to be seized and the location to be searched. *Thien*, 138 Wash.2d at 145 (citing *United States v. Schultz*, 14 F.3d 1093, 1097 (6th Cir. 1994)). Clearly in Newton's case, there are detailed facts which would satisfy any reasonable magistrate, to a level beyond probable cause, that it was likely that illegal drugs and other items associated with selling and distributing drugs would be found in the vehicle. The affidavit in support of the search warrant put forth particularized facts as it related to what they observed in the vehicle. Ex. 62. The officers observed what they believed to be, based on training and

experience, methamphetamine, visible to them from their vantage point outside the vehicle. Clearly this one fact alone, combined with the officer's training and experience and knowledge regarding methamphetamine gives sufficient factual nexus to satisfy the requirements of probable cause to support a search warrant for the vehicle.

Newton's argument, if taken to its likely end, would mean no magistrate could do more than allow the search and seizure of what police already know for sure to be present in a location to be searched. That is simply not the state of the law. To obtain a search warrant, an officer must have facts and information sufficient to support probable cause- that an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. *Cole*, 128 Wn.2d at 286. The facts contained in the search warrant affidavit, combined with the officer's knowledge, training and experience contained in the search warrant affidavit gave probable cause that evidence of a crime would be found in the vehicle, in the locked compartments of the vehicle and in the cell phones in the vehicle.

Newton also argues the search warrant is invalid because it fails to list the crime under investigation in the warrant. The Court in *Riley* held that a search warrant must either specify the crime under investigation or limit the items that may be seized to satisfy the particularity requirement

of the Fourth Amendment. *State v. Riley*, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993). In *Riley*, the warrant failed to state the crime under investigation, and it authorized seizure of “any fruits, instrumentalities and/or evidence of a crime, to-wit: notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.” *Id.* at 26. The Court in *Riley* found this warrant to permit “the seizure of broad categories of material...” and therefore was overbroad. *Id.* at 28.

As opposed to the search warrant in *Riley*, the warrant in Newton’s case specified the items to be searched for a seized. The warrant allowed seizure of methamphetamine, paraphernalia used in the ingestion or consumption of a controlled substance, methamphetamine distribution equipment, personal property such as mail, receipts, photographs or ID cards to establish dominion and control, and to search locked containers for illegal substances. Ex. 62. Though the warrant did not specify the crime the police were investigating, it listed, with specificity, the items to be searched for and seized. Thus it satisfied the requirements of the Fourth Amendment and *Riley*. The warrant was not overbroad.

Newton also argues the search warrant is overbroad because it allowed the police to search for and seize items that are protected by the

First Amendment and that are not themselves illegal. However, a warrant may authorize seizure of evidence that establishes a nexus between the suspect and the crime. *See Warden v. Hayden*, 387 U.S. 294, 307, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). Courts generally uphold search warrants that allow for searches of evidence of dominion and control where a list of items follows. *See Andresen v. Maryland*, 427 U.S. 463, 479-82, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). The statement in the search warrant in Newton's case allowed for search and seizure of: "Personal property, including but not limit [*sic*] to mail, receipts, photographs or identification cards, in order to establish dominion and control of the vehicle, as well as to confirm the identity of the defendant(s)." This language is sufficiently specific and is not overbroad. *See U.S. v. Alexander*, 761 F.2d 1294, 1302 (9th Cir. 1985); *U.S. v. Honore*, 450 F.2d 31, 33 (9th Cir. 1971).

This court should review the search warrant and search warrant affidavit in a manner which encourages the continued use of search warrants, and in a common sense and realistic fashion. *See U.S. v. Harris, supra; U.S. v. Ventresca, supra; State v. Yokley, supra*. Based on all the information contained in the search warrant affidavit, this search warrant was properly issued, supported by probable cause and was not overly broad.

III. THE JURY INSTRUCTIONS WERE NOT PREJUDICIAL TO NEWTON

a. The Invited Error Doctrine prevents Newton from attacking a jury instruction she proposed at trial

Newton is barred from arguing this jury instruction is improper and a basis for reversal under the invited error doctrine. The invited error doctrine prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The case of *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002) is on point with Newton's case. In *Patu*, the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction and the jury convicted the defendant. *Patu*, 147 Wn.2d at 719. On appeal, Patu sought reversal of the conviction based on the trial court's failure to include an essential element of the offense in the instruction. *Id.* The Supreme Court affirmed Patu's conviction and held the invited error doctrine applied because a party may not request an instruction and later complain on appeal that the requested instruction was given. *Id.* at 721. In a similar case, *State v. Studd*, the Court held that the invited error doctrine applied to defendants who proposed an erroneous instruction at trial and found the defendants could not raise the issue on appeal. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

As Newton proposed this instruction to the trial court, and requested the court give it, the invited error doctrine prevents her from complaining about it now on appeal.

b. The jury instruction on unwitting possession did not shift the burden of proof

If this court finds invited error doctrine does not prevent Newton from alleging this instruction was error, her argument still fails as the jury instruction did not improperly shift the burden of proof.

The jury instruction on unwitting possession does not shift the burden of proof. Newton is correct that Possession of a Controlled substance with intent to deliver implicitly requires that the defendant knowingly possess the controlled substance, and with a specific intent to deliver it. *See State v. Sims*, 119 Wash.2d 138, 142, 829 P.2d 1075 (1992). In *Sims*, the court found that guilty knowledge is not a common law element of the crime of Possession of a Controlled Substance with Intent to Deliver, and further noted that there is no merit to the defendant's argument that it was error to fail to instruct the jury on guilty knowledge. *Sims*, 119 Wash.2d at 142. It is not the defendant's burden to prove unwitting possession, but rather the state's burden to prove possession with the intent to deliver for this court. However, an argument of unwitting possession would benefit the defendant because how could a

person intend to deliver an illegal drug when they do not know is an illegal drug?

It is “impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing.” *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); *State v. Sanders*, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). Guilty knowledge of the nature or presence of the substance is subsumed under the statutory requirement that the defendant intended to deliver a controlled substance. *Sanders*, 66 Wn. App. at 380. Therefore, it would be impossible for a jury to convict a defendant of possession of a controlled substance with intent to deliver if they believed it was possible the defendant possessed that controlled substance unwittingly. Even though the jury was instructed that the defendant must prove she possessed it unwittingly by a preponderance of the evidence, a jury simply could not convict beyond a reasonable doubt for that crime because of the specific intent to deliver that controlled substance. Though it was arguably error for the court to give this instruction, it would not have changed the outcome of the case had the court not given this instruction. The giving of the instruction was not only invited error, but it was harmless error. It did not prejudice the substantial rights of the defendant and did not affect the final outcome of the case. *See In re Det. Of Pouncey*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010).

#### IV. DEFENSE COUNSEL WAS NOT INEFFECTIVE

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

An effective attorney must not file every conceivable motion or make every possible objection. In this case, the search warrant was clearly based on probable cause and appropriately issued. The police observed in open view, a bowl of what appeared to be, and was later confirmed to be, methamphetamine in the vehicle. One defendant was arrested and found to possess a scale with residue of methamphetamine on it and the other was found in possession of a syringe with methamphetamine inside. These facts gave probable cause for issuance of a search warrant for the vehicle. Case law supports a search warrant in this situation and a well-seasoned defense attorney knows when his client has a chance of success on a motion to suppress. It is not ineffective for failing to make a losing argument. If it were, then every case that involved a search warrant, the attorney would be ineffective for failing to file a motion to suppress. That is not a reasonable line to draw. An attorney must evaluate each situation on a case-by-case basis and that is simply what the defense attorney did in this situation.

Newton also claims her attorney was ineffective for proposing an inappropriate instruction. Though it was arguably improper to propose the unwitting possession instruction, as argued above, this error did not prejudice Newton and did not affect the outcome of the trial. “When jury instructions are inconsistent, it is the duty of the reviewing court to determine whether ‘the jury was misled as to its function and responsibilities under the law’ by that inconsistency.” *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (quoting *State v. Hayes*, 73 Wn.2d 568, 572, 439 P.2d 978 (1968)). Here, the jury was not misled. The to convict instructions clearly indicate the State had the burden of proving that the defendant possessed a controlled substance with the intent to deliver. As previously discussed, it is not possible for a jury to convict a defendant of this crime if they do not also find the defendant was aware of and knew of the nature of the controlled substance because how can one intend to deliver something he does not know he possess? Because guilty knowledge of the nature or presence of the substance is subsumed under the statutory requirement that the defendant intended to deliver a controlled substance, then Newton’s claim of ineffective assistance of counsel fails. *Sanders*, 66 Wn. App. at 380.

Further, it was legitimate trial strategy for defense counsel to propose the unwitting possession instruction for two separate reasons.

The evidence of Newton's guilt was overwhelming. Defense counsel's option of defenses was limited and by proposing an instruction on unwitting possession, it gave weight and credence to his argument that she is not guilty if she did not know she possessed the methamphetamine because the jury received an instruction from a judge showing the defense attorney's argument was a valid defense. Though possibly a weak argument, when faced with a client who is clearly guilty by the overwhelming evidence, a defense attorney uses his experience and knowledge to provide the best defense and best argument he can for his client. This is what Newton's attorney did for her. Also, it is clear from other parts of the record that defense counsel made certain strategic decisions during trial and trial preparation to put his client in a better position to argue on appeal that she had ineffective assistance of counsel. *See* RP Vol. 4, p. 833-35. Defense counsel certainly strengthened her argument for ineffective assistance of counsel by proposing this instruction.

In looking at the record in total, it is abundantly clear that Newton had the benefit of a zealous advocate in her defense counsel. The record is full of her attorney's objections and arguments. It is safe to say that her attorney made more argument and more objections than her co-defendant's attorney. She had a zealous attorney who made tactical

decisions to best defend her against overwhelming evidence of her guilt. An attorney need not be successful to be effective. Newton had the benefit of effective assistance of counsel.

V. RULE OF COMPLETENESS DID NOT REQUIRE ADMISSION OF ALL DEFENDANT'S STATEMENTS TO POLICE

Evidence Rule 106 provides that when a writing or recorded statement or part thereof is introduced, the adverse party may require the party to introduce any other part of the statement or writing which, for fairness, should be considered contemporaneously. It is not, however, a way for a defendant to admit otherwise inadmissible evidence, or to put forth her theory of the case without testifying and thus avoiding cross-examination and impeachment. In order for a second part or remainder of a conversation to be admitted under ER 106, it must tend to modify, explain, or rebut the part that was introduced. *State v. LaPierre*, 71 Wn.2d 385, 428 P.2d 579 (1967). In *State v. Simms*, 151 Wash. App. 677, 214 P.3d 919 (2009), the court properly refused to allow defense counsel to elicit further statements the defendant made to a police officer when they were separated in time and unrelated to the first part of the statements that the State admitted. *LaPierre*, 71 Wn.2d at 388-89.

Newton alleges it was error for the trial court to refuse admission of her entire statement made to police when the State introduced part of it.

The defendant told one police officer that she had a syringe in her pocket. RP Vol. 2, p. 338. Later, upon questioning, she told a different police officer that the syringe had methamphetamine. RP Vol. 2, p. 232. Upon further questioning from the detective, she said the syringe was the only methamphetamine she had. RP Vol. 2, p. 275. Her statements were separated in time, the second statement that Newton wished to introduce, did not modify, explain or rebut the statement the State introduced. Under the case law interpreting ER 106, this statement is not admissible. The trial court properly excluded this testimony as it was not admissible pursuant to any other hearsay exception.

Newton argues that the trial court's exclusion of this evidence prevented her from presenting a defense. This argument is without support. In fact, it prevented Newton from admitting self-serving hearsay without taking the stand and being subject to cross-examination and impeachment of her many prior convictions involving dishonesty. The defendant was not prevented from testifying or from presenting witnesses on her own behalf. The trial court simply followed the rules of evidence and case law and applied it to this situation and properly excluded a second statement that neither modified or explained the first statement she made to police.

VI. ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD

Newton argues the statute allowing for accomplice liability is unconstitutional. To prove a statute is unconstitutional, the challenger must overcome a very high burden, one which Newton cannot meet. A statute is presumed to be constitutional and the challenger must show the statute is unconstitutional beyond a reasonable doubt. *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012) (citing *Bothell v. Barnhard*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011)). A statute is unconstitutional on its face if “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Such statutes are rendered inoperative. *Id.* A statute that is unconstitutional as applied prohibits the future application of the statute in a similar context, but the statute is not totally invalidated. *Id.* at 669. Specifically, a statute is overbroad if it prohibits a substantial amount of protected speech and conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

The Court of Appeals in *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wash.2d 1016, 245 P.3d 772 (2011) considered the same attack on the accomplice liability statute, RCW 9A.08.020, that Newton makes. In *Coleman*, the defendant argued the

statute was unconstitutionally overbroad because it criminalizes a substantial amount of speech protected by the First Amendment. *Coleman*, 155 Wn. App. At 960. The Court rejected Coleman’s argument and found that the accomplice liability statute “requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.” *Id.* at 961. This therefore avoids activities that are not performed in aid of a crime and that only consequentially further the crime. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)).

The Court of Appeals in *State v. Ferguson*, 164 Wash. App. 370, 264 P.3d 575 (2011) also considered the same attack on the accomplice liability statute that Newton presents. In *Ferguson*, the Court found that the accomplice liability statute Newton attacks “forbids advocacy directed at and likely to incite or produce imminent lawless action,” and does not forbid the “mere advocacy of law violation that is protected under the holding in *Brandenburg*.” *Ferguson*, 164 Wash. App. At 376 (referring to *Brandenburg v. Ohio, supra*).

Newton argues the Court’s decisions in *Coleman* and *Ferguson* are wrong and it appears, advocates for their reversal. However, Newton’s argument is misplaced. Though the definition of the term “aid” allows for words to be the form of assistance, it still must be assistance that is given

to another person during the commission of “the crime.” The definition of accomplice liability requires that the accomplice know that what she is doing will promote or facilitate the specific crime that the primary then commits. The definition is such that no one could be convicted of unintentionally or consequentially promoting or facilitating a crime by virtue of a general public speech made as Newton would have this court believe. The instruction given in Newton’s trial properly informed the jury of the law on accomplice liability and that has been upheld by two Courts of Appeal in *Coleman, supra* and *Ferguson, supra*. Newton has provided no sound basis or new reason why the decisions of *Coleman* and *Ferguson* should be reconsidered. The accomplice liability statute is not overly broad and it is constitutional.

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D. **CONCLUSION**

For the reasons set forth above, the trial court should be affirmed  
in all respects.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

\_\_\_\_\_  
RACHAEL R. PROBSTFELD,  
WSBA #37878  
Deputy Prosecuting Attorney

# CLARK COUNTY PROSECUTOR

## March 25, 2013 - 2:49 PM

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