IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON SILVA WILLIAMS, Appellant.	No. 38643-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jason Silva Williams guilty of two counts of possession of a controlled substance for methamphetamine and oxycodone. Williams appealed his convictions and, in August 2010, we remanded for a new suppression hearing because the trial court erred when it found that Williams lacked standing to challenge the search of a laptop bag containing controlled substances. On remand, the trial court concluded that the warrantless searches of the laptop bag and vehicle were lawful. Because Williams had no burden to show an expectation of privacy in the bag, we hold that the warrantless search of the laptop bag was unlawful and any evidence discovered as a result of it was inadmissible. We further hold that defense counsel was ineffective for failing to object to inadmissible hearsay testimony and reverse Williams's convictions. But because it appears from our review of the record that the inadmissible evidence was the only evidence presented to the jury to support its guilty verdicts

and our review is confined to the evidence that the jury actually considered, our only remedy is to reverse and remand for further proceedings consistent with this opinion.

FACTS

At approximately 1 am on March 26, 2008, Tacoma Police Officer Shelly Brown saw two men, initially sitting in a truck parked by the side of the road, get out of the truck and she then saw the driver, later identified as Robert Rambo, grab a gas can. Brown pulled her patrol vehicle behind the parked truck, approached the men, and asked them if everything was okay; she did not activate her emergency lights. Rambo told her that his truck did not work and that someone was picking them up. He also told her that he picked up a gas can because his truck was out of gas. Brown could see that the truck's gas gauge indicated it was almost half full. Brown asked Rambo if he had identification and he handed his driver's license to her; Brown wrote down his information and handed the license back to him. She similarly asked the passenger, Williams, if he had identification. Williams gave Brown his identification; she wrote down his information and handed it back to him.

Officer Brown returned to her vehicle and ran a records check on the two men. A records check on Rambo came back clean, but Williams had a misdemeanor warrant for driving while under the influence (DUI). A second officer, Michael Johnson, arrived and assisted with the arrest of Williams. After Brown told Rambo what was happening, Rambo told her that a blue laptop-style bag sitting in the middle of the truck's bench seat belonged to Williams. Brown picked up the bag and asked Williams if it belonged to him, which he denied. Brown searched the bag and found unspent ammunition, an unlabeled pill bottle containing oxycodone, coffee filters with methamphetamine residue, and a notebook.

Officer Brown arrested Rambo for constructive possession of the contents of the laptop bag and searched the vehicle. She discovered a small pouch lying next to where the laptop bag had been that contained a scale, three grams of methamphetamine, and small resealable plastic bags typically used for storing narcotics. Brown also found pipes commonly used to consume narcotics.

The State charged Williams with unlawful possession of a controlled substance with intent to deliver, methamphetamine, and unlawful possession of a controlled substance, oxycodone. Rambo pleaded guilty to possession of a controlled substance with intent to deliver before trial. Rambo did not testify at Williams's trial.

Procedural Facts

On July 23, 2008, Williams moved to suppress the evidence seized subsequent to his arrest, asserting that the officers committed an unlawful pretextual stop and lacked probable cause to arrest him. The trial court held a CrR 3.6 suppression hearing on July 30 and denied Williams's motion. A jury trial began on August 25. At trial, Officer Brown testified about the events leading to Williams's arrest. She stated that after Williams was arrested and secured in the back of a patrol car, she approached Rambo to let him know what was going on. She further testified that when she approached Rambo, he told her that a blue bag in his truck belonged to Williams. Defense counsel did not object to this testimony.

The jury entered verdicts finding Williams not guilty of possession of methamphetamine with intent to deliver, guilty of the lesser included offense of possession of methamphetamine and guilty of possession of oxycodone. Williams timely appealed his convictions.

On August 31, 2010, we held the trial court erred when it concluded that Williams lacked

standing to challenge the search of the laptop bag and remanded for a new suppression hearing. *State v. Williams*, noted at 157 Wn. App. 1046 (2010). The trial court held a hearing on September 27. The State presented no evidence at this second hearing. Based on evidence already presented, the trial court changed some findings of facts and concluded that the warrantless searches of the laptop bag and vehicle were lawful. Williams filed a supplemental brief assigning error to the trial court's finding that Williams had denied ownership of the laptop bag, and the trial court's conclusions of law that (1) Williams lacked a reasonable expectation of privacy in the laptop bag; (2) the evidence found in the laptop bag was properly admitted into evidence at trial; (3) the warrantless search of the pouch was lawful under *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); and (4) evidence found in the small pouch was properly admitted into evidence at trial.

DISCUSSION

Laptop Bag Evidence

Williams contends that the trial court erred when it denied his motion to suppress evidence seized following his arrest. Specifically, Williams argues that Officer Brown's warrantless search of the laptop bag was not justified by the search incident to arrest exception recognized in *Gant* because Williams was secured in the back of Brown's patrol car before she conducted the search. The State argues that the search was lawful because (1) both Williams and Rambo "disavowed" the bag and, therefore, relinquished any reasonable expectation of privacy in its contents, (2) as a valid search incident to Rambo's arrest, or (3) for officer safety.[1]

[1] In addition, the State cites to *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994), and *State v. Jackson*, 107 Wn. App. 646, 649-50, 27 P.3d 689 (2001), for the propositions that (1) if one passenger in a vehicle gives consent to search the vehicle then any evidence found can be used against a nonconsenting occupant of the vehicle, and (2) officers are entitled to investigate

To review a trial court's ruling on a suppression motion, we examine whether substantial evidence supports the challenged findings. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Substantial evidence is "'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'" *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (internal quotation marks omitted) (quoting *Olmstead v. Dep't of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)). We treat unchallenged findings as verities on appeal. *Ross*, 106 Wn. App. at 880. And we review a trial court's conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

At the September 27 suppression hearing, the State argued that *Gant* did not apply with respect to the laptop bag evidence because the search was not incident to either Rambo's or Williams's arrest. Specifically, the State argued that because Rambo had "in effect, hand[ed] the bag to the officer," there was no search of a vehicle triggering a *Gant* analysis. Report of Proceedings (RP) (Sept. 27, 2010) at 18. The trial court agreed. Based solely on the argument

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an item where there is "genuine confusion" over whether it belongs to a nonarrested passenger. The State's reliance on these cases is misplaced.

Cantrell involves evidence used against a driver when a passenger consented to a search of the vehicle and the driver did not object. Here, there is nothing in the record to indicate that Rambo consented to a search of the laptop bag, only that he asserted it belonged to Williams. *Jackson* involves a driver's arrest followed by both the driver and passenger asserting that a jacket in the back seat was theirs. Because both Rambo and Williams denied ownership of the bag, the instant case is factually distinguishable from *Jackson* where police searched a jacket for identifying information and the arrested driver denied ownership only after the officer found a rock of crack cocaine in one of the pockets. 107 Wn. App. at 648-50 (where officers are genuinely confused over an item's ownership and could not know who owned the item, as a matter of policy, officers should be allowed to investigate the item for identifying information). Moreover, Officer Brown did not testify that she searched the laptop bag for identifying information but because she wanted to know what was inside it. In short, the law in these cases is inapplicable here and we do not address these arguments further.

by the parties, the trial court modified its findings of fact to reflect a more detailed account of the events[2] and concluded that the search of the laptop bag was lawful.

Without citing to authority, the State asserts that Williams had no expectation of privacy in Rambo's vehicle because (1) he was a passenger, (2) he was under arrest, and (3) he was removed from the vehicle. The State's argument is moot. As an initial matter, we reiterate that passengers have automatic standing to challenge the search and seizure of a driver's automobile where they are charged with possessory offenses supported by evidence discovered in the vehicle. *See, e.g.*, *State v. Coss*, 87 Wn. App. 891, 895-96, 943 P.2d 1126 (1997), *review denied*, 134 Wn.2d 1028 (1998). The automatic standing doctrine confers standing on anyone charged in a possessory crime, eliminating the requirement to show a legitimate expectation of privacy. *Coss*, 87 Wn. App. at 895-96.

Washington courts have consistently held that vehicle passengers hold an independent, constitutionally protected privacy interest not diminished merely upon stepping into an automobile driven by another.[3] *See State v. Byrd*, 110 Wn. App. 259, 262, 39 P.3d 1010 (2002). Here, the

[2] It appears that during the suppression hearing on remand, both parties misrepresented the facts of the case to the trial court resulting in an error in the trial court's revised findings of fact. Though not dispositive in this case, we note that the trial court's finding that Officer Brown saw a drug paraphernalia pipe as Rambo exited his truck after Williams was arrested is unsupported by the record. According to Brown's testimony, Rambo had exited the truck before she initially approached the two men and she found the pipes and pouch during her search incident to Rambo's arrest.

[3] We note that the United States Supreme Court has held that a passenger in an automobile does not necessarily have an expectation of privacy in all parts of the car where they do not assert a property or possessory interest in the car or an interest in the property seized. *Rakas v. Illinois*, 439 U.S. 128, 148-49, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To the extent the State attempts to argue that Williams "disavowed" the laptop bag such that he relinquished his reasonable expectation of privacy, the automatic standing doctrine obviates the issue in this case and we do not address the State's argument further.

trial court employed the two-part test of *State v. Evans*, 159 Wn.2d 402, 409, 150 P.3d 105 (2007),[4] to find that Williams had no reasonable expectation of privacy in the contents of the laptop bag and thus the evidence seized during the warrantless search was admissible. But because the automatic standing doctrine applies, we hold that the trial court erred when it concluded Williams bore a burden to show an expectation of privacy in the vehicle or the contents of the laptop bag.

Next, we determine whether the trial court properly admitted the contents of the laptop bag as evidence against Williams. Warrantless searches and seizures are per se illegal unless they come within specially established exceptions to the warrant requirement. U.S. Const. amend. IV; Wash. Const. art. I, § 7. The State bears the burden of proving that the warrantless search fits within one of these closely guarded exceptions. *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (citing *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001)). This case requires us to review three recognized exceptions: a vehicle search incident to a lawful arrest, exigent circumstances, and inventory.

First, an officer may conduct a vehicle search incident to a lawful arrest when it is "'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)). In cases other than where a recent vehicle occupant is arrested for a mere traffic violation, "the offense of arrest will supply a basis for searching the passenger

[4] The *Evans* test for whether a defendant has a reasonable expectation of privacy in an item seized requires examination of (1) whether the defendant exhibited an actual subjective expectation of privacy by seeking to preserve something as private and (2) whether society recognizes that expectation as reasonable. 159 Wn.2d at 409 (quoting *State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996)).

compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S. Ct. at 1719. Under Washington law, where there is a nexus between the arrestee, the crime of arrest, and the vehicle, an automobile search incident to arrest will not violate article I, section 7 of the state constitution. *State v. Patton*, 167 Wn.2d 379, 383-84, 219 P.3d 651 (2009). And a warrantless vehicle search incident to arrest is lawful if (1) the arrestee is within reaching distance of the passenger compartment of the vehicle at the time of a search triggered by officer safety concerns, or (2) there is a need to secure evidence of the crime for which a person is arrested. *State v. Adams*, 169 Wn.2d 487, 488, 238 P.3d 459 (2010).

Here, Williams was arrested on an outstanding warrant for a completely unrelated misdemeanor. The trial court found that the warrantless search of the laptop bag occurred *before* Rambo's arrest. This fact is undisputed. Thus, the record shows that there was no arrest giving the officer a reasonable basis to reach into the vehicle, seize the laptop bag, and conduct the warrantless search. Moreover, nothing in the record relates the contents of the laptop bag to the DUI warrant which authorized Williams's arrest. Accordingly, the search warrant exception for evidence of crime of arrest recognized in *Gant* does not apply to this case.

Second, police may search without a warrant when "exigent circumstances" require it. *Smith*, 165 Wn.2d at 517 (citing *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002), *cert. denied*, 538 U.S. 912 (2003)). The rationale behind the exigent circumstances exception "'is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'" *Smith*, 165 Wn.2d at 517 (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). Here, Officer Brown

arrested Williams and secured him in the back of a patrol vehicle prior to conducting the warrantless search of Rambo's truck. Rambo disavowed the laptop bag and there was no threat of the destruction of evidence. Nothing in the record supports a finding that there was any threat to the officers' safety and the trial court made no such finding. Accordingly, the State's argument that this search falls under the exigent circumstances exception fails.

Third, the State argues that Officer Brown was merely "impounding" the bag from Rambo's car and that she was entitled to do so upon Rambo's disavowal and his claim that the bag belonged to Williams. According to the State, once the officer had impounded the bag, the officer had a right or even duty to conduct an inventory of its contents. We disagree.

Searches pursuant to a lawful arrest and routine inventory searches are recognized exceptions to the warrant requirement. *State v. Dugas*, 109 Wn. App. 592, 597, 36 P.3d 577 (2001). The purpose of the inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. *Dugas*, 109 Wn. App. at 597. Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they serve a purpose other than discovering evidence of criminal activity. *Dugas*, 109 Wn. App. at 597.

In *State v. Houser*, 95 Wn.2d 143, 158, 622 P.2d 1218 (1980), our Supreme Court held that when a closed piece of luggage in a vehicle gives no indication of dangerous contents, the officer cannot search the contents of the luggage unless the owner consents. Thus, absent exigent circumstances, a legitimate search only calls for noting the bag as a sealed unit. *Houser*, 95 Wn.2d at 159 (citing *People v. Counterman*, 192 Colo. 152, 556 P.2d 481 (1976) (police exceeded proper scope of inventory search in opening and searching a knapsack which did not

give any indication of danger or other reasons for special inventory)). Here, just as in *Houser*, there was no indication that the closed laptop bag contained dangerous contents justifying special inventory. Accordingly, we reject the State's argument that the search was lawful under the inventory search exception. And to the extent that the State attempts to argue that the search was lawful under the inevitable discovery doctrine, our Supreme Court has stated that Washington does not recognize that doctrine as a valid exception to the warrant requirement. *See State v. Afana*, 169 Wn.2d 169, 181-84, 233 P.3d 879 (2010) (analogizing Washington's rejection of the "good faith" exception to the exclusionary rule under article 1, section 7 of the Washington Constitution in a vehicle search incident to the arrest of a passenger case to Washington's rejection of the inevitable discovery doctrine) (citing *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009)).

The State has failed to meet its burden to prove that Officer Brown's warrantless search and seizure of the laptop bag falls into any recognized exception to the search warrant requirement. Because Williams bore no burden to show an expectation of privacy in the contents of the bag, we hold that the trial court erred when it concluded that the warrantless search and seizure of the laptop bag was lawful and improperly admitted the contents of the laptop bag as evidence at trial.

Pouch Evidence

"'When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.'" *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007)) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)). Because Officer Brown's warrantless search of the laptop bag was unlawful and the contents of

the bag inadmissible, any evidence discovered as a result of that unlawful search was also inadmissible. Here, the trial court erred when it concluded that the pouch and pipes found on the front bench seat of Rambo's truck were lawfully searched and seized incident to Rambo's arrest for constructive possession of the contents of the unlawfully searched laptop bag. Accordingly, we hold that the trial court erred when it admitted the pouch and pipe as evidence at trial against Williams.

Although the fact that the evidence of Williams's drug possession was unlawfully admitted is sufficient to require reversal, we address other arguments that also require us to reverse his conviction.

Ineffective Assistance of Counsel

Williams contends that his trial counsel was ineffective for failing to object to Officer Brown's hearsay testimony regarding Rambo's statement that the laptop bag belonged to Williams. We agree.

We review an ineffective assistance of counsel claim de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. 10). *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To establish ineffective assistance, Williams must show that (1) defense counsel's performance was deficient and (2) this performance prejudiced him. *Strickland*, 466 U.S. at 687. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when, but for the

deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant must satisfy both prongs of the ineffective assistance of counsel test; if one prong of the test fails, we need not address the remaining prong. *Hendrickson*, 129 Wn.2d at 78.

A statement is inadmissible hearsay if it is not made by the declarant while testifying at trial and it is offered to prove the truth of the matter asserted in the statement. ER 801(c). ER 802 provides, "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." Thus, unless the State offered the statement under a hearsay exception, Rambo's statement was inadmissible to prove that Williams owned the laptop bag. Moreover, the statement would have been incompetent evidence if offered.

At trial, Officer Brown testified that after Williams was arrested and placed in the back of a patrol car, Rambo said, "Officer, there is a blue bag in there. That's Williams' bag." 2 RP at 45. Then, she testified that "after [Rambo] indicated that the bag was Williams['] bag, I asked Williams if it was his bag. He said it's not my bag." 2 RP at 46. Brown stated she searched the bag because "if I am going to take possession of something and put it into my patrol vehicle, I need to know what's inside of it." 2 RP at 46. Neither Williams nor Rambo testified at trial.

It is clear from our review of the record that the State offered Officer Brown's testimony to prove Williams's unlawful possession or ownership of the bag contents. Moreover, the State argues on appeal that Brown's challenged testimony is *evidence* from which the jury could have inferred unlawful possession. We agree with the State that the jury could have inferred that

Williams unlawfully possessed the drugs from Brown's hearsay testimony. Such testimony, however, is inadmissible hearsay under ER 801(c). Accordingly, we hold that defense counsel's performance was deficient for failing to object to Brown's wholly hearsay testimony and that failure prejudiced Williams because the jury had no evidence other than Brown's account of Rambo's statement to support its guilty verdicts.

In sum, we hold that the unlawful warrantless search of the laptop bag renders its contents and all evidence discovered as a result of inadmissible and defense counsel was ineffective.[5] Although we believe it likely that the evidence admissible on retrial will be insufficient to prove these charges beyond a reasonable doubt, on review we are compelled to evaluate Williams's challenge to the sufficiency of the evidence in light of the evidence the jury actually heard and evaluated. *See State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993) (citing *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988)). Accordingly, our only remedy is to reverse and remand for further proceedings consistent with this opinion.

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.

QUINN-BRINTNALL, J.

I concur:

ARMSTRONG, P.J.

[5] Because we reverse both convictions, we do not reach Williams's remaining contentions regarding prosecutorial misconduct, cumulative error, and sufficiency of the evidence.

Hunt, J. (concurring in part) — I concur in the majority's reversal of Williams' conviction for insufficient evidence and remand for further proceedings. I do not concur in the majority's alternate ground for reversal, namely their holding that the evidence should have been suppressed.[6]

HUNT, J.

[6] Although I agree that Williams had standing to challenge the evidence used against him, in light of his disclaimer of ownership of the bag, I would hold that he had no reasonable expectation of privacy in the bag; thus, the officer's search of the bag did not violate our state or federal constitutional protections against unreasonable warrantless searches.