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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERMAINE LARON ABDUL GORE, Appellant.	No. 48960-1-II UNPUBLISHED OPINION

JOHANSON, J. — Jermaine Gore appeals his jury trial convictions for first degree unlawful possession of a firearm, two counts of unlawful possession of a controlled substance with intent to deliver, and first degree rendering criminal assistance. He also appeals the firearm sentencing enhancements for the latter three convictions. Gore argues that (1) trial counsel was ineffective when he agreed to an order allowing the State to search Gore's cell phone, (2) insufficient evidence supports the firearm sentencing enhancements, and (3) the prosecutor engaged in misconduct by making an improper "puzzle" analogy during closing argument. In Gore's statement of additional grounds[1] (SAG), he further asserts that (4) the search warrant for his vehicle was not supported by probable cause and (5) he was unlawfully detained.

[1] RAP 10.10.

We agree that Gore's counsel was ineffective when he and Gore apparently inadvertently signed an order that allowed the State to examine the contents of Gore's cell phone, resulting in more serious charges and an additional charge. We reject Gore's remaining contentions. Thus, we reverse and remand Gore's two convictions for unlawful possession of a controlled substance with intent to deliver, the rendering criminal assistance conviction, and the related firearm enhancements. We also affirm the first degree unlawful possession of a firearm conviction.

FACTS

I. BACKGROUND FACTS[2]

On May 5, 2015, while investigating a May 1 drive-by shooting, law enforcement learned that a suspect, Alexander Kitt, would be dropped off at a particular treatment facility in Tacoma. Lead Detective Brian Vold decided to employ the Task Force for surveillance on the day of Kitt's expected arrival at the facility.

Officer Kevin Wales and Officer Jeffrey Thiry of the Tacoma Police Department were instructed to contact the occupants in the Cadillac that had been observed dropping Kitt off at the treatment facility. The officers approached the Cadillac, which contained three occupants. Gore was sitting in the driver's seat. His son, Jermohnn Gore,[3] was sitting behind Gore in the back seat. A third man, Ladell Moton, was sitting in the back seat on the passenger side.

A records check revealed that there were no outstanding warrants for Gore, but that Jermohnn was suspected in a shooting. Jermohnn was arrested and taken into custody. Law

[2] The background facts are based on trial testimony and exhibits entered into evidence.

[3] We refer to Jermohnn Gore by his first name to avoid confusion with the appellant, who shares Jermohnn's last name.

enforcement learned that Moton had provided a false name and arrested him. During a search incident to arrest, Officer Wales found a handgun and narcotics on Moton's person.

Detectives decided to impound the vehicle and obtain a search warrant, and they wanted to interview Gore, Moton, and Jermohnn. Gore was handcuffed, taken into custody, and released after giving a statement at police headquarters.

II. SEARCH OF GORE'S VEHICLE[4]

Police searched Gore's car pursuant to a warrant. The search warrant affidavit included numerous facts about law enforcement's contacts with the occupants of Gore's vehicle. In relevant part, the affidavit stated,

> At approximately 1545 hours on 5-5-15 F.B.I. Agent Todd Bakken advised detectives that Alexander Kitt had been arrested after he was observed exiting a white and brown 2001 Cadillac Deville. . . . Additionally three other occupants were contacted and detained, Ladell Moton, Jermohnn Gore, and Jermaine Gore. During this contact a 9mm caliber semiautomatic pistol was removed from the waistband of Ladell Moton as well as some suspected rock cocaine. He was arrested for [unlawful possession of a firearm (U.P.O.F.)] and [unlawful possession of a controlled substance (U.P.C.S.)] and the pistol was left within the vehicle.
>
> Jermohnn Gore was also arrested as he was wanted on an unrelated shooting. During the course of being interviewed he told other detectives that in addition[] to the pistol found on Moton there was a black guitar case inside the Cadillac, which was observed by investigators in the back seat of the Cadillac that contained an unknown caliber semiautomatic rifle. He told the officers that he was responsible for the rifle.
>
> When interviewed by detectives Alexander Kitt denied any participation in or knowledge of the shooting.
>
> Upon being interviewed Jermaine Gore denied all knowledge of the homicide and the firearms and suspected drugs in his car.
>
> Based on the above circumstances your affiant is of the belief that the search and recovery of any firearms within the Cadillac in question would further the investigation and prosecution of this homicide as well as the charge of U.P.O.F. and U.P.C.S. on Moton and potentially Jermaine Gore.

[4] The facts in this section are primarily based on the search warrant affidavit.

Clerk's Papers (CP) at 58-59.

During the vehicle search, the police found Gore's cell phone on the driver's seat. They discovered a bag of crack cocaine between the driver's seat and center console. The center console, adjacent to the driver's seat, had a top compartment and a lower compartment, and the police found a bag containing crystal methamphetamine, a loaded .38 caliber revolver, and mail addressed to Gore in the lower compartment.

III. CHARGES

In July 2015, Gore was initially charged with first degree unlawful possession of a firearm and two counts of unlawful possession of a controlled substance. The latter two counts carried firearm sentencing enhancements. On April 4, 2016, the State filed an amended information charging Gore with first degree unlawful possession of a firearm, unlawful possession of a controlled substance with intent to deliver cocaine, unlawful possession of a controlled substance with intent to deliver methamphetamine, and first degree rendering criminal assistance. The latter three charges included firearm sentencing enhancements under former RCW 9.94A.533(3) (2015).

IV. SUPPRESSION MOTIONS

Gore filed a motion to suppress seized evidence by challenging, among other things, the search warrant authorizing the search of the Cadillac. Gore argued that the search warrant lacked probable cause. He also argued that the initial seizure of the occupants of the vehicle was unlawful because it was not based on a well-founded suspicion, such that the "*evidence discovered pursuant to the initial seizure . . . must be excluded*."[5] CP at 8.

[5] Gore filed a second suppression motion that is not at issue on appeal.

The trial court denied Gore's motion.

The trial court entered the following conclusions of law relevant on appeal:

> 3. [The judge] did not abuse his discretion in authorizing the search warrant for the Cadillac based on a finding of probable cause to believe it contained firearms, ammunition, magazines, controlled substances, and dominion and control documents.
> 4. The search warrant included a nonprejudicial scrivener's error in identifying the "target" crime as first degree murder. The warrant identified with sufficient particularity the items to be seized pursuant to the warrant such that it appropriately limited the discretion of the officers executing the warrant.
> . . . .
> 6. As to law enforcement's contact with the defendant, this was a lawful *Terry*[6] detention based on Kitt's connection to the car and its occupants as well as . . . all of the considerations that law enforcement had in seeking to impound the car. Furthermore, probable cause supported the impoundment of the Cadillac and the search warrant regardless of any information derived from the detention of the defendant.

CP at 107-08.

V. MOTION TO ACCESS CELL PHONE RECORDS

During a February 25, 2016 pretrial hearing, defense counsel sought an order to access May 5, 2015 text messages from Gore's cell phone that law enforcement seized during Gore's vehicle's search. According to Gore's counsel, he was seeking a limited search of the phone for text messages of "strategic value" to the defense. Report of Proceedings (RP) (Feb. 25, 2016) at 100. Counsel believed there were text messages on the phone that could exonerate Gore. Counsel and Gore had met with Detective Vold and Gore had, at the time of their meeting, consented to a search of Gore's phone for the purpose of obtaining the text messages that defense counsel

[6] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

believed would be helpful to Gore's case. Gore had since withdrawn consent, and counsel sought an order from the trial court to search the phone without Gore's consent.

Counsel confirmed that the request to obtain the text messages originated with the defense, not the State. Counsel informed the trial court that he prepared a consent to search a "narrow corner of the phone." RP (Feb. 25, 2016) at 103. Defense counsel stated, "In fact, Detective Vold this morning came to me and said, are you sure you want to do this. It was at that point we began hammering out the parameters of the consent. I mean, maybe it should be marked. I can show you. We hammered out a narrow corner of the phone that should be looked at. There are privacy issues. I respect that." RP (Feb. 25, 2016) at 103. The State insisted that if cell phone records were to be copied from the phone, defense must provide an expert to conduct the extraction.

Counsel stated that he had an expert who could extract the data. The trial court said that the parties could agree to an order and the court would sign it.

Counsel and Gore then had an interaction before the trial court in which it is unclear whether Gore approved of counsel's expert accessing the cell phone files. Counsel, seeming to contradict his earlier statement that Gore would not consent to a search of his phone, said, "Tentatively, . . . Mr. Gore has indicated he would not oppose my expert looking at the phone." RP (Feb. 25, 2016) at 104. Gore said, "I mean at this point, . . . this is something that should have been done, you know. . . . I don't want no delays." RP (Feb. 25, 2016) at 104.

The trial court and counsel had the following interaction:

> [Defense Counsel]: I am in a difficult position here. I can't wait until we are in the middle of trial to get an order. Sometimes clients end up at odds with the lawyers. This is apparently one of them. . . .
>
> . . . If Mr. Gore wants to fire me, he can do that. I have to prepare his defense even if it is against -- I have to do what I think is best for Mr. Gore, even if he thinks it isn't. . . .

> THE COURT: You are talking about an order to have . . . your individual obtain the text messages off the phone?
> [Defense Counsel]: Yes.
> THE COURT: I didn't hear that Mr. Gore was opposed to that. He thought it would have been done sooner.

RP (Feb. 25, 2016) at 105.

On March 7, the State, defense counsel, Gore, and the trial judge all signed an order "regarding defense access and handling of exhibit." CP at 397 (capitalization omitted). This document authorized the Pierce County Property Room to release Gore's phone to the defense. Notably, it also stated, "[B]y agreement of the parties, the State, through the Tacoma Police Department, shall make a digital copy of the cell phone data . . . *that is subject to examination by the State*." CP at 397 (emphasis added).

VI. MOTION IN LIMINE TO SUPPRESS TEXT MESSAGES

On April 4, the same day that the State amended Gore's charges, defense counsel filed a motion in limine to exclude Gore's cell phone's text messages. Defense argued that (1) the text messages were mere propensity evidence or evidence of prior bad acts subject to exclusion under ER 404(b), (2) the defense signed an order authorizing his expert to retrieve text messages received only on May 5, 2015, and (3) "[t]he [S]tate said that they wanted to preserve evidence on the phone prior to my expert witness receiving it, but we have never done anything other than authorize dumps on May 5 in the midmorning hours." 2 RP at 53. Defense counsel also argued that the State lacked probable cause to seize and search Gore's phone and that Gore never gave the State consent to search the phone. Gore denied signing the order, and defense counsel stated that Gore "has been emphatic the entire time" that he consented to recovery of the text messages received

only on May 5. 2 RP at 57. Gore stated that defense counsel "went over [Gore's] head and said that he wanted to do it. I said I didn't want to do it." 2 RP at 58.

The State argued that the text messages should be admitted as evidence to prove the charged crimes. The State provided the trial court with the order that Gore consented to and that the judge entered on March 7. The State argued that both defense counsel and Gore signed the order consenting to the State's access to data on the phone.

The trial court noted that the order did not impose any limitations to a specific date and it was signed by "everybody, including Mr. Gore." 2 RP at 57. The trial court ruled that unless it receives evidence to the contrary, the order stands. The trial court also ruled that the text messages were admissible as evidence to prove the elements of the crimes charged.

VII. TRIAL, CLOSING ARGUMENT, AND VERDICTS

At trial, the State used text messages and pictures from the phone as evidence.[7] A forensic analysis technician testified that he recovered data off of Gore's phone. A detective identified several text messages involving drug transactions. He testified to the meaning of "slang" terms used to describe street drugs and identified numerous text messages in which Gore appeared to be engaging in discussions regarding drug transactions using the slang terms. Gore's wife testified about text messages between her and Gore in which they discussed a shooting and Jermohnn's desire to leave the city and state.

[7] Little of the trial evidence is at issue in the appeal. Thus, we discuss only the trial facts relevant on appeal.

The State also presented testimony that drug dealers often carry guns to protect themselves and that drug transactions can be dangerous. The detective also testified that drug dealers are often targets for robbery.

In closing argument, the State discussed the text messages in detail to establish Gore's intent to distribute. The State said, "What do [Gore's] text messages tell us about how he makes a living . . . ? You heard just a few of the drug trafficking related messages from the defendant, and I'm just going to go through a few more. When you read those messages, there is only one conclusion to draw and that is that he is peddling cocaine, methamphetamine, and marijuana." 6 RP at 618. The State presented the content of numerous text messages that appeared to show Gore initiating or responding to requests for drug transactions. In addition, the State presented photographs obtained from Gore's phone that showed Gore with large amounts of cash. The State argued, "The evidence, as we've talked about from the cell phone, is that [Gore] was dealing meth, cocaine, and marijuana." 6 RP at 622.

The State also discussed text messages on the phone to prove that Gore rendered criminal assistance. The State described the content of numerous text messages from Gore expressing concern about Jermohnn's connection to a shooting and indicating that Gore was making phone calls and providing transportation for Jermohnn to leave the city and state.

When discussing the State's burden during closing arguments, the prosecution offered a puzzle analogy to explain the concept of reasonable doubt.

The State referred to the "puzzle analogy" throughout argument and rebuttal to argue that the State had proved Gore's guilt beyond a reasonable doubt. The State's argument did not attempt to quantify "reasonable doubt."

The jury found Gore guilty as charged, including the firearm enhancements. The trial court imposed a total sentence of 308 months in confinement. Gore appeals his convictions and the firearm sentencing enhancements.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Gore argues that he was denied the constitutional right to effective counsel. We agree.

A. PRINCIPLES OF LAW

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The federal Sixth Amendment protects defendants from ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Courts engage in a strong presumption that counsel's representation was not deficient. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant alleging ineffective assistance of counsel bears the burden of establishing deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A defendant can rebut the presumption of reasonable performance by demonstrating that "'there is no conceivable legitimate tactic

explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenback*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

A defendant establishes prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *Grier*, 171 Wn.2d at 34. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694-95).

B. COUNSEL WAS DEFICIENT

Gore argues that counsel acted improperly when he consented to police access to Gore's cell phone. The State argues that counsel was not deficient because he provided a rigorous defense and made a tactical decision when he provided consent to the search. We agree with Gore.

First, contrary to the State's argument, the test for ineffective assistance of counsel is not whether counsel provided a rigorous defense in some respects. Instead, we determine whether defense counsel was deficient by examining whether his challenged conduct falls below an objective standard of reasonableness under prevailing professional norms. *Davis*, 152 Wn.2d at 673. In this case, there must be a conceivable legitimate tactic explaining counsel's decision to provide consent to the State to examine the contents of Gore's phone. *See Grier*, 171 Wn.2d at 33.

When counsel sought the order to access Gore's text messages, he stated that he believed the text messages he was seeking contained exonerating information and that a trial court order was required so he could obtain access to specific text messages on a "narrow corner of the phone" that would assist in his client's defense. RP (Feb. 25, 2016) at 103.

Counsel's choice to obtain a trial court order to *access* text messages can be considered legitimate strategy because he was acting to obtain evidence to defend his client. *See Grier*, 171 Wn.2d at 33. However, counsel not only signed an order granting defense access to the phone, he signed an order that permitted the State to examine all of the information on the phone.

The record indicates that counsel was not acting tactically because, as he stated during his argument to suppress the cell phone evidence, he did not intend to grant consent to the State to access all of the data on the phone. Counsel argued that he sought *defense* access to data from a specific day.

It is conceivable that counsel believed the phone contained only exonerating information or that the value of exonerating information to the defense would outweigh any incriminating information. But there is no conceivable tactical reason that he would allow the State access to the cell phone data without first knowing the nature of the information on the phone. The record demonstrates that counsel inadvertently agreed to allow the State to view the phone's data by signing the order without knowing what the order said.

The record also demonstrates that Gore intended to sign an order that allowed only the defense access to the phone. Defense counsel told the trial court that Gore never gave the State consent to search the phone. Gore denied signing the order, and defense counsel stated that Gore "has been emphatic the entire time" that he consented to recovery of the text messages received only on May 5. 2 RP at 57. There is nothing in the record to suggest that either Gore or his attorney intended to grant the State the authority to examine all of the information on the phone. Nor can we imagine any tactical reason for doing so.

While a legitimate trial tactic may justify counsel seeking defense access to some files on the phone, there is no conceivable strategy justifying counsel's consent to the State's access to the cell phone data. Because no conceivable legitimate tactic explains why counsel signed an order that granted the State access to Gore's cell phone data, his performance was deficient. *Grier*, 171 Wn.2d at 33-34.

C. PREJUDICE

Gore argues that he was prejudiced because, as a result of his attorney signing the order consenting to the cell phone search, the State brought additional charges supported solely by evidence obtained from the cell phone. The State argues that Gore consented to the cell phone search so defense counsel is not responsible for police access to the phone and that Gore cannot show prejudice because law enforcement was going to search the phone whether defense counsel consented or not. We agree with Gore.

The record reflects that after obtaining access to the text messages, and just before trial, the State amended charges to add "intent to deliver" to the two drug possession charges and to add a charge of rendering criminal assistance. CP at 122. At trial, the State elicited testimony about text messages indicating that Gore was *dealing* the drugs he possessed. And the State presented text messages and testimony from Gore's wife that supported the rendering criminal assistance charge. In closing argument, the State discussed the text messages in detail and repeatedly referred to them to support both the intent to deliver and the rendering criminal assistance charges. Thus, the record shows that the State relied on these text messages to prove Gore's intent to deliver on the two drug charges and as the primary evidence to prove Gore rendered criminal assistance to his son.

On this record, had defense counsel not agreed that the State could search Gore's phone, the State would not have had the evidence to support Gore's convictions for these three offenses.

However, the State argues that the outcome of the trial would not have been different "but for" defense counsel's action, because Gore himself signed the order granting permission to the State to search the phone. Gore acknowledges that he signed the order but argues that "it is evident that he relied on defense counsel regarding the substance of the order." Br. of Appellant at 14. Again, we agree with Gore.

The record shows that counsel intended to sign an order allowing only a defense expert to search the cell phone and that Gore agreed to only the defense expert accessing the cell phone. The record shows that counsel and Gore were unaware that the order actually allowed the State to also examine the contents of the phone. We conclude from the record that Gore relied on counsel's representations such that but for counsel's deficient performance, the prejudice would not have occurred.[8]

The State also argues that there was no prejudice to Gore because the State would have accessed the cell phone records whether or not the defense consented. But there is no evidence in the record that the State intended to, or could have, searched the phone without consent. In any event, the State did not do so.

Gore has demonstrated that there is no reasonable trial tactic for his counsel to agree to allow the State to search Gore's cell phone and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *See Grier*,

[8] To the extent that the State argues that Gore consented to this search, the State produced no evidence that such consent was knowing and voluntary.

171 Wn.2d at 33-34. Defense counsel's deficient performance resulted in prejudice because Gore was convicted of more serious charges and additional charges. Gore has satisfied his burden to show that he received ineffective assistance of counsel. Thus, we reverse the two possession with intent to deliver convictions and the rendering criminal assistance conviction.[9]

II. PROSECUTORIAL MISCONDUCT

Gore argues that the prosecutor committed misconduct by making an improper analogy during closing argument.[10] We hold that the analogy was not improper argument.

A. PRINCIPLES OF LAW

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The defendant bears the burden of establishing impropriety of the prosecutor's statements as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). When the defense does not object and request a curative instruction, the defense waives the issue of misconduct unless the statement was so flagrant and ill intentioned that an instruction could not have cured the prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

The jigsaw puzzle analogy has been used by attorneys and reviewed on appeal for years. *See State v. Lindsay*, 180 Wn.2d 423, 434-35, 326 P.3d 125 (2014); *State v. Fuller*, 169 Wn. App.

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[9] Gore also argues that insufficient evidence supports the jury's finding that he was armed with a firearm during the commission of the drug-related convictions and the rendering criminal assistance conviction. Because we hold that Gore's counsel rendered ineffective assistance on these three charges, we need not reach this issue, since these underlying convictions are reversed.

[10] We reach this argument because of its potential effect on Gore's first degree illegal possession of a firearm conviction. This conviction is unaffected by our reversal of Gore's three other convictions based on ineffective assistance of counsel as related to the cell phone evidence.

797, 824, 282 P.3d 126 (2012). We examine the State's use of the jigsaw puzzle analogy on a case-by-case basis, considering the context of the argument as a whole. *Fuller*, 169 Wn. App. at 825. A puzzle analogy is improper when it is used to quantify the number of pieces or percent of the puzzle that is enough to meet the beyond a reasonable doubt standard. *Lindsay*, 180 Wn.2d at 435-36; *see also State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). But jigsaw puzzle analogies may be proper if they are not used to improperly quantify the standard of proof. *See State v. Curtiss*, 161 Wn. App. 673, 700-01, 250 P.3d 496 (2011).

B. ANALOGY WAS PROPER

Gore argues that by comparing the burden of proof to assembling a puzzle on a ferry, the prosecution trivialized and minimized the State's burden. Gore's argument is unpersuasive.

"'When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role.'" *Lindsay*, 180 Wn.2d at 436 (quoting *State v. Lindsay*, 171 Wn. App. 808, 828, 288 P.3d 641 (2012), *rev'd*, *Lindsay*, 180 Wn.2d 423). Q*uantifying* the standard of proof by means of a jigsaw puzzle analogy is improper. *Lindsay*, 180 Wn.2d at 435-36. Thus, the prosecutor in *Lindsay* engaged in misconduct when he stated, "'You could have 50 percent of those puzzle pieces missing and you know it's Seattle.'" 180 Wn.2d at 434.

The *Lindsay* court approved of *Curtiss*, which found that the prosecutor had not engaged in misconduct when he used a puzzle analogy because his analogy did not quantify the standard of proof. 180 Wn.2d at 435; *Curtiss*, 161 Wn. App. at 700 (quoting the prosecutor's statement that "'[t]here will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is'").

Here, the State's puzzle argument is distinguishable from *Lindsay* and similar to *Curtiss*. During closing argument, the prosecutor stated,

> Think about a trial much the same way that you think about a puzzle. People have been on the ferry, and they have found tables where someone leaves a puzzle behind or there are puzzles sitting on the table that passengers are free to use or free to do to pass the time. And oftentimes those puzzles don't come with a box, so you don't know what it is the image is that you're putting together. When you put together a puzzle, you may find yourself with pieces you don't know what to do with, right? You put it in every conceivable spot, it just doesn't seem to fit and so you set it aside. At some point, when you're putting together the puzzle, if you have enough time, you become convinced beyond a reasonable doubt as to what the image is that you're seeing. You may reach that point, but for certain people it's different. Every person has their own point which they're convinced of the image. You may reach that point, even though you haven't completed the puzzle. . . .
>
> Now, think about a trial much the same way, because a trial is about pieces of evidence that are intended to be put together in such a way that leaves you convinced beyond a reasonable doubt that someone committed a crime. . . .
>
> The point is when you look at all of the evidence and all the pieces of evidence, in the big picture sense are you convinced beyond a reasonable doubt the defendant is guilty.

6 RP at 611-13.

In using this analogy, the prosecutor did not quantify how many pieces of the puzzle needed to be filled in before a person could know beyond a reasonable doubt what the picture showed. He did not speculate or quantify the amount necessary as the prosecutor did in *Lindsay*. 180 Wn.2d at 434. Instead, like the prosecutor in *Curtiss*, he generally indicated that the jurors would have a moment, when looking at the evidence and when assembling a puzzle, where they become certain what picture the puzzle is showing. 161 Wn. App. at 700.

Next, Gore argues that puzzle analogies should *never* be permitted and "this Court should abolish the puzzle analogy completely because it is unnecessary, distracts the jury, and does not further the ends of justice." Br. of Appellant at 24. Again, Gore cites to *Johnson*. But the Supreme

Court's *Lindsay* decision, citing *Curtiss* with approval, is controlling. Thus, we reject this argument.[11]

In conclusion, we hold that the State's puzzle analogy was not improper and that the State did not commit prosecutorial misconduct.

III. VALIDITY OF SEARCH WARRANT

In a SAG, Gore argues that the trial court erred when it denied his motion to suppress evidence found in his vehicle and on his cell phone. He argues that (1) the search warrant for his vehicle was not supported by probable cause and (2) he was unlawfully seized such that evidence discovered pursuant to that seizure should be suppressed. We reject his arguments.

A. PRINCIPLES OF LAW

"We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law." *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). "Where, as here, the defendant does not challenge any of the trial court's findings of fact, we consider them verities on appeal." *Bliss*, 153 Wn. App. at 203. "We review conclusions of law de novo." *Bliss*, 153 Wn. App. at 203.

Appellate courts generally review the issuance of a search warrant only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). "Normally we give great deference to the issuing judge or magistrate." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). "However, at the suppression hearing the trial court acts in an appellate-like capacity; its

[11] Gore also argues that the prosecution's use of the puzzle analogy was flagrant and ill intentioned. Because the State's puzzle analogy was not improper, we do not reach this issue.

review, like ours, is limited to the four corners of the affidavit supporting probable cause." *Neth*, 165 Wn.2d at 182. Thus, although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

Under the Fourth Amendment to the United States Constitution and art. I, § 7 of the Washington Constitution, issuance of a search warrant must be based on probable cause. "A search warrant is entitled to a presumption of validity." *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). "Probable cause exists if the affidavit supporting the warrant describes facts and circumstances sufficient to establish a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Figeroa Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015). There must be a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." *Neth*, 165 Wn.2d at 183. "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *Chenoweth*, 160 Wn.2d at 476.

B. PROBABLE CAUSE SUPPORTS THE SEARCH WARRANT

In challenging the search warrant, Gore appears to challenge the portions of conclusions of law 3, 4, and 6 addressing the existence of probable cause to support the search warrant.[12]

[12] The trial court rendered the following relevant conclusions of law::

> 3. [The judge] did not abuse his discretion in authorizing the search warrant for the Cadillac based on a finding of probable cause to believe it contained firearms, ammunition, magazines, controlled substances, and dominion and control documents.
> 4. The search warrant included a nonprejudicial scrivener's error in identifying the "target" crime as first degree murder. The warrant identified with sufficient particularity the items to be seized pursuant to the warrant

To determine whether the trial court erred in concluding probable cause supports the search warrant of Gore's car, we examine whether the search warrant affidavit contains facts establishing a nexus between criminal activity, the items to be seized, and Gore's vehicle. *Neth*, 165 Wn.2d at 183.

The search warrant affidavit contained numerous facts establishing a nexus between Kitt, Moton, and Jermohnn, and evidence of their criminal activity in Gore's car. *See Neth*, 165 Wn.2d at 182-83. The affidavit provided details about the shooting in which Kitt was a suspect. The affidavit described that an individual was shot in a drive-by shooting on May 1, 2015 and died on May 6 from the gunshot wound. Two witnesses "independently identified" Kitt in a photo lineup as one of the individuals involved in the drive-by shooting. CP at 57. The witnesses stated that the car used for the drive-by shooting contained "numerous other black males." CP at 57. On the morning of May 4, police interviewed a young woman who heard her boyfriend and another suspect in the shooting discuss details of the May 1 shooting and the fact that Kitt was involved. Local agencies sent out a bulletin requesting assistance in locating and arresting Kitt. The affidavit also stated,

> At approximately 1545 hours on 5-5-15 F.B.I. Agent Todd Bakken advised detectives that Alexander Kitt had been arrested after he was observed exiting a white and brown 2001 Cadillac Deville. . . . Additionally three other occupants were contacted and detained, Ladell Moton, Jermohnn Gore, and Jermaine Gore. During this contact a 9mm caliber semiautomatic pistol was removed from the

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> such that it appropriately limited the discretion of the officers executing the warrant.
>
> . . . .
>
> 6. . . . Furthermore, probable cause supported the impoundment of the Cadillac and the search warrant regardless of any information derived from the detention of the defendant.

CP at 107-08.

> waistband of Ladell Moton as well as some suspected rock cocaine. He was arrested for U.P.O.F. and U.P.C.S. and the pistol was left within the vehicle.
>
> Jermohnn Gore was also arrested as he was wanted on an unrelated shooting. During the course of being interviewed he told other detectives that in addition[] to the pistol found on Moton there was a black guitar case inside the Cadillac, which was observed by investigators in the back seat of the Cadillac that contained an unknown caliber semiautomatic rifle. He told the officers that he was responsible for the rifle.
>
> When interviewed by detectives Alexander Kitt denied any participation in or knowledge of the shooting.
>
> Upon being interviewed Jermaine Gore denied all knowledge of the homicide and the firearms and suspected drugs in his car.
>
> Based on the above circumstances your affiant is of the belief that the search and recovery of any firearms within the Cadillac in question would further the investigation and prosecution of this homicide as well as the charge of U.P.O.F. and U.P.C.S. on Moton and potentially Jermaine Gore.

CP at 58-59.

After reviewing these facts, the trial judge issued a search warrant authorizing a search of Gore's vehicle for items associated with Moton, Kitt, and Jermohnn's suspected criminal activity. The items to be seized included firearms, ammunition, magazines, controlled substances, and dominion and control documents, as well as fingerprints, trace evidence such as hair and fibers, and other crime scene evidence.

The search warrant for Gore's car is presumptively valid. *Chenoweth*, 160 Wn.2d at 477. The facts establish that law enforcement had "more than suspicion or conjecture" that the car would contain evidence of crimes. *Chenoweth*, 160 Wn.2d at 476. Moton was frisked and arrested immediately after exiting the car and found with a firearm and cocaine on his person. Jermohnn was arrested pursuant to an outstanding warrant for his suspected involvement in a shooting, and he told police in an interview after his arrest that there was a gun located in a guitar case in Gore's vehicle. Kitt, suspected in a drive-by shooting, had exited the vehicle just before his arrest by police, and the affidavit stated law enforcement believed the car could contain evidence to aid in

the prosecution of Kitt's shooting. Police knew from witnesses that there were several young, black males involved in the May 1 shooting who had yet to be identified. These facts in the affidavit establish probable cause that Gore's vehicle would contain evidence of gun-related and drug crimes in which Moton, Kitt, and Jermohnn were suspects.

Based on the facts contained in the search warrant affidavit, we hold that probable cause existed to support the search warrant for Gore's car. Thus, probable cause supported the warrant, and Gore's motion to suppress on this basis was properly denied.

C. EXIGENT CIRCUMSTANCE

Gore asserts that the search warrant affidavit improperly relied on the fact that Moton's gun was in the car. Gore argues that because an officer removed a gun from Moton's waistband and eventually placed that gun back in the car that Moton had been sitting in, the gun's presence in the car is an "'Exigent Circumstance[]'" created by the police that may not be relied on in the affidavit. SAG at 5. We disagree.

Even if the search warrant affidavit relied in part on the fact that Moton's gun was in the vehicle, the affidavit explicitly stated that the gun "left within the vehicle" had been removed from Moton's waistband after he exited the vehicle. CP at 58. Thus, the reviewing judge was not misled about where the gun came from. The fact that Moton's gun was in the car was only one of several facts that gave rise to an inference that the individuals named in the warrant affidavit—Moton, Jermohnn, and Kitt—were probably involved in criminal activity and that evidence of the crimes could be found at the place to be searched. *See Figeroa Martines*, 184 Wn.2d at 90. For instance, law enforcement found both cocaine and the gun on Moton, and Jermohnn told the police that there was another gun in the vehicle in a guitar case. It is a reasonable inference that additional

evidence relating to Moton's, Jermohnn's, and Kitt's crimes would be located in the vehicle. For these reasons, and the reasons discussed above concluding that probable cause supported the search warrant, we reject Gore's argument.

IV. GORE'S SEIZURE

Gore argues that law enforcement did not have reasonable suspicion to justify its temporary seizure of Gore, such that evidence discovered in his car must be excluded. We disagree.

A. PRINCIPLES OF LAW

"We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law." *Bliss*, 153 Wn. App. at 203. "Where, as here, the defendant does not challenge any of the trial court's findings of fact, we consider them verities on appeal." *Bliss*, 153 Wn. App. at 203. "We review conclusions of law de novo." *Bliss*, 153 Wn. App. at 203.

B. GORE'S DETENTION WAS LAWFUL

Gore argues that all evidence obtained from the search of his car—including the cell phone that police obtained from the search of the vehicle—should be excluded because it was obtained as a result of his unlawful detention. In making this argument, Gore challenges conclusion of law 6 from the trial court's denial of his motions to suppress that concluded that Gore was lawfully detained pursuant to a *Terry* stop and that probable cause supported the search warrant regardless of information derived from Gore's detention. We disagree.

Conclusion of law 6 states,

> As to law enforcement's contact with the defendant, this was a lawful *Terry* detention based on Kitt's connection to the car and its occupants as well as . . . all of the considerations that law enforcement had in seeking to impound the car. Furthermore, probable cause supported the impoundment of the Cadillac and the

> search warrant regardless of any information derived from the detention of the defendant.

CP at 108.

The trial court's findings of fact support its conclusion that Gore's detention was a lawful *Terry* contact. The trial court found, in relevant part, that law enforcement was waiting for the arrival of Kitt who they intended to arrest based on probable cause for a gun-related first degree assault. Kitt arrived in a vehicle driven by Gore. Gore dropped off Kitt and then legally parked his vehicle with the windows down. Jermohnn and Moton were passengers. The officers approached Gore's vehicle on foot and no patrol car lights or sirens were activated. Officer Thiry asked Gore "why [he was] in the area and who [he] had just dropped off." CP at 104. Thiry asked Gore if he would be willing to identify himself and provide identification. The request was "polite and courteous." CP at 104. Gore "voluntarily provided his identification." CP at 105.

Then, because Moton gave a false name, Moton was arrested and a semiautomatic weapon was found in his waistband and cocaine in his pocket. Jermohnn was also arrested based on probable cause in an unrelated shooting investigation. Gore was asked to exit the vehicle and was detained. Within 15 minutes of the initial contact, the decision was made to impound Gore's vehicle in order to obtain a search warrant for it. The decision to impound Gore's vehicle was based in part on probable cause to arrest Kitt for the gun-related first degree assault. Two firearms used in that incident had not been found. Kitt had just been in Gore's vehicle and Kitt didn't have a gun on him when he was arrested, and it was reasonable to believe that Kitt would have left any gun in the car rather than take it with him into the treatment facility. Moton was in Gore's car and had a gun and drugs on his person, and it was reasonable to believe additional guns or drugs would be found in the vehicle.

The trial court's findings of fact support its conclusion that Gore's detention was lawful under *Terry*. The trial court did not err when it denied Gore's motion to suppress.

CONCLUSION[13]

In conclusion, we reverse and remand Gore's two convictions for unlawful possession of a controlled substance with intent to deliver, the rendering criminal assistance conviction, and the related firearm enhancements. We affirm the first degree unlawful possession of a firearm conviction.

We reverse in part and affirm in part.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, J.

We concur:

Worswick, J.
WORSWICK, J.

Bjorgen, C.J.
BJORGEN, C.J.

[13] Gore asks that we deny appellate costs to the State. Because the State is not the prevailing party, the State is not entitled to costs.