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Court of Appeals
Division III
State of Washington

No. 309444

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

JOSE RUIZ-ALCALA,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE BLAINE GIBSON, JUDGE

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in granting a motion for a new trial under CrR 7.5(a).
2. The trial court erred in its Finding of Fact No. 1 in its Findings and Orders for New Trial and New Defense Counsel, in that the failure of defense counsel to move to exclude evidence of a small baggie of marijuana seeds constituted ineffective assistance of counsel.
3. The trial court erred in its Finding of Fact No. 2, that the failure of defense counsel to move to exclude evidence of the reactions of a drug sniffing dog used to inspect vehicles located at the defendant's residence constituted ineffective assistance of counsel.
4. The trial court erred in its Finding of Fact No. 3, that the failure of defense counsel to move to exclude evidence of a blue tarp found at the defendant's residence constituted ineffective assistance of counsel.
5. The trial court erred in its Finding of Fact No. 4, that the mention, by defense counsel, of a gun found in the defendant's residence constituted ineffective assistance of counsel.
6. The trial court erred in its Finding of Fact No. 5, that the errors referenced in its last two findings, by themselves, were not sufficient

to warrant a new trial, inferring that the deficiencies referenced in the first two findings were sufficient by themselves to warrant a new trial.

7. The trial court erred in concluding that substantial justice had not been done, and that the defendant was not afforded effective representation and a fair and impartial trial.

II.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Has a trial court abused its discretion in granting a new trial, when the record demonstrates that defense counsel exercised pursued a valid trial strategy, or in the alternative, that even if there were deficiencies in counsel's performance, there was no prejudice to the defendant as a result?

III.

STATEMENT OF FACTS

In June of 2011, detectives with the Yakima County LEAD drug task force observed from the air what appeared to be a large marijuana grow operation, north of the south fork of Ahtanum Creek, and on the south side of the ridge line. Further investigation revealed what appeared to be an access or drop point to the operation, an abandoned logging road with a gate installed by the Washington State Department

of Natural Resources off of the south fork of Ahtanum Road. **(4-10-12 RP 159-162)**

Detectives installed seismically-activated remote cameras at the drop point, in order to observe any individuals who might be gaining access to the grow operation. **(4-10-12 RP 162)**

Upon reviewing videos made by the remote cameras, Detective Mark Negrete did observe a pattern: vehicles were typically arriving on Fridays, dropping off between two and five individuals, then returning to pick them up on Sundays. **(4-10-12 RP 165-66)**

The detective was able to observe license plates, and a check revealed that one of the vehicles was registered to a Gerardo Alcala, with an address of 1416 South 16th Street in Yakima. **(4-10-12 RP 166-67)**

Detective Negrete printed out still photos from the videos in color. A photograph of one of the drivers did not match that of Gerardo Alcala license photo. That photograph was provided to detectives who executed a search warrant at 1416 S. 16th Street. **(4-10-12 RP 167-69, 202; Ex. 1)**

At trial, the State introduced those photographs from the videos which provided the best facial views of individuals spotted at the drop

point. **(4-10-12 RP 172-79; Ex. 30-39)** The individual portrayed in Ex. 30, meeting two individuals at the drop point, was identified as the defendant Jorge Ruiz-Alcala. **(4-10-12 RP 172; Ex. 30)**

At the time the search warrant was executed, the defendant was located in the bathroom at residence. Detectives recognized him from videos taken at the drop point. **(4-10-12 RP 39)**

When shown the photograph taken of him from video, the defendant initially denied it was him in the photograph. **(4-10-12 RP 42-43)**

Detective Tucker testified that the photograph was either black-and-white or color. Both versions were admitted at trial. **(4-10-12 RP 69-70; Ex. 1; Ex. 28)**

Detective Negrete subsequently asked the defendant, in Spanish, whether he was the individual in the photograph. Ruiz-Alcala admitted that it was indeed him, but that he was merely dropping off two friends who were hunting. **(4-10-12 RP 194-95)**

Ruiz-Alcala further admitted that he used one of his brother's cars, a Honda, but that he didn't notice any smell of marijuana in the car. Detective Negrete testified that coming into contact with marijuana plants would leave an obvious odor. **(4-10-12 RP 196-98)**

The marijuana grow operation constituted of some 10,000 to 15,000 plants. Some one thousand plants were collected for evidence. Those plants were identified as marijuana as a result of training and experience. **(4-10-12 RP 29-31)**

A campsite was found near the plants, which were, in the detectives' opinion, within two weeks of being harvested. **(4-10-12 RP 29-35; 48-52; Ex. 2-15)**

Some 20,000 to 25,000 seeds would have been necessary to cultivate the number of plants found. **(4-10-12 RP 36)**

During execution of the search warrant, detectives retrieved a scale, and clear plastic baggies which are commonly used to package marijuana. **(4-10-12 RP 46-47; 4-10-12 RP 56-61; Ex. 16-26)**

The detectives also observed twine and a tarp outside the residence, which were the same type and color as some found at the grow operation. **(4-10-12 RP 47-51; Ex. 13; Ex. 21)**

A small bag of seeds was found in the defendant's bedroom. Another was found on top of a shed on the premises. **(4-10-12 RP 56-61, 122-23; Ex. 19; Ex. 23, 24)**

Detective Martin testified that the seeds he recovered from the defendant's bedroom appeared to be marijuana seeds as a result of his

training and experience. **(4-10-12 RP 122-23)** A crime lab forensic scientist testified that green vegetable matter submitted by LEAD was identified as marijuana through recognition and chemical testing. The seeds were identified as being consistent with marijuana. **(4-10-12 RP 141-43)**

Deputy Jesus Rojas, who is a drug recognition canine handler, testified that the canine alerted on several vehicles at the 1416 S. 16th Street residence, including Hondas belonging to Gerardo Alcala. **(4-11-12 RP 233)** The canine is trained to alert on the odor of any of several controlled substances: marijuana, heroin, cocaine, and methamphetamine. **(4-11-12 RP 230)**

Defense counsel cross-examined Deputy Rojas, reiterating that the canine could not differentiate between the different drugs, nor was it certain how much time had passed since any drugs had been present. **(4-11-12 RP 235)**

At trial, counsel cross-examined Detective Tucker, pointing out that the tarp and twine observed were fairly common items:

Q. . . . Now, do you ever go camping?

A. I do.

Q. Do you use tarps?

A. I have.

Q. Showing you Exhibit No. 25, have you ever seen (sp?) that kind of tarp in a non-drug context?

A. I have.

Q. In fact, there is nothing unusual about that tarp at all, is there?

A. Other than it matches the same stuff located in the grow site.

Q. The stuff in the grow site wasn't unusual either, was it?

A. Other than it was in a marijuana grow site, no.

...

Q. Anything unusual about this twine?

A. No.

(4-10-12 RP 112-113)

Silvia Martinez testified for the defense at trial, stating that the tarp at the residence was used to cover garbage being taken to the dump.

(4-12-12 RP 18)

Defense counsel also obtained admissions from Detective Tucker that no marijuana buds were found at the residence, nor was there any heavy-duty irrigation equipment consistent with what was found at the grow site. **(4-10-12 RP 113-14)**

At a pre-trial hearing on April 9, 2012, counsel reiterated the defense objection to the admission of Mr. Ruiz-Alcala's statements, as well as any mention of his immigration status. Counsel also observed that evidence of firearms taken as a result of other search warrants was

not admitted at an earlier trial, but that there was mention of a rifle found in the bedroom of the defendant's brother. **(4-9-12 RP 4-5)**

While the defendant was testifying, his attorney asked:

Q. Now, in August 2011, your brother Gerardo Ruiz-Alcala, also lived in that house?

A. Yes.

Q. Did you ever talk to him about growing marijuana?

A. No.

Q. Did you know that he had a gun in his room?

A. No, I did not know.

(4-12-12 RP 61-62)

IV. STATEMENT OF PROCEDURE

The defendant was charged by information with a single count of manufacture of a controlled substance, marijuana, under Yakima County Superior Court cause number 11-1-01137-8. **(CP 1)**

After his first trial resulted in a mistrial, a second trial was held between April 9th and April 16th of 2012. **(4-12-12 through 4-16-12 RP)**

After the defense moved to dismiss at the conclusion of the State's case, the court inquired of defense counsel as to why certain evidence was not objected to as irrelevant, including the small amounts of

marijuana seeds found during execution of a search warrant at the defendant's residence, as well as the blue tarp found outside the residence. **(4-12-12 RP 7-9)**

Mr. Ruiz-Alcala was convicted as charged, and the jury also found that the crime constituted a major violation of the Uniform Controlled Substance Act. **(CP 98; 99)**

After the court received the verdicts, the defense moved to enter a judgment notwithstanding the verdict. **(4-16-12 RP 153)**

Defense counsel filed a written motion, arguing that insufficient evidence supported the verdicts, and that a small amount of seeds found in the defendant's residence were not shown to be the same type as that found at the marijuana grown operation, or that they had anything to do with that operation. **(CP 78-79)**

At a hearing set for sentencing in this matter, further argument was heard on the defense motion, which the trial court considered as a motion to vacate and dismiss. At that hearing, the court questioned the deputy prosecutor about the relevance of the seeds. The State argued that the jury should have been able to draw inferences from the fact that the defendant denied any knowledge of manufacturing marijuana,

yet seeds, which might have been left over from the grow operation, were found in his bedroom. **(4-24-12 RP 2-5)**

The court also questioned the relevance of testimony that a drug-sniffing dog alerted on vehicles which were located at the defendant's residence. The State argued that a jury could infer that the vehicles were used to transport the individuals who were involved in the actual grow operation. **(4-24-12 RP 6)**

After the April 24th hearing, defense counsel filed a brief memorandum pertaining to a new trial as a result of ineffective assistance of counsel. **(CP 107)**

The State responded, arguing both that defense counsel's performance did not fall below an objective standard of reasonableness, and that there was no prejudice to the defendant in any event. **(CP 108-11)**

The parties next convened on May 25, 2012. At that hearing, the court announced that it had determined that Mr. Ruiz-Alcala did not receive a fair trial, and ordered a new trial. **(5-25-12 RP 10)** A written decision had already been filed, as well as findings of fact and conclusions of law, without further argument of counsel. **(CP 112-123; CP 124-26)**

The State timely appealed. (CP 127-142)

V.

STANDARD OF REVIEW

A trial court's granting of a new trial under CrR 7.5(a) is reviewed for abuse of discretion.

State v. Jackman, 113 Wn.2d 772, 776, 783 P.2d 580 (1989)

VI.

ARGUMENT

1. A new trial was not warranted, and the court abused its discretion by granting the motion.

In a criminal proceeding, a new trial is necessitated only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *quoted in* State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). "Something more than a possibility of prejudice must be shown to warrant a new trial." State v. Lemieux, 75 Wn.2d 89 91, 448 P.2d 943 (1968); Id.

A trial court's decision granting a new trial will not be disturbed on appeal, unless it is predicated on erroneous interpretations of the law, or constitutes an abuse of discretion. Jackman, 113 Wn.2d at 777.

It has been stated on several occasions, however, that such discretion does not give a trial court license to weigh the evidence and substitute its judgment for that of the jury, simply because it may disagree with the verdict. Bunnell v. Barr, 68 Wn.2d 771, 775, 415 P.2d 640 (1966), *cited by* State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

In Washington, a trial judge is not deemed to be a "thirteenth juror":

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

Rettinger v. Bresnahan, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953), *quoted by* Williams, 96 Wn.2d at 222.

As the Supreme Court has observed, the granting of a new trial is three dimensional: "[a] fine balance must be struck so that any one entity does not unduly usurp the functions of either of the other two,

while still giving each sufficient latitude to fulfill its own legitimate function. Id.

While the trial court may utilize knowledge gained from presiding over the trial, the court “must of necessity pass on making any determinations as to the credibility, significance and cogency of the proffered evidence.” State v. Barry, 25 Wn. App. 751, 758-59, 611 P.2d 1262 (1980).

Here, the trial court based its decision upon CrR 7.5(a)(8), that “substantial justice has not been done.” **(CP 112)** The court’s conclusion was largely based upon finding that Mr. Ruiz-Alcala received ineffective assistance of counsel, since the attorney should have objected to the admission of certain evidence: the marijuana seeds, the alerts of the drug-sniffing dog, as well as any mention of the blue tarp or the gun in bedroom of the defendant’s brother. **(CP 112-123)**

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (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); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A claim of ineffective assistance of counsel presents a mixed question of law and fact, reviewed *de novo*. In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26.

Ineffective assistance of counsel is not demonstrated on this record. First, the court stated in its decision that the prosecution never showed at trial that the defendant had ever been personally present at the grow site. While that may be true, evidence *was* introduced that he picked up other individuals who appeared to be coming from the grow site. He drove a vehicle to the drop point, his face visible on the video and still photographs. This was sufficient to place the issue of accomplice liability before the jury. **(CP 114)**

The court further identified the first question before it as this: “. . . had the appropriate motions or objections been made, would any of the key items found in the house been admissible?” **(CP 114)**

It is clear from the court’s analysis that it believed those items should not have been admitted at trial, and they would not have been admitted if objections had been made. **(CP 114)** But that, by itself, does not answer the question whether counsel was deficient. In fact, “counsel is not expected to perform flawlessly or with the highest degree of skill.” State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978).

The evidence of the marijuana seeds could be admitted by a trial court, and was relevant since the defendant had denied any knowledge

of the marijuana grow operation. Indeed, “[m]arijuana is manufactured directly from marijuana seeds and, under RCW 69.50.101(q), possessing seeds is the equivalent of possessing marijuana plants. State v. Bickle, 153 Wn. App. 222, 232, 222 P.3d 113 (2009).

Here, then, possessing the seeds was at very least circumstantial evidence of the defendant’s intent to grow marijuana, or act as an accomplice in such an endeavor. The jury also had evidence of the defendant’s presence at the drop site, and the transport of individuals who, it could be inferred, were actively engaged in the cultivation of marijuana. Ruiz-Alcala also initially denied it was him in the photographs, was probative of guilty knowledge. As the deputy prosecutor stated, the jury should have been allowed to weigh all the relevant evidence in reaching a decision.

Defense counsel believed that the amount of seeds found at the residence “was so miniscule that I believed the jury would be able see through that in terms of there being no connection.” **(4-24-12 RP 5)** There was a strategy identified on the part of defense counsel. But even if counsel’s performance was deficient, there has been no showing that the result of the trial would be different.

Counsel's cross-examination of the canine deputy was also demonstrative of counsel's strategy. As he pointed out, it was impossible to distinguish which of several controlled substances was present, or to determine how long it had been since drugs had been present.

The relevance of the testimony for the prosecution is clear, as well. Again, the defendant had been present at the drop site, by his admission and as demonstrated by the video record. He denied knowing anything about the grow operation, and testified that he was just picking up his friends who were hunting during a period to time in which there was no hunting. The canine alerts were relevant to rebut his statements and testimony as to his knowledge of the operation.

Counsel also vigorously cross-examined Detective Tucker as to the tarp and twine. He clearly demonstrated for the jury's benefit that those items were quite common, and cast aspersions upon the apparent significance placed upon those items by the task force detectives. Again, this was a trial tactic employed by counsel, clearly to cast doubt upon the investigation.

Finally, the mention of the gun belonging to the defendant's brother was brief, and not emphasized by counsel to any extent. Strategically,

the mention could have served to cast the jury's attention upon the brother, and not the defendant. There is no showing that this direct examination question was either deficient, or prejudiced the defendant.

The granting of the new trial was an abuse of discretion, and should be reversed.

VII.
CONCLUSION

For all of the foregoing reasons, this appeal should be granted, the order for new trial vacated, the verdicts reinstated, and this matter remanded to the trial court for sentencing.

Respectfully submitted this 8th day of January, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Respondent via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the defendant via U.S. Mail.

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Dated at Yakima WA this 8th day of January, 2013.

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