No. 30702-6-III

FILED
June 12, 2012
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

vs.

CHRISTOPHER M. WINKLER
Appellant

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Attorney for Appellant
Burkhart and Burkhart, PLLC
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

IV. STATEMENT OF THE CASE 5

V. ARGUMENT 8

A. WINKLER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY HIS WARRANTLESS ARREST..... 8

1. Winkler was subject to an unlawful citizen's arrest.... 9

2. Trooper Clark's warrantless arrest of Winkler was not supported by probable cause..... 13

3. The violation of Winkler's constitutional rights is manifest errror..... 15

4. The error is not harmless error..... 16

B. WINKLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED HIS CONSTITUTIONAL RIGHTS 17

1. Counsel's performance was deficient for failing to challenge Winkler's warrantless arrest 18

a. *Trial Counsel ought to have moved for suppression based on an unlawful citizen's arrest of Winkler* 18

b. *Trial Counsel ought to have moved for suppression based on an unlawful, warrantless arrest of Winkler* 19

c. *Trial counsel's theory of the case supported a motion for suppression* 21

2. Counsel's deficient performance prejudiced the defense 22

VI. CONCLUSION 23

CERTIFICATE OF MAILING 25

TABLE OF AUTHORITIES

Federal Cases

Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) 10

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 17

State Cases

State v. Bellows, 72 Wn.2d 264, 432 P.2d 654 (1967) 13-4

State v. Brousseau, 172 Wn.2d 331, 259 P.3d 209 (2011) 16

State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005) 16

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) 16

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 16

State v. Gonzales, 24 Wn. App 437, 604 P.2d 168 (1979) 10

State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008) 13

State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009) 17

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 16

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 18

State v. Jasper, 174 Wn.2d. 96, 271 P.3d 876 (2012) 8

State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007) 8

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 9

State v. Malone, 106 Wn.2d 607, 724 P.2d 364 (1986) 10

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 18

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002) 18

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009) 9

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 18

State v. Terrovona, 105 Wn.2d 632, 716 P.2d 295 (1986) 14

State v. Turner, 143 Wn.2d 715, 23 P.3d 499 (2001) 17

State v. Vasquez, 109 Wn. App. 310, 34 P.3d 1255 (2001) 13

State v. Walker, 157 Wn.2d 307, 138 P.3dd 113 (2006) 10, 13

Statutes

RCW 9A.52.070 10

RCW 9A.52.080 10

RCW 10.31.100 13

Court Rules

RAP 2.5(a)(3) 8

I. INTRODUCTION

On the evening of October 14, 2011, in Spokane County, Washington, three private citizens and an off-duty Washington State Trooper armed themselves with handguns, shotguns, and flashlights. Approximately four hours earlier, an unknown suspect had broken into the Trooper's daughter's trailer home and stolen personal items. That evening, believing that they heard a person moving through the trees and underbrush on and adjacent to private property, they combed through the woods searching for what they suspected to be the burglar. The group followed sounds of someone or something moving through the woods onto a neighbor's property.

Shortly thereafter, two of the private citizens separately encountered the Appellant, Christopher M. Winkler. Although they did not recognize him, and it was not immediately apparent whether he was connected to the earlier burglary, they pointed their firearms

at him, ordered him to the ground, and detained him until the Trooper handcuffed him and turned him over to county authorities.

Winkler was eventually charged in Spokane County Superior Court with one count of residential burglary of the trailer home. Notwithstanding his warrantless arrest, and the lack of probable cause supporting that arrest, trial defense counsel did not challenge his arrest or bring a motion to suppress evidence. Following a jury trial, Winkler was found guilty of residential burglary and sentenced to 50 months confinement.

Errors at the trial court level require that Winkler's conviction and sentence be reversed and his case remanded for a new trial. First, Winkler's constitutional rights were violated by his warrantless arrest that was unsupported by probable cause. The error is manifest and not harmless. Second, Winkler received ineffective assistance of counsel, because trial counsel failed to challenge the unlawful arrest and did not bring a motion to suppress evidence. Counsel's performance was deficient and prejudiced Winkler in his defense. For these reasons, Winkler now timely appeals his conviction.

II. ASSIGNMENTS OF ERROR

1. Winkler's constitutional rights were violated by his warrantless arrest.

2. Trial defense counsel rendered ineffective assistance of counsel by failing to challenge Winkler's warrantless arrest prior to trial.

3. Trial defense counsel rendered ineffective assistance of counsel by failing to object to the admission of evidence at trial obtained as a result of Winker's warrantless arrest.

III. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Whether Winkler's constitutional rights were violated by his warrantless arrest when:

(a) The evidence elicited at trial shows that Winkler was subject to a citizen's arrest by the Nadeaus, despite the fact that he had made no show of force or violence toward them or anyone else;

(b) Winkler was handcuffed and further detained by an off-duty Washington State Trooper;

(c) Winkler was first contacted by his captors on private wooded property not owned by any of the captors over four hours after the alleged burglary;

(d) None of the captors knew whether Winkler had permission or license to be on the private property, whether he was the same person they had chased through the woods, or whether he was in possession of any property belonging to Katie Clark; and

(e) All four of Winkler's captors testified at trial as to the events leading up to and forming the basis for Winkler's arrest.

(Assignment of Error 1).

2. Whether trial defense counsel rendered ineffective assistance of counsel when:

(a) Trial counsel did not challenge Winkler's warrantless arrest through a motion to suppress;

(b) The evidence in the court record shows that Winkler was detained and arrested by two private citizens carrying firearms;

(c) Winkler was handcuffed and further detained by an off-duty Washington State Trooper;

(d) Winkler was first contacted by his captors on private wooded property not owned by any of the captors over four hours after the alleged burglary; and

(e) None of the captors knew whether Winkler had permission or license to be on the private property, whether he was the same person they had chased through the woods, or whether he was in possession of any property belonging to Katie Clark.

(Assignments of Error 2 and 3).

IV. STATEMENT OF THE CASE

On October 18, 2011, Appellant Christopher M. Winkler was charged with one count of Residential Burglary in Spokane County Superior Court. CP 3. The Information alleged that on October 14, 2011, Winkler unlawfully entered the home of Katie Clark in Spokane, Washington. CP 3.

A jury trial was held on February 27 and 28, 2012. RP 1-226. Witnesses for the State testified to the facts below.

On October 14, 2011, the alleged victim, Katie Clark and her live-in boyfriend, Chris Immonen, arrived home from work at approximately 2:30 p.m. CP 123-4, 143-4. The couple resides in a trailer home on property owned by Katie Clark's parents, Sheila and Kevin Clark; the 10-acre property is wooded. RP 93. Upon arriving home, Katie Clark discovered that someone had "trashed" her house and taken several items, including two televisions, underwear and socks, two gallons of milk, and frozen popsicle otterpops. RP 125, 132. Katie Clark called her father, Washington State Trooper Kevin Clark, and informed him of the break-in. RP 126.

After informing county authorities of the break-in, Trooper Clark conducted his own investigation of the incident. RP 98. For several hours, Trooper Clark combed the woods on and adjacent to his property looking for evidence. He found several items taken from Katie Clark's home, including a backpack with two laptop computers, controls for an X-box game, a milk jug, otterpops, a cup, and two televisions. RP 100-1, 103.

Between approximately 5:30 and 6:30 p.m., the Clarks' neighbors, Robbie and Matthew Nadeau (father and son), contacted Trooper Clark. RP 105, 169. The Nadeaus had been contacted earlier in the day by their neighbor Virginia Saunders and were investigating an incident that had occurred on her property. RP 168.

Saunders had requested the Nadeaus' assistance, because at approximately 1:30 p.m. a man with long hair in a ponytail, eating an otterpop and carrying a backpack, had entered her yard from the woods and peeked into her windows. RP 148-53, 157. When confronted, the man had told Saunders that he was looking for the road. RP 149. He then left her property.

Shortly after the Nadeaus and the Clarks exchanged information, the Nadeaus continued searching the woods and,

although they could not see anyone, they thought they heard a person running through the woods. RP 162. They contacted Trooper Clark and his wife, Sheila, who joined them in pursuit of the person. RP 162. All four were armed with handguns and/or shotguns and, because nighttime had fallen, flashlights. RP 107,109, 159. Together, the party of four searched the woods. RP 107-8.

Following the sounds of someone or something moving through the woods, they entered onto another neighbor's property, the "Box residence." RP 108. The group then split up—the Clarks moved toward the front of the residence to notify the owners of their presence and the Nadeaus went another direction. RP 108, 164. At that point, a man came running along a path toward the Nadeaus. RP 164. The Nadeaus pointed their shotguns at the man and commanded him to stop, get on the ground, and keep his hands away from his face. RP 164-65. The Clarks, hearing the Nadeaus' shouting, met back up with the father and son. RP 109, 165. Trooper Clark learned the identity of the man apprehended by the Nadeaus, Appellant Christopher Winkler, and without additional questioning, immediately placed Winkler in handcuffs. RP 109.

Winkler was then handed over to county deputies who had been called to the property. RP 111.

Ultimately, on February 28, 2012, Winkler was found guilty by jury verdict of one count of residential burglary. CP 32. On March 6, 2012, Winkler was sentenced to 50 months confinement. CP 40-51. Winkler now timely appeals his conviction and sentence. CP 56-7.

V. ARGUMENT

A. WINKLER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY HIS WARRANTLESS ARREST

For the first time on appeal, Winkler challenges his arrest as unconstitutional.

Manifest error affecting a constitutional right may generally be raised for the first time on appeal under RAP 2.5(a)(3). There is no dispute that a warrantless arrest without probable cause is constitutional error. In order to show that an error is "manifest," there must be a sufficient record for the Court to review. See State v. Kirkpatrick, 160 Wn.2d 873, 880–81, 161 P.3d 990 (2007) overruled on other grounds by State v. Jasper, 174 Wn.2d. 96, 271 P.3d 876 (2012).

"Manifest" error is error that resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. O'Hara, 167 Wn.2d at 99. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99–100.

In the present case, the facts relevant to probable cause were not elicited at a suppression hearing, because trial counsel did not challenge Winkler's arrest or bring a motion to suppress evidence; however, at trial, all four individuals involved in Winkler's detention and arrest testified candidly about the events leading up to and forming the basis for the arrest. Accordingly, there is ample record on the issue of probable cause to determine whether the error is manifest.

1. Winkler was subject to an unlawful citizen's arrest

The trial record supports a finding that the two private citizens, Robbie and Matthew Nadeau, who affected the detention and arrest of Winkler, did so unlawfully.

Under the common law, a private, individual citizen may affect an arrest where the citizen has reason to believe the suspect is committing a misdemeanor in his or her presence and the offense is a breach of the peace. State v. Malone, 106 Wn.2d 607, 610 FN1, 724 P.2d 364(1986); State v. Gonzales, 24 Wn. App 437, 439, 604 P.2d 168 (1979). A "breach of the peace" includes at least the "threat of violence." State v. Walker, 157 Wn.2d 307, 328, 138 P.3dd 113 (2006) (Chambers concurrence)(citing to Atwater v. City of Lago Vista, 532 U.S. 318, 328 n. 2, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001)). Criminal trespass in the first degree is a gross misdemeanor; criminal trespass in the second degree is a misdemeanor. RCW 9A.52.070; RCW 9A.52.080.

At the time the Nadeaus detained and arrested Winkler, at most, they may have had reason to believe that Winkler was committing criminal trespass—a gross or simple misdemeanor. Several facts elicited at trial support this finding: (1) at the time of his detention and arrest, Winkler was either on or adjacent to private property belonging the Nadeaus' neighbors; (2) although the Nadeaus did not yet know who Winkler was or whether he had permission to be on the property (and in fact, the Nadeaus were admittedly on their neighbor's property without permission), they

believed that Winkler was a transient and that they had chased him through the woods; (3) during the chase, the parties did not identify the person they were chasing, nor did they see where that person went; (4) although Winkler was found in the vicinity of the earlier burglary, no evidence yet known to the Nadeaus directly connected Winkler with the burglary; and (5) the burglary occurred over four hours prior to the Nadeaus' detention and arrest of Winkler. RP 160-65, 170-72. Given these facts, the Nadeaus may have had reason to believe Winkler was committing a misdemeanor, criminal trespass, when they pointed their guns at him and ordered him to the ground; however, such a belief was tenuous at best.

Assuming for the sake of argument that the Nadeaus reasonably believed Winkler was committing a misdemeanor in their presence, they still did not affect a lawful detention and arrest, because Winkler was not committing a breach of the peace. Again, the facts elicited at trial clearly support this finding.

Winkler was not armed, did not appear to be armed, and did not threaten the Nadeaus or anyone else with violence. In fact, both Matthew and Robbie Nadeau testified that Winkler immediately dropped to the ground and complied with their requests upon seeing their weapons and hearing their commands.

RP 164-65, 172. Additionally, although Winkler was running along a wooded path in the direction of the Nadeaus at the time he encountered them, Matthew Nadeau surmised that Winkler may have been scared—he did not testify that Winkler appeared to be attacking or threatening them. RP 164. Moreover, the Nadeaus and the Clarks, not Winkler, were the parties committing a breach of the peace. They armed themselves with handguns and shotguns and went traipsing through the woods at dusk and after dark in a residential, albeit rural, area. RP 158-9, 161, 164, 169. The parties, in vigilante fashion, actively searched for several hours for anyone hiding or happening to be in the woods, and in fact, startled and gave chase to an unknown person. RP 163. The evidence clearly shows that the Clarks and Nadeaus made a great show of force by chasing a person(s) through the woods and by threatening Winkler with a firearm; they created the circumstances that led to their contact with Winkler. Plainly, Winkler was not committing a breach of the peace at the time he was detained and arrested. His arrest by the Nadeaus, private citizens, was therefore unlawful.

2. Trooper Clark's warrantless arrest of Winkler was not supported by probable cause

Not only was the citizen's arrest by the Nadeaus unlawful, but also Winkler's arrest by off-duty Washington State Trooper Kevin Clark was unlawful.

Under article I, section 7 of the Washington Constitution, warrantless searches or seizures are presumed invalid. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). The State bears the burden to show that an exception to the warrant requirement applies. Grande, 164 Wn.2d at 141. One such exception is that police may make warrantless arrests based on probable cause to believe that the arrestee has committed or is committing a felony or criminal trespass. RCW 10.31.100; see State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006) (holding RCW 10.31.100 constitutional).

Probable cause exists when the arresting officer knows of facts and circumstances sufficient to justify a reasonable belief that an offense has been committed. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001). This inquiry is based on the factual considerations that a prudent person would rely on, rather than any legal technicalities. State v. Bellows, 72 Wn.2d 264, 266–67, 432

P.2d 654 (1967). But probable cause must be based on more than a bare suspicion of criminal activity. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

At the time Trooper Clark arrested Winkler, he did not have individualized probable cause to believe that Winkler had committed the burglary or that Winkler was committing criminal trespass. As discussed above, the facts elicited at trial support this finding—(1) at the time Winkler was arrested, the burglary had occurred over four hours prior; (2) there was no evidence that Winkler was on the Box property without permission or license; (3) the parties did not identify the person or persons they were chasing through the woods as Winkler; and (4) although Clark could see that Winkler was wearing women's underwear, there was no evidence known to Clark at that time directly linking Winkler to the burglary. RP 108-110, 112. The only evidence known to Clark that even arguably supported an inference that Winkler was engaging in criminal activity was that Winkler was in the vicinity of the burglary, that he was on private property, and that he had been apprehended by the Nadeaus. Such scant information does not amount to individualized probable cause sufficient to support a warrantless arrest; on the contrary, it supports an inference that Winkler was

arrested on a bare suspicion of criminal activity and for being in the wrong place at the wrong time. Accordingly, Winkler's warrantless arrest was unlawful.

3. The violation of Winkler's constitutional rights is manifest error

Winkler's arrest, either by the private citizens or by Trooper Clark, was unlawful and not supported by probable cause. The error is manifest—(1) the error is clearly evidenced in the trial record and (2) it caused actual prejudice to Winkler because there were practical and identifiable consequences at trial. For example, all four individuals who affected the arrest of Winkler testified candidly about the events leading up to the arrest at trial. Additionally, evidence that Winkler was wearing or had in his possession three pairs of women's panties, a multicolored stocking, and a glove, all of which apparently belonged to Katie Clark and were taken from her home, was admitted at trial. RP 77, 80-1, 112. This evidence was obtained as a direct and singular result of his arrest. Accordingly, it is proper for the Court to consider this constitutional error for the first time on appeal.

4. The error is not harmless error

Washington's exclusionary rule requires suppression of unconstitutionally obtained evidence. State v. Doughty, 170 Wn.2d 57, 65, 239 P.3d 573 (2010) (quoting State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009)). Accordingly, given that his captors lacked probable cause to arrest Winkler, the evidence obtained as a result of his arrest should have been suppressed.

Constitutional error is not harmless unless it is established beyond a reasonable doubt that the error did not affect the verdict. State v. Brousseau, 172 Wn.2d 331, 363, 259 P.3d 209 (2011). Put another way, an error is harmless beyond a reasonable doubt if the overwhelming untainted evidence necessarily leads to a finding of guilt. State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (2005); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Assuming that the tainted evidence had been properly excluded, it is clear, based on the facts elicited at trial, that the error is not harmless. The only untainted evidence placing Winkler at or near the scene of the crime would have been testimony from a neighbor that he had been seen eating a blue otterpop, carrying a backpack, and walking around the wooded neighborhood earlier

that day. RP 148-51, 157. This untainted evidence is not overwhelming; and such thin, circumstantial evidence likely would not support a conviction for residential burglary. It is therefore likely that the verdict of guilt would have been different. Because the error is not harmless, Winkler's conviction ought to be reversed and his case remanded for a new trial.

B. WINKLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED HIS CONSTITUTIONAL RIGHTS

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. State v. Grier, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

"To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient

representation. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable *legitimate* trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is deficient. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. Grier, 150 Wn. App. at 633.

1. Counsel's performance was deficient for failing to challenge Winkler's warrantless arrest

There were at least two bases for challenging Winkler's warrantless arrest, and there was no legitimate tactical reason for failing to do so.

a. *Trial Counsel ought to have moved for suppression based on an unlawful citizen's arrest of Winkler*

The trial record supports a finding that the two private citizens, Robbie and Matthew Nadeau, who affected the detention and arrest of Winkler, did so unlawfully.

As discussed above, in order to affect a lawful citizen's arrest, the Nadeaus must have reasonably believed that (1) Winkler was committing a misdemeanor in their presence, and (2) that the misdemeanor constituted a breach of the peace. At the time the Nadeaus detained and arrested Winkler, they may have had reason to believe a misdemeanor, criminal trespass, was being committed; but they did not have reason to believe Winkler was committing a breach of the peace. The evidence in the record clearly shows that the Clarks and the Nadeaus created the circumstances leading to their contact with Winkler, and that Winkler did not make any show of force or violence toward them or any third parties.

In light of this evidence, a motion to suppress based on the unlawful citizen's arrest not only was appropriate, but also would have likely been successful.

b. Trial Counsel ought to have moved for suppression based on an unlawful, warrantless arrest of Winkler

Not only was Winkler's citizen's arrest by the Nadeaus unlawful, but also Winkler's arrest by off-duty Washington State Trooper Kevin Clark was unlawful.

As discussed above, in order to affect a lawful warrantless arrest, Trooper Clark must have had probable cause to believe that Winkler was committing a crime, such as residential burglary or criminal trespass. At the time Trooper Clark arrested Winkler, he did not have individualized probable cause to believe that Winkler had committed a burglary or that Winkler was committing criminal trespass. The only individualized information available to Clark was that Winkler was in the vicinity of where the burglary had occurred over four hours before, that he was on private property, and that he had been apprehended by the Nadeaus—he did not know who Winkler was, whether he had license or permission to be on the property, or whether he had in his possession items linking him to the burglary. This information (and lack thereof) did not amount to individualized probable cause to believe that Winkler was committing a crime. Accordingly, Winkler's warrantless arrest was unlawful.

In light of this evidence, a motion to suppress based on the unlawful warrantless arrest not only was appropriate, but also would have likely been successful.

c. *Trial Counsel's theory of the case supported a motion for suppression*

There is no legitimate tactical reason for trial counsel's failure to challenge Winkler's unlawful arrest or failure to bring a motion to suppress evidence obtained from that arrest. Not only did the facts and law clearly support such a motion, but also such a motion would have furthered the defense's theory of the case.

For example, in trial counsel's closing arguments, he states: "there's not been one piece of evidence that puts him [Winkler] any closer to that house than when he was contacted by the Nadeaus that day." RP 215. Essentially, counsel argued that neither the Nadeaus nor the State had any evidence linking Winkler to the burglary and establishing that he had entered Katie Clark's residence at the time he was arrested or at trial.

Rather than preserving the issue prior to trial, defense counsel, in closing argument, took aim at the lack evidence. In other words, rather than affirmatively challenging the error in an appropriate motion prior to trial, trial counsel allowed tainted evidence to be admitted in front of the jury and then, only after, attempted to argue its lack of merit. A motion to suppress for lack of probable cause to arrest would have been tactically

advantageous and efficient. There is no legitimate explanation for failing to do so, particularly when the evidence and law so strongly supports it. Counsel's performance was thus deficient.

2. Counsel's deficient performance prejudiced the defense

At trial, the bulk of evidence introduced by the State linking Winkler to the burglary at Katie Clark's home was obtained a result of Winkler's warrantless arrest. For example, evidence that Winkler was wearing or had in his possession three pairs of women's panties, a multicolored stocking, and a glove, all of which apparently belonged to Katie Clark and were taken from her home was obtained during his arrest. RP 77, 80-1, 112. If trial counsel had successfully challenged Winkler's arrest, such evidence would have been suppressed and deemed inadmissible at time of trial.

The only untainted evidence placing Winkler at or near the scene of the crime would have been testimony from a neighbor that he had been seen eating a blue otterpop, carrying a backpack, and walking around the wooded neighborhood earlier that day. RP 148-51, 157. This untainted evidence is not overwhelming; and such circumstantial evidence likely would not have been sufficient to

support a conviction for residential burglary. Given that a suppression motion would likely have been successful on either of the two bases argued above, and that untainted evidence would not likely have been sufficient to support a conviction, the outcome of the trial proceedings likely would have been different had trial counsel's performance not been deficient. Accordingly, Winkler was prejudiced by trial counsel's deficient performance.

VI. CONCLUSION

Errors at the trial court level require that Winkler's conviction for Residential Burglary be reversed. First, Winkler's constitutional rights were violated by his warrantless arrest by vigilante private citizens and an off-duty trooper. The error is manifest in the record on appeal given that all four captors testified at trial about the events leading up to and forming the basis for Winkler's arrest and Winkler was actually prejudiced by the error—tainted evidence, the bulk of incriminating evidence, was admitted at trial. Moreover, the error is not harmless. Second, trial counsel rendered ineffective assistance of counsel by failing to challenge the warrantless arrest and failing to bring a motion to suppress evidence. Given the strong factual basis and support of established law, such a motion

would have likely been successful and determinative on the issue of guilt. Counsel's performance was deficient and prejudiced the defense, because tainted evidence was admitted at trial and likely determined the outcome of the trial to Winkler's disadvantage. Winkler therefore respectfully requests that this Court reverse his conviction for Residential Burglary and remand his case to the trial court for a new trial.

Respectfully submitted this 12th day of June, 2012.

Andrea Burkhart, WSBA #38519
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on June 12, 2012, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

Mark Erik Lindsey
Spokane County Prosecuting Attorneys
1100 W. Mallon Avenue
Spokane, WA 99260-2043

Christopher M. Winkler
DOC # 866960
Washington Corrections Center
P.O. Box 900 R5-A6
Shelton, WA 98584

Andrea Burkhart, WSBA #38519