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Court of Appeals
Division III
State of Washington

No. 96069-1

NO. 345254

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CLARK ALLEN TELLVIK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Scott Sparks

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it refused to suppress evidence an officer seized from a zipped case, during an inventory search.

2. The trial court failed to enter written findings of fact and conclusions of law after the suppression hearing.

3. Defense counsel neglected to move for a mistrial, after a witness violated an order in limine, and there is a reasonable probability defense counsel's error affected the outcome of the trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the officer authorized to inspect the contents of a zipped case, without a warrant, during an inventory search? (Assignments of Error 1 and 2)

2. Did defense counsel render effective assistance when she neglected to move for a mistrial, after a witness violated an order in limine? (Assignment of Error 3)

III. STATEMENT OF THE CASE

Substantive facts

Laura Poulter (Ms. Poulter) believed a disgruntled had been stealing from her property in Ellensburg. So, she ordered a four-camera home security system online and asked her friend who owned a custom audio/video data networking business in Seattle to install it. 5/11/16 RP 287. The friend came down from Seattle, stayed overnight at Ms. Poulter's in Ellensburg, and installed the system the next day. He situated one camera to face a shop on Ms. Poulter's property, where she stored antiques, a collector's 1970 Camaro, and tools. He positioned another camera to face a shed. A third camera faced her carport, where she kept car and jet ski batteries. It allowed her see any cars that

pulled into her driveway. A fourth camera faced her front door to capture anyone who walked up to her house. Ms. Poulter could follow footage from all four cameras on her cellphone. 5/11/16 RP 344; 5/11/16 RP 288-289.

After Ms. Poulter's friend installed the system, it started to snow in Ellensburg. He could not drive in snow, so Ms. Poulter drove him back to Seattle. It was around 6:00 pm. 5/11/16 RP 290. On her way back to Ellensburg, she stopped in Cle Elum to play poker with friends. It was around 11:00 pm. Around 1:00 am, she pulled her cellphone up to show a friend her new system when she saw what she thought was somebody leaving her front door with a garbage sack full of stuff. 5/11/16 RP 291. Ms. Poulter immediately called police and headed home. 5/11/16 RP 291.

Police arrived at Ms. Poulter's house before she did and found a red Dodge Dakota truck stuck in the snow, in front of the carport. 5/11/16 RP 361. An officer noticed two men standing near the truck. One of the men was Clark Allen Tellvik (Mr. Tellvik). The other was his friend, Michael Peck (Mr. Peck). 5/11/16 RP 362. Mr. Peck told police they were only there to get directions.

Earlier that day, Mr. Tellvik arrived at Mr. Peck's house in a truck he was test driving from a man named "Squints." 5/12/16 RP 650-651. Mr. Peck and his girlfriend had been arguing all day and he needed space. He and Mr. Tellvik decided to go for a drive. 5/12/16 RP 645-46. They drove around until they got lost and ended up at Ms. Poulter's house. 5/11/16 RP 384.

The camera that faced Ms. Poulter's front door captured Mr. Tellvik walk up to the house and knock on the door. There was no answer. He took off his gloves, put them in his pocket, and rang the doorbell. Still no answer, he peered through a window on top

of the door. He returned to the truck and they tried to leave. But, the truck was stuck in the snow and would not budge. 5/11/16 RP 338; 5/12/16 RP 516.

Mr. Tellvik told police they looked around and grabbed different items to help with traction. They took some hay from an outbuilding on the property and a porch mat from Ms. Poulter's front door. 5/10/16 RP 85. The camera that faced the shop on Ms. Poulter's property captured Mr. Tellvik use a prybar to jimmy the lock and then enter the shop. It also showed Mr. Tellvik exit the shop with only the prybar in hand. 5/10/16 RP 98; 5/11/16 RP 388; 5/11/16 RP 415-416. Footage on the shed's camera captured one of the men as he opened it. 5/11/16 RP 414.

At the scene, officers noticed items scattered around the truck that were consistent with what Mr. Tellvik told police: a broken bale of hay, a mat from Ms. Poulter's porch, and scaffolding. 5/11/16 RP 388. The officer also noticed what he described as tell-tale signs the truck was stolen. The truck's back window was broken, and the ignition was punched out, with a screwdriver inserted as a key. 5/11/16 RP 465. The officer checked the truck's registration number and found it was stolen out of Yakima. 5/11/16 RP 463.

Police arrested Mr. Tellvik and Mr. Peck and searched them for possible weapons. Police removed a knife, a small torch, a flashlight, and $435.00 cash from Mr. Peck, and a pocketknife from Mr. Tellvik. 5/10/16 RP 134; 5/10/16 RP 155; 5/11/16 RP 376; 5/12/16 RP 584.

An officer conducted an inventory search on the vehicle, while they waited to put the truck in impound. 5/10/16 RP 155-157. Outside the truck, the officer noticed a flat nail bar or prybar that was kind of stamped down in the snow, beneath the driver's side door. 5/11/16 RP 465. In the truck's bed, the officer found a car battery and a small bag

of hand tools Ms. Poulter believed were taken from her carport and her shed. 5/11/16 RP 322-328. Mr. Peck told the officer the car battery and tools belonged to him. The truck was not running well, so they brought along a spare car battery and tools, just in case. 5/10/6 RP 87. Notably missing, was the garbage bag full of stuff Ms. Poulter claimed she saw someone leave with from her house. 5/11/16 RP 339.

Inside the truck, the officer found two jackets, two cell phones, a Global Positioning System, or GPS system and a black zippered case, partially wedged under the seat. 5/10/16 RP 160-161. Not knowing whether the case belonged to the registered car owner or to Mr. Tellvik or Mr. Peck, the officer opened the case and found what he described as "somebody's drugs sales kit." There were "a lot of drugs. A substantial amount of crystalline substance, individually packaged, a digital scale, and a glass smoking pipe." 5/10/16 RP 160-162.

The next day, Ms. Poulter called police again, after she watched footage from her home security cameras. She told police she saw Mr. Tellvik bury a gun in the snow near the truck. 5/11/16 RP 330-331. The officer who responded to the call watched the same footage and thought he saw the prybar fall from the truck. 5/11/16 RP 391-392. Nevertheless, he went outside to search the area. Snow in the driveway had hardened into a sheet of ice, so the officer borrowed a prybar from Ms. Poulter to break the area. He covered a pretty good size area before he was called off the search. Another officer had been to Ms. Poulter's house earlier and had watched the same footage. He believed he saw a prybar tossed in the snow, not a gun. 5/11/16 RP 393.

Ms. Poulter was convinced she saw Mr. Tellvik drop a gun and quite persistent. She continued to call police until a police sergeant asked yet another officer to contact

her. The officer went to her house and watched the footage. He told the court he saw a subject, by the driver's side door, kneel, and drop something in the snow. The subject then kicked snow over the thing and stomped on it, as a patrol car pulled in the driveway. Unlike the two officers who viewed the footage before him, this officer told the court he saw the subject do this twice. 5/12/16 RP 598.

The driveway was still frozen and the officer did not have shovel. So, he borrowed metal detectors from a friend who lived in the area. 5/12/16 RP 608; 5/12/16 RP 612. Although the driveway was still hard, he kicked away at the snow with the tip of his boot until he saw a black outline of something in the snow. He saw it was a gun, went back over the outline with the metal detector, and took it in evidence. 5/12/16 RP 603.

Police traced the gun to a business owner. The owner never reported the gun stolen, but claimed someone had broken into a trailer he kept at his girlfriend's shop in Yakima. He realized tools were taken and some stereo equipment, but was not certain whether the gun was stolen until police called him. 5/11/16 RP 452-453.

Procedural facts

Initially, the state charged Mr. Tellvik and Mr. Peck with first-degree burglary; possession of a stolen vehicle, possession with intent to deliver a controlled substance; and third-degree theft. CP 1-3. After police found the gun in Ms. Poulter's driveway, the state charged Mr. Tellvik, a convicted felon, with possession of a stolen firearm, and with second-degree unlawful possession of a firearm. CP 219-221. Mr. Tellvik and Mr. Peck pleaded not guilty to the charges and the state tried them together. CP 7; CP 29; 4/1/16 RP 37; 4/29/16 RP 52; 2/8/16 RP 13.

At pretrial, Mr. Peck's attorney moved to suppress evidence the officer seized from the black zippered case during the inventory search. She argued the officer's search exceeded that of an "inventory search" and became an "investigative search." For that reason, he was required to apply for a search warrant, before he opened black case. 5/10/16 RP 233-235.

The officer, who conducted the inventory search, told the court he did not apply for a warrant because he did not think there was a reasonable expectation of privacy in a stolen vehicle. 5/10/16 RP 168. The state maintained Mr. Peck had no standing to object to the search because he was in a stolen vehicle. 5/10/16 RP 239.

Mr. Tellvik's attorney joined Mr. Peck's motion and countered to the state's argument with the theory of third party interest. She argued the officer was required to obtain a search warrant to not only to protect the defendants' constitutional rights, but also the rights of the truck's owner. Because the situation was not an urgent one, the officer could have either waited to ask the truck's owner whether the case belonged to him or to apply for a search warrant. 5/10/16 RP 241.

The court denied the motion. It found,

> The people that were in possession of the allegedly stolen vehicle never make a claim, never say –- they, in fact, say there's nothing else in there that's mine. So that's now property that belongs to no one and the police, not even knowing that there's any contraband in the bag are expected to get a warrant to look into the bag? No. It doesn't work that way. There was no reason why the officers in this case thought that the CD bag contained any evidence. It was a CD bag and I didn't get the link that [Mr. Peck's attorney] [emphasis added] referenced to the cash that was taken from Mr. Peck. I didn't see that linked up with [the officer] [emphasis added], who did the inventory search.
>
> But even if he did, like I said, there's no evidence that there were any drugs in that CD case. The officers are required under an inventory search to do the inventory search. They have to look. I mean, you could

> have a toolbox in the back of the truck. There's no -- why would you think there's any crime, evidence of a crime in there? There's no way the judge is going to sign a search warrant for it, but they still need to look to see if there's any tools in there. Otherwise, when the tools come up missing, somebody's going to say there was $12,000 worth of tools in that toolbox. The tow truck operator, the Sheriff's Office, the individual officers are all going to be liable for that. Now, there's a reason we have these inventory searches and it's for the reasons [the officer] [emphasis added] spoke of. And I didn't, I didn't see anything out of the ordinary here that would make me think that he was trying to use the inventory search to try to bypass a warrant requirement.

5/10/16 RP 242-243.

> Okay, okay. And again, we'll have to make more detailed findings later on if it's necessary. We don't know what's going to happen with the trial, so I always -- there's no reason for me to go and spend five hours writing up a document and then if there's a not guilty finding, well, that was a waste of time, Judge. You know, maybe the Court of Appeals would like me to do it in that order, but that doesn't make any sense.

5/10/16 RP 243.

Mr. Tellvik's attorney moved the court to limit witness testimony to what they believe they saw on the footage. Whether it was a gun Mr. Tellvik dropped, she argued, was an issue for the jury to decide. 5/10/16 RP 208. The court granted the motion. It found, "commenting on the evidence is clear, but they get to describe what it is they think they're seeing. All right, okay. Just like we say suspected methamphetamine because you don't know it's methamphetamine until it goes to the lab and is tested, same thing." 5/10/16 RP 210.

At trial, Ms. Poulter was the state's first witness. And almost immediately, she testified she was certain what she saw in the footage was, in fact, a gun.

> **MS. POULTER:** Yes. We, we've looked at the videos many times and the police have come back several times because in watching the video, we saw stuff that, you know, wasn't what was left uncovered. You know, I saw the gun.

> **STATE:** Okay, you saw something you thought was a gun?
>
> **MS. POULTER:** Yeah, but -- well, I know for sure it was a gun. I saw it clearly. And we still-framed it, my son did.
>
> **STATE:** Just a second, just a second. There's an objection?
>
> **MR. TELLVIK'S ATTORNEY:** Objection, Your Honor. She doesn't know for sure what anything was.
>
> **MS. POULTER:** Oh, I, I -- I believe -- I know for sure because we still-framed it right on the gun. And it was, it couldn't have been anything but a gun.

5/11/16 RP 330.

As if the court forgot about its order in limine, it simply overruled Mr. Tellvik's objection. And for whatever reasons, Mr. Tellvik's attorney neglected to move for a mistrial, or for the court to instruct the jury to disregard Ms. Poulter's claims. 5/11/16 RP 330.

The jury found Mr. Tellvik not guilty of third-degree theft, but guilty of first-degree burglary, possession of stolen vehicle, possession with intent to deliver, making or having burglary tools, possession of stolen firearm, and second-degree unlawful firearm possession. The jury also found Mr. Tellvik was armed with a firearm when he committed first-degree burglary, and while he possessed the stolen vehicle, along with the controlled substance. 5/13/16 RP 898; CP 232; CP 235; CP 237; CP 238; CP 240; CP 241; CP 242; CP 234; and CP 236.

The court sentenced Mr. Tellvik to serve 267.5 months in prison, which included 15 years for the three firearm enhancements that by statute he must serve consecutively. 6/10/16 RP 925; CP 252-265. This appeal followed. CP 267.

IV. ARGUMENT

A. WITHOUT A WARRANT TO SEARCH INSIDE THE ZIPPED CASE, EVIDENCE THE OFFICER SEIZED WAS INADMISSIBLE.

Standard of review

This court must review the trial court's decision to deny a suppression motion to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. State v. Dunham, 194 Wash. App. 744, 747, 379 P.3d 958 (2016); State v. Weller, 185 Wash. App. 913, 922, 344 P.3d 695, *review denied*, 183 Wash.2d 1010, 352 P.3d 188 (2015). Substantial evidence is evidence sufficient to convince a fair-minded person that a finding is true. State v. Hardgrove, 154 Wash. App. 182, 185, 225 P.3d 357 (2010).

Otherwise stated, a trial court abuses its discretion if it can be said no reasonable person would have adopted the trial court's decision. State v. Atsbeha, 142 Wash.2d 904, 913–14, 16 P.3d 626 (2001). If the trial court enters findings of fact and conclusions of law in accordance with CrR 3.6(b), this court must consider whether substantial evidence supports any challenged findings of fact and whether the findings support the trial court's conclusions of law. *See* State v. Hill, 123 Wash.2d 641, 644–47, 870 P.2d 313 (1994).

Analysis

1. Privacy is a fundamental right under our state constitution, even during inventory searches. Searches conducted outside the judicial process, without a judge's prior approval, are per se unreasonable under our state constitution, subject only to a few specifically established and well delineated exceptions. State v. Wisdom, 187 Wash. App. 652, 667, 349 P.3d 953, 959–60 (2015), *as amended on reconsideration in part* (Sept. 3, 2015); State v. Duncan, 146 Wash.2d 166, 171, 43 P.3d 513 (2002). Article I,

section 7 of our constitution provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. Although our constitution, unlike the Fourth Amendment to the federal constitution, does not mention warrants, state law also presumes that a law enforcement officer will obtain a judicial warrant before a search. A valid warrant constitutes "authority of law" under article I, section 7. State v. Wisdom, 187 Wash. App. 652, 667, 349 P.3d 953, 959–60 (2015), *as amended on reconsideration in part* (Sept. 3, 2015) *citing* State v. Valdez, 167 Wash.2d 761, 771–72, 224 P.3d 751 (2009).

Inventory searches have long been recognized as a practical necessity. State v. Gluck, 83 Wash.2d 424, 428, 518 P.2d 703 (1974) (*citing* State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968); State v. Olsen, 43 Wash.2d 726, 263 P.2d 824 (1953)). A non-investigatory inventory search of a vehicle may be conducted in good faith after it is lawfully impounded. State v. Houser, 95 Wash.2d 143, 154, 622 P.2d 1218 (1980). The requirement that an inventory search be conducted in good faith is a limitation that precludes an inventory search as a pretext for an investigatory search. Houser, 95 Wash.2d at 155, 622 P.2d 1218; Montague, 73 Wash.2d at 385, 438 P.2d 571 ("this court" would not "have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that ... impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant"). Accordingly, a routine inventory search does not require a warrant. State v. Wisdom, 187 Wash. App. 652, 673, 349 P.3d 953, 962–63 (2015), *as amended on reconsideration in part* (Sept. 3, 2015) *citing*, United States v. Chadwick, 433 U.S. at 10 n. 5, 97 S.Ct. 2476 (1977); State v. Houser, 95 Wash.2d at 153, 622 P.2d 1218;

Warrantless inventory searches are permissible because they protect the vehicle owner's (or occupants') property; protect law enforcement agencies/officers and temporary storage bailees from false claims of theft; and, protect police officers and the public from potential danger. State v. White, 135 Wash.2d 761, 769–70, 958 P.2d 982 (1998); Houser, 95 Wash.2d at 154, 622 P.2d 1218; State v. Gluck, 83 Wash.2d 428, 518 P.2d 703 (1974). However, an inventory search must be restricted to the areas necessary to fulfill the purpose of the search. Houser, 95 Wash.2d at 154, 622 P.2d 1218.

For example, to protect against the risk of loss or damage to property in the vehicle, the search "should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks." Id. at 155, 622 P.2d 1218; State v. Tyler, 177 Wash.2d 690, 700–01, 302 P.3d 165, 171 (2013). In State v. Dugas, 109 Wash. App. 592, 597, 36 P.3d 577 (2001), Division One of this court wrote:

> The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. Knowledge of the precise nature of the property protects against claims of theft, vandalism, or negligence.

State v. Wisdom, 187 Wash. App. 652, 674, 349 P.3d 953, 963 (2015), *as amended on reconsideration in part (*Sept. 3, 2015).

2. Precedence confirms the trial court should have suppressed evidence the officer seized from the zipped case. In at least three decisions, our courts suppressed evidence found in a closed container because the officer could have merely listed the container on the inventory rather than opening the container and listing each individual

item inside. State v. Wisdom, 187 Wash. App. 652, 675, 349 P.3d 953, 963 (2015), *as amended on reconsideration in part* (Sept. 3, 2015).

In State v. Houser, 95 Wash.2d 143, 622 P.2d 1218 (1980), our Supreme Court suppressed evidence of drugs obtained through a warrantless search of a toiletry bag located in the locked trunk of an arrestee's impounded vehicle. The Court held "where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents." Id., citing Houser, 95 Wash.2d at 158, 622 P.2d 1218. The Court recognized a citizen places personal items in luggage to transport the items in privacy and with dignity. For that reason, citizens have a significant privacy interest in their personal luggage, as opposed to other containers. Id., *citing* Houser, 95 Wn.2d at 157–58.

In State v. White, 135 Wash.2d 761, 958 P.2d 982 (1998), our Supreme Court adopted its Houser ruling and concluded a vehicle's trunk is considered locked regardless of whether it could be opened by a release latch in the passenger compartment. The permissible scope of an inventory search does not include locked containers or trunks "absent a manifest necessity for conducting such a search." Houser, 95 Wash.2d at 156, 622 P.2d 1218; *see* White, 135 Wash.2d at 771, 958 P.2d 982 ("possibility of theft does not rise to the level of manifest necessity"). Because in searching the locked trunk the police exceeded the authority to conduct an inventory search, evidence from the trunk should have been suppressed. State v. Tyler, 177 Wash.2d 690, 711–12, 302 P.3d 165, 176 (2013) *citing* State v. White 135 Wash.2d at 771, 958 P.2d 982.

Similarly, in State v. Dugas, 109 Wash.App. 592, 599, 36 P.3d 577 (2001), Division One of this court concluded it was unreasonable for officers to search inside a

closed container, and held "the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents." State v. Dunham, 194 Wash. App. 744, 750, 379 P.3d 958, 962 (2016). In that case, the officers testified their routine procedure for an impound search was to record all impounded items, including items in jacket pockets, in order to avoid false claims and to discover drugs and any dangerous contents. Dugas, 109 Wash.App. at 595, 36 P.3d 577.

Here, the trial court's oral ruling conflicted with precedence set in Houser, White, and Dugas. Because neither Mr. Tellvik nor Mr. Peck claimed the case, the court concluded the case was unclaimed property and the officer had a right to search it to ensure its contents were accounted for, so as to avoid false claims. 5/10/16 RP 242-243.

> The people that were in possession of the allegedly stolen vehicle never make a claim, never say -- they, in fact, say there's nothing else in there that's mine. So that's now property that belongs to no one and the police, not even knowing that there's any contraband in the bag are expected to get a warrant to look into the bag? No. It doesn't work that way. There was no reason why the officers in this case thought that the CD bag contained any evidence. It was a CD bag and I didn't get the link that [Mr. Peck's attorney] [emphasis added] referenced to the cash that was taken from Mr. Peck. I didn't see that linked up with [the officer] [emphasis added], who did the inventory search.
>
> But even if he did, like I said, there's no evidence that there were any drugs in that CD case. The officers are required under an inventory search to do the inventory search. They have to look. I mean, you could have a toolbox in the back of the truck. There's no -- why would you think there's any crime, evidence of a crime in there?
>
> There's no way the judge is going to sign a search warrant for it, but they still need to look to see if there's any tools in there. Otherwise, when the tools come up missing, somebody's going to say there was $12,000 worth of tools in that toolbox. The tow truck operator, the Sheriff's Office, the individual officers are all going to be liable for that. Now, there's a reason we have these inventory searches and it's for the reasons [the officer] [emphasis added] spoke of. And I didn't, I didn't see anything out of the

> ordinary here that would make me think that he was trying to use the inventory search to try to bypass a warrant requirement.

5/10/16 RP 242-243.

While we attempt to challenge the trial court's suppression ruling here, we are limited, because we cannot assign error to the trial court's findings. The court neglected to enter written findings of fact and conclusions of law after the suppression hearing. We only have its oral ruling to consider and that is not sufficient for appellate review.

3. The court's failure to enter written findings of fact and conclusions of law requires remand. CrR 3.6(b) mandates trial courts to enter written findings of fact and conclusions of law after suppression hearings. CrR 3.6(b). The purpose of this rule is to ensure efficient and accurate appellate review. State v. McGary, 37 Wash. App. 856, 861, 683 P.2d 1125, *review denied*, 102 Wash.2d 1024 (1984); State v. Cannon, 130 Wash.2d 313, 329, 922 P.2d 1293, 1301 (1996). A trial court's failure to enter written findings and conclusions typically requires remand. State v. Head, 136 Wash.2d 619, 624, 964 P.2d 1187 (1998). An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction. Id.

The reason being, a trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. State v. Mallory, 69 Wash.2d 532, 533, 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Id. at 533-34, 419 P.2d 324; *accord* State v. Dailey, 93 Wash.2d 454, 458-59, 610 P.2d 357 (1980).

Here, the court conceded its oral ruling was not binding.

> Okay, okay. And again, we'll have to make more detailed findings later on if it's necessary. We don't know what's going to happen with the trial, so I always -- there's no reason for me to go and spend five hours writing up a document and then if there's a not guilty finding, well, that was a waste of time, Judge. You know, maybe the Court of Appeals would like me to do it in that order, but that doesn't make any sense.

RP 243.

Moreover, appellate review is facilitated by written findings and conclusions. For that reason, a prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence used to support each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review. State v. Head, 136 Wash.2d 619, 622–23, 964 P.2d 1187, 1189 (1998). Here, the state acknowledged its responsibility, but failed to meet it. "Well, I'm going to have to be, because everybody (indiscernible), I have to make sure that there are findings of fact and conclusions of law written on the 3.6 hearing…" 6/10/16 RP 929.

Neither the state nor the court met their respective burdens here, so we ask this court to remand this case to allow them to do so. If this court remands, we ask to reserve the right to assign error to the trial court's findings and to address the issue of prejudice in either a reply or a supplemental brief.

B. MS. POULTER'S INSISTENCE SHE SAW A GUN ON THE CAMERA FOOTAGE, DESPITE THE COURT'S ORDER IN LIMINE, WAS GROUNDS FOR A MISTRIAL.

Standard of review

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466

U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is a mixed question of fact and law that we review de novo. State v. Jones, 183 Wash.2d 327, 338, 352 P.3d 776 (2015).

Analysis

1. Mr. Tellvik's attorney neglected to move for a mistrial, when Ms. Poulter violated the order in limine. To prove ineffective assistance of counsel, a defendant must show (a) his trial "counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (b) his trial "counsel's deficient representation prejudiced [his case], 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 Wash.2d 322, 334–35, 899 P.2d 1251 (1995).

a. Mr. Tellvik's attorney's representation was deficient. Deficient performance is that which " 'falls below a minimum objective standard of reasonable attorney conduct.' " State v. Jones, 183 Wash.2d 339, 352 P.3d 776 (2015) (*quoting* State v. Benn, 120 Wash.2d 631, 663, 845 P.2d 289 (1993)). Legitimate trial strategy cannot be the basis for an ineffective assistance of counsel claim. In re Pers. Restraint of Cross, 180 Wash.2d 664, 694, 327 P.3d 660 (2014). This court will presume counsel was effective unless "there is no possible tactical explanation for counsel's action." Cross, 180 Wash.2d at 694.

Here, Mr. Tellvik's attorney moved the court to exclude comments from witnesses that what they saw on the footage was a gun. Her position was whether Mr. Tellvik dropped a gun, was an issue for the jury to decide. 5/10/16 RP 208. The court

granted the motion. It found, "commenting on the evidence is clear, but they get to describe what it is they think they're seeing. All right, okay. Just like we say suspected methamphetamine because you don't know it's methamphetamine until it goes to the lab and is tested, same thing." 5/10/16 RP 210.

Given the court granted the motion in limine, she sought, there was no possible tactical explanation for why Mr. Tellvik's attorney failed to move for a mistrial after Ms. Poulter told the jury repeatedly the object she saw on the video was a gun. She objected to Ms. Poulter's testimony and arguably, her objection was enough to preserve this issue for appeal. "If the trial court grants counsel's motion in limine to exclude evidence, but counsel's opponent offers the same evidence at trial, the only prudent practice is for counsel to reiterate the objection, on the record, at the earliest opportunity. § 103.6 Pretrial rulings (motions in limine)—Foundations for appeal, 5 Wash. Prac., Evidence Law and Practice § 103.6 (6th ed.) However, she neglected to move for a mistrial. Her failure to do so fell below a minimum objective standard of reasonable attorney conduct in that instance.

b. There is a reasonable probability that, except for his attorney's error, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694-695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on this claim, Mr. Tellvik must show had his attorney requested a mistrial, the outcome would have been different. In other words, he would have to show the trial court would have granted the motion. State v. Thomas, 109 Wash.2d 222, 226, 743 P.2d 816 (1987).

Our Supreme Court ruled a trial court should grant a mistrial when the defendant has suffered prejudice such that nothing short of a new trial will ensure that defendant a fair trial. State v. Rodriguez, 146 Wash.2d 260, 270, 45 P.3d 541 (2002) (*quoting* State v. Kwan Fai Mak, 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). Whether a witness's testimony "justifies a mistrial depends on (i) the seriousness of the irregularity; (ii) whether the statement in question was cumulative of other evidence; and (iii) whether the irregularity could effectively be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow." State v. Weber, 99 Wash.2d 158, 165–66, 659 P.2d 1102 (1983).

i. Seriousness of the irregularity. The "irregularity", here, was sufficiently serious because it violated an order in limine to exclude that which Ms. Poulter told the jury. State v. Essex, 57 Wash. App. 411, 416, 788 P.2d 589 (1990).

> **MS. POULTER:** Yes. We, we've looked at the videos many times and the police have come back several times because in watching the video, we saw stuff that, you know, wasn't what was left uncovered. You know, I saw the gun.
>
> **STATE:** Okay, you saw something you thought was a gun?
>
> **MS. POULTER:** Yeah, but –- well, I know for sure it was a gun. I saw it clearly. And we still-framed it, my son did.
>
> **THE COURT:** Just a second, just a second. There's an objection?
>
> **MR. TELLVIK'S ATTORNEY:** Objection, Your Honor. She doesn't know for sure what anything was.
>
> **MS. POULTER:** Oh, I, I –- I believe –- I know for sure because we still framed it right on the gun.. And it was, it couldn't have been anything but a gun.

5/11/16 RP 330.

Ms. Poulter's testimony came in after the court reminded the state Ms. Poulter's suspicions were not testimony and granted the defense's motion to limit, not only Ms. Poulter's testimony, but all state witness' testimonies to what they believe they saw on the video. 5/10/16 RP 253. The state ensured the court it instructed Ms. Poulter to not make any such comments. 5/11/16 RP 279. Yet, in spite of the court's order in limine, its words of caution to the state, and the state's assurance, Ms. Poulter repeatedly told the jury she saw a gun on the footage.

ii. Whether Ms. Poulter's statement was cumulative of other evidence. If evidence was not cumulative of other evidence properly admitted, this factor weighs in favor of a mistrial. State v. Babcock, 145 Wash. App. 157, 164, 185 P.3d 1213, 1217 (2008) *citing* State v. Escalona, 49 Wash. App. 251, 255, 742 P.2d 190, 192 (1987).

Here, Ms. Poulter's testimony was neither cumulative nor repetitive of other testimony presented at trial. The court ruled in limine witnesses could not say what they saw on the footage was a gun. "The commenting on the evidence is clear, but they get to describe what it is they think they're seeing. All right, okay. Just like we say suspected methamphetamine because you don't know it's methamphetamine until it goes to the lab and is tested, same thing." 5/11/16 RP 210.

No other state witness testified they saw a gun. In fact, every officer, save one, testified they believed they saw Mr. Tellvik drop a prybar. 5/11/16 RP 374-376. And even the lone officer, who testified he saw Mr. Tellvik drop two items in the snow, was careful not to say he saw Mr. Tellvik drop a gun. Instead, he told the jury when he went to search the area where he believed he saw Mr. Tellvik drop the things, he saw a black

outline in the snow and then realized it was a gun after the metal detector picked it up. 5/12/16 RP 603-612.

Furthermore, the jury did not have any physical evidence to connect Mr. Tellvik to the gun. An officer testified there were no identifiable friction ridge prints on the gun. So, there was no way to prove Mr. Tellvik handled the gun. 5/12/16 RP 618.

iii. Whether the irregularity could be effectively cured by an instruction to disregard the remark. While it is presumed juries follow court instructions to disregard testimony, *see* Weber, 99 Wash.2d 158, 166, 659 P.2d 1102 (1983), no instruction can " 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.' " State v. Babcock, 145 Wash. App. 157, 164, 185 P.3d 1213, 1217 (2008) *citing* Escalona, 49 Wash. App. at 255, 742 P.2d 190 (*alteration in original*) (*quoting* State v. Miles, 73 Wash.2d 67, 71, 436 P.2d 198 (1968)); *see also* State v. Suleski, 67 Wash.2d 45, 51, 406 P.2d 613 (1965).

Division Two of this court found the absence of a curative instruction was significant in State v. Young, 129 Wash. App. 468, 476, 119 P.3d 870 (2005). In that case, the trial court did not specifically address an unintentional disclosure with the jury and never told the jury to disregard the disclosure. State v. Garcia, 177 Wash. App. 769, 782, 313 P.3d 422, 429 (2013) *citing*, Young, 129 Wash. App. at 476, 119 P.3d 870. Instead, the court merely gave a standard instruction that told the jury not to consider the contents of the information as proof of the crimes charged. Young, 129 Wash. App. at 476–77, 119 P.3d 870. Division One found this instruction insufficient, stating,

> While it is presumed that juries follow the instructions of the court, an instruction that fails to expressly direct the jury to disregard evidence,

> particularly where, as here, the instruction does not directly address the specific evidence at issue, cannot logically be said to remove the prejudicial impression created by revelation of identical other acts.

Young, 129 Wash. App. at 477, 119 P.3d 870.

Perhaps an instruction could have cured the irregularity. However, unlike in Young, no instruction was given here, not even an insufficient one. Mr. Tellvik's attorney did not move for the court to instruct the jury to disregard Ms. Poulter's comments about the gun, and the court, on its own, neglected to give one. Instead, after Mr. Tellvik's attorney objected to Ms. Poulter's testimony, the court simply overruled the objection and allowed Ms. Poulter to continue to tell the jury she saw Mr. Tellvik drop a gun.

> **MR. TELLVIK'S ATTORNEY:** Objection, Your Honor. She doesn't know for sure what anything was.
>
> **MS. POULTER:** Oh, I, I —
>
> **THE COURT:** Okay.
>
> **MS. POULTER:** I believe — I know for sure because we still-framed it right on the gun.
>
> **THE COURT:** Okay.
>
> **MS. POULTER:** And it was, it couldn't have been anything but a gun.
>
> **THE COURT:** Fair enough, overruled. Continue.

5/11/16 RP 330.

This court must presume the jury considered Ms. Poulter's testimony in its deliberations, because it was never instructed not to. Had the jury been instructed to disregard Ms. Poulter's repeated declarations under oath she saw Mr. Tellvik drop a gun, there was a reasonable probability the jury would not have found Mr. Tellvik guilty on

the firearm charges and the enhancements. CP 232; CP 235; CP 238; CP 241; CP 242; CP 236; CP 234; 5/13/16 RP 898.

V. CONCLUSION

We ask this court to remand the case to the trial court so it can enter written findings of fact and conclusions of law as required under CrR 3.6. After the court has filed written findings and conclusions, we seek to reserve the right to properly assign error to those findings and to address any prejudice claims, in either a reply or a supplemental brief.

Furthermore, because Mr. Tellvik did not receive effective assistance of counsel, we also ask this court to dismiss his firearm convictions and enhancements.

Submitted this 12th day of June, 2017.

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DECLARATION OF SERVICE

June 12, 2017

Court of Appeals Case No. 345254

Case Name: *State of Washington v. Clark Allen Tellvik*

I declare under penalty and perjury of the laws of Washington State that on **Monday, June 12, 2017,** I filed the attached appellant's opening brief with Division Three Court of Appeals and served copies to:

KITTITAS COUNTY PROSECUTING ATTORNEY
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*The prosecutor's office accepts service via email.

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