IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DWAYNE CLARK, Appellant.	No. 40488-5-II UNPUBLISHED OPINION

Armstrong, P.J. — Dwayne Clark appeals his convictions for first degree kidnapping with sexual motivation and third degree child molestation. He argues that the State presented insufficient evidence to convict him of kidnapping and molesting the victim[1] because the State obtained all the evidence as a result of a warrantless search of his cell phone in violation of the Fourth Amendment and article I, section 7. Clark also argues that he was denied effective assistance of counsel because his counsel failed to move to suppress this evidence. Finding no reversible error, we affirm.

[1] The State also charged Clark with first degree kidnapping, indecent liberties, and second degree assault in connection to a second victim. The jury found Clark guilty of first degree kidnapping and indecent liberties, but Clark does not challenge these convictions.

FACTS

On May 16, 2007, 15-year-old A.P.[2] encountered Clark standing by a pickup truck. Clark asked A.P. to come over to his truck to discuss the prospect of joining the Army. When A.P. walked over, Clark shoved him into the truck and locked the door, preventing A.P. from escaping.

Clark drove A.P. around the Parkland area for several hours during which he took photos of and fondled A.P.'s genitals. He also ordered A.P. to masturbate and gave A.P. a piece of paper with his telephone number on it, asking A.P. to call him. Clark then drove to Spanaway Lake Park and left the vehicle to go to the park toilet. A.P. escaped from the truck and ran to his home, taking Clark's cell phone and the piece of paper Clark gave him.

After A.P.'s father reported the incident, Deputy Vickie Kimbriel arrived at A.P.'s home and examined the cell phone A.P. took from the truck. She called a phonebook entry labeled "mom," reaching a woman who identified herself as Clark's mother.

On May 17, 2007, Clark called 911 and reported that his cell phone was stolen from his pickup truck in Spanaway Lake Park at around 4:00 p.m. on May 16, 2007. Detective Timothy Donlin, while investigating the kidnapping of A.P., learned about Clark's reported cell phone theft. Detective Donlin obtained Clark's photo from the Department of Licensing and prepared a photomontage of which A.P. identified Clark. Detective Donlin unsuccessfully attempted to contact Clark at his Lakewood address and similarly was unable to locate Clark using the phone number given to 911. The police ultimately apprehended Clark as a result of an incident with a

[2] Because the victim is a juvenile, we find that some anonymity is appropriate. Accordingly, we use initials to identify him.

second victim.

The State charged Clark with first degree kidnapping with sexual motivation and third degree child molestation. Clark did not move to suppress any of the evidence stemming from the cell phone search. Nor did he object to A.P.'s identification of him in court and from the photomontage.

The jury found Clark guilty of first degree kidnapping and third degree child molestation of A.P.

ANALYSIS

I. Manifest Constitutional Error

Clark argues that the State failed to prove the charges against him because the State's evidence all flowed from an illegal search.[3] Specifically, Clark argues that the photomontage A.P. used to identify him and A.P.'s in-court identification were inadmissible because they were discovered as a result of a warrantless search of Clark's cell phone. The State counters that Clark has waived any challenge to the cell phone search by failing to move to suppress.

[3] Clark may be framing the issue as one of insufficient evidence to avoid the State's argument that his failure to move to suppress waives any claim of an illegal search. But the Supreme Court has held that in considering a sufficiency challenge, the reviewing court can consider all evidence, even evidence an appellate court determines was wrongly admitted. *Lockhart v. Nelson*, 488 U.S. 33, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). In any event, because Clark argues both direct manifest constitutional error and indirect constitutional error through a claim of ineffective assistance of counsel, we deal with the core issue for both—whether the record shows manifest error or prejudice.

Generally, a defendant cannot raise an error for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). For the exception to apply, the defendant must demonstrate that (1) the error is truly of constitutional magnitude and (2) the error is manifest. *O'Hara*, 167 Wn.2d at 98. An error is "manifest" when the defendant makes a plausible showing that the asserted error had a practical and identifiable consequence in the trial of the case. *O'Hara*, 167 Wn.2d at 99. An error cannot be manifest if the record is insufficient for the appellate court to adjudicate the merits of the alleged error. *O'Hara*, 167 Wn.2d at 99; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). Thus, to warrant review, Clark must demonstrate that on the record before the trial court, it would have suppressed the evidence obtained from the cell phone search. *State v. Contreras*, 92 Wn. App. 307, 312, 966 P.2d 915 (1998).

The record is insufficient to demonstrate that the trial court would have granted a suppression motion. First, as the State points out, the record does not establish that Deputy Kimbriel had no warrant. She explained only that the purpose of her search was "[t]o locate the owner of the phone." Report of Proceedings (RP) at 111. But because Clark did not move to suppress, neither party questioned Deputy Kimbriel about whether she had a warrant.

More troublesome is the evidence that Clark gave A.P. a slip of paper containing his phone number and name. Again, because Clark did not move to suppress, the State had no reason or opportunity to explore whether the slip was an independent source to identify Clark. *See State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (independent source is a

recognized exception to the exclusionary rule under article I, section 7); *State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987). When the prosecutor showed A.P. the piece of paper and asked him if he recognized it, A.P. replied, "I am not sure. I thought there was a name on it, too, but it's – some of it is a blur. I am not sure." RP at 65. And Deputy Kimbriel testified that she was given the cell phone and piece of paper to book into evidence. Because it is entirely possible the piece of paper Clark gave A.P. would have led police to Clark, we cannot say on this record that the trial court would have suppressed the identification evidence. Accordingly, Clark has not demonstrated a manifest constitutional error. *See State v. Roberts*, 158 Wn. App. 174, 182, 240 P.3d 1198 (2010) (citing *McFarland*, 127 Wn.2d at 333).

II. Ineffective Assistance of Counsel

Clark next argues that his counsel ineffectively represented him by failing to move to suppress the cell phone evidence. Specifically, he claims that counsel had no tactical reason not to challenge the cell phone search. Clark finds prejudice in the trial court's admission of the evidence identifying him as the kidnapper and molester of A.P.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on such a claim, the defendant must show both that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To show prejudice, the defendant must show that if counsel had objected or argued as Clark now urges, they likely would have succeeded. *See McFarland*, 127 Wn.2d at 337 n.4.

Clark has not shown prejudice. Even if the trial court had found the cell phone search illegal, it would not have suppressed the identification evidence if the State had established the slip of paper as an independent source for identifying Clark. *Afana*, 169 Wn.2d at 181. Accordingly, Clark has not shown that the outcome of the trial would have differed had counsel moved to suppress the identification evidence. *McFarland*, 127 Wn.2d at 337 n.4. Clark's claim of ineffective assistance fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.