

**FILED**

JUL 20 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30702-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER M. WINKLER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Defendant's constitutional rights were violated by his warrantless arrest.
2. Counsel rendered ineffective assistance when counsel failed to move to suppress the evidence obtained during the warrantless arrest of defendant.
3. Counsel rendered ineffective assistance of counsel when counsel failed to object to the admission of evidence obtained as a result of defendant's warrantless arrest.

II.

ISSUES PRESENTED

1. Were defendant's constitutional rights violated when he was detained by citizens prior to being formally arrested?
2. Did counsel render ineffective assistance to defendant by not moving for suppression of the evidence obtained due to his arrest?

### III.

#### STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for purposes of this appeal only. The State offers the following additional facts for clarification. Ms. Saunders testified that she observed defendant retrieve a full backpack from the woods when he left her property. RP 149-151. Defendant was observed to be in the immediate vicinity of and in possession of property stolen from Katie Clark's residence on October 14, 2011, prior to his being arrested. RP 149-151, 77-84, 104, 107, 109, 112, 127-128, 140-141, 157, 162-165, 168, and 171-172.

### IV.

#### ARGUMENT

- A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RULES OF APPELLATE PROCEDURE ("RAP") 2.5(A)(3).

Generally, the failure to raise an error at trial is not reviewed on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-687, 757 P.2d 492 (1988). Neither the defendant nor his counsel raised the issue of whether the detention of defendant by citizens prior to his arrest was unlawful.

Neither the defendant nor his counsel moved the trial court for suppression of evidence obtained during his detention by citizens prior to formal arrest which he now contends was unlawful. The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has shown no practical and identifiable consequences in the trial of this case that are directly attributable to the alleged error. The defense theory of the case was that there was no evidence whatsoever that proved defendant had committed the alleged burglary. Defense Counsel specifically argued that defendant's possession of items stolen during the burglary was insufficient to prove that defendant had burglarized the Clark residence. RP 212, 215-216. Hence, defendant has not satisfied the threshold burden that the *trial court* committed a manifest error which affected a constitutional right and is not entitled to appellate review thereof at this point.

B. DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN HE WAS LAWFULLY DETAINED BY CITIZENS PRIOR TO HIS BEING FORMALLY ARRESTED.

Defendant claims that he was unlawfully arrested by citizens because they had no reason to believe that he had committed a felony or was committing a misdemeanor in their presence and he had not breached the peace. Defendant contends that, at best, the citizens would have had reason to believe that he had committed criminal trespass. Defendant argues that if anyone committed a breach of the peace it was the citizens who detained him pending formal arrest because he was on another's private property. Defendant's claim is not supported by the record or the law since defendant's argument concedes that he was on someone's private property without invitation, license, or privilege at the time he was detained. Defendant's claim is not supported by the record since he was found in possession of stolen property from the burglarized home when he was finally detained. The stolen property included, women's underwear, socks, popsicles, and two laptop computers inside a backpack that defendant was observed leaving the area of Ms. Saunders home with earlier.

Defendant bases his argument that defendant was unlawfully detained and arrested on the concurring opinion in *State v. Walker*,

157 Wn.2d 307, 138 P.3d 113 (2006). Justice Chambers opined that a “breach of the peace” which would provide the basis for a warrantless arrest must include either the use or threat of violence. Nevertheless, the Supreme Court’s majority holding in that case focused upon the Legislature’s power to expand the arrest authority of police officers and to classify crimes as felonies or misdemeanors and thereby determine the arrest authority required. *Id.*, 157 Wn.2d at 317. Though interesting, the concurring opinion does not control in the *Walker* case. The concurring opinion is, at best, a dissent clothed as a concurring opinion. Accordingly, the law of Washington does not require the use or threatened use of violence for an action to constitute a breach of the peace thereby triggering the justification of a warrantless detention.

A private citizen may detain a person for a misdemeanor if it (1) constitutes a breach of the peace and (2) is committed in the citizen’s presence. *State v. Garcia*, 146 Wn. App. 821, 824, 193 P.3d 181 (2008). Here, the defendant was lawfully detained for the initial misdemeanor of criminal trespass because he was observed on the private property of Ms. Saunders, and the Clarks. The fact that the Nadeaus and Clarks were in pursuit yet did not catch defendant until he was on another piece of private property does not render the detention unlawful since he had to cross the back ten acres of the Clark property to access the Saunders property.

Once detained, defendant was observed by the private citizens to commit yet another crime, possession of stolen property. Hence the detention of the defendant by private citizens was lawful.

C. DEFENSE COUNSEL RENDERED EFFECTIVE ASSISTANCE IN NOT MOVING TO SUPPRESS THE EVIDENCE OBTAINED DURING THE LAWFUL DETENTION OF DEFENDANT.

Defendant claims he received ineffective assistance for counsel's failure to move to suppress the admission of evidence obtained from his detention by private citizens.

A defendant must establish that the attorney's performance was deficient *and* that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052,

80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the inquiry focuses upon whether counsel's decision not to move to suppress the evidence obtained during defendant's lawful detention by private citizens can be characterized as legitimate trial strategy or tactics.

Inferentially, defense counsel did not move the trial court to suppress the evidence because it was not unlawfully obtained. Defendant claimed that he was merely passing through the woods, found the stolen property, and that there was no evidence that he had committed the charged crime of burglary. Hence, suppression of the evidence obtained during his detention was of no import to the defense theory of the case.

Assuming, *arguendo*, that counsel had moved to suppress the evidence. It is unlikely that such a motion would have been successful under the circumstances herein. Moreover, there is no prohibition against the State's use of evidence or information obtained by a private citizen, even though by unlawful means, unless the actions of the private citizen

were in some way “instigated, encouraged, counseled, directed, or controlled” by the State or its officers.” *State v. Agee*, 15 Wn. App. 709, 713-714, 552 P.2d 1084(1976). There is nothing in the record which indicates, or even suggests, that the State instigated, encouraged, counseled, directed or controlled the actions of either the Nadeaus or Clarks in their detention of the defendant here. Accordingly, it is reasonable to infer that trial counsel evaluated the circumstances in light of the law and saw no reasonable basis for filing a motion to suppress the evidence obtained pursuant to the private detention of defendant.

The defense theory of the case depended upon the jury finding the defendant’s testimony more credible than that of the other witnesses. It is reasonable to infer that the jury did what the defense asked; it weighed the evidence and rendered its verdict. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant’s trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Mr. Winkler’s theory of the case credible does not establish that his trial counsel was ineffective. Appellant has not shown that counsel’s representation was objectively deficient *and* that the outcome would have been different. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of

counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 226. Here, appellant has failed to satisfy his burden that his counsel was ineffective.

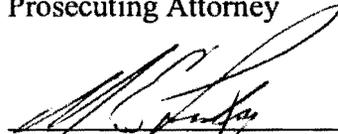
V.

CONCLUSION

For the reasons stated above the defendant's conviction should be affirmed.

Dated this 20<sup>TH</sup> day of July, 2012.

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