Supreme Court No. 99546-0
(COA No. 79738-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ELWELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Daniel Elwell, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision, filed February 1, 2021, terminating review. RAP 13.3(a)(1); RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. Article I, section 7 prohibits any disturbance of one's private affairs without authority of law. The trial court wrongly denied Mr. Elwell's pro se motion to suppress the item discovered in the warrantless search of his property because it found the item was stolen and he lacked a reasonable expectation of privacy. The Court of Appeals affirmed based on alternate grounds in an unprecedented expansion of the open view doctrine. It ruled because the officer recognized Mr. Elwell and could "easily infer" he possessed the stolen property, the officer's actions of removing the blanket, uncovering the box, and unwrapping the item did not constitute a search because the item was in open view. Does the Court of Appeals' opinion unlawfully expand the open view doctrine beyond the narrow exception to article I, section 7 as interpreted by this Court? RAP 13.4(b)(1), (3).

2. Courts must apply a strong presumption against waiver of the Sixth Amendment and article I, section 22 right to counsel and may permit an individual to represent himself only where he makes an unequivocal

request to proceed pro se and knowingly, intelligently, and voluntarily waives his right to counsel. Here, rather than consider Mr. Elwell's motion for new counsel because his lawyer would not file a motion to suppress, the court instructed Mr. Elwell to file his own motion to suppress, even though Mr. Elwell did not ask to proceed pro se. The Court of Appeals excused this constitutional violation because it ruled the trial court "properly allowed hybrid representation." Did the court deny Mr. Elwell his right to counsel at a critical stage when it forced him to proceed pro se on the motion to suppress in the absence of any request to proceed pro se, without a valid waiver of the right to counsel, and without a request to act as "hybrid counsel?" RAP 13.4(b)(1), (3).

3. The right to counsel includes the right to be represented by an attorney who does not have an actual conflict with his client. Mr. Elwell's attorney repeatedly took positions against him on the record and opposed Mr. Elwell's request for a motion to suppress as meritless. Was Mr. Elwell denied his right to conflict-free counsel? RAP 13.4(b)(2), (3).

4. The right to counsel includes the right to the effective assistance of counsel by an attorney who knows the law and actively advocates for his client. Mr. Elwell's attorney, who recently suffered a significant head injury, refused to move to suppress property uncovered in a warrantless search, suggested the court conduct Mr. Elwell's pro se

motion to suppress in front of the jury, and failed to move to exclude improperly made audio recordings. Was Mr. Elwell denied the effective assistance of counsel? RAP 13.4(b)(1), (3).

C. STATEMENT OF THE CASE

Daniel Elwell was walking down the sidewalk, pushing a dolly with a large object on it. CP 337; RP 194-95; Ex. 6. The object was not openly visible but was entirely covered and wrapped in a red blanket. CP 337; Ex. 6. Officer Craig stopped Mr. Elwell on the street because he recognized Mr. Elwell from a surveillance video of an apartment building that had been burglarized nine hours before. CP 337.

The video displayed an unknown man picking the locks of several secured doors, entering the arcade room, and rolling a machine out of the arcade room. RP 171, 182-84. No video showed the person or machine leaving the building. RP 172. However, staff discovered a Pac-Man machine missing from the arcade room. RP 170.

Upon approaching Mr. Elwell, the officer told him he matched the description of the suspect and immediately accused him of the crime, asking him, "There wouldn't happen to be a Pacman [sic] machine in there; would there be?" RP 199; Ex. 6. Mr. Elwell responded, "I don't think so," and said he found the stuff in the garbage. RP 199; Ex. 6. The officer told Mr. Elwell he matched the description of a burglar. RP 199;

Ex. 6. After repeatedly asking Mr. Elwell to "show us what's underneath there" and without receiving verbal agreement from Mr. Elwell, the officer removed the blanket, unwrapped a plastic covering, and started digging into the box. RP 200, 203; Ex. 6. The officer uncovered a Pac-Man machine. RP 200; CP 337; Ex. 6. The State charged Mr. Elwell with residential burglary. CP 1.

The court continued the case multiple times at defense attorney Walter Peale's request because of his medical problems. CP 316-17. Mr. Peale declared a concussion rendered him unable to perform competently, and he needed a continuance "to obtain competent and effective ability to prepare for and conduct hearings and trial." CP 10-11.

Mr. Elwell twice told the court he wanted new counsel because his attorney was incapacitated and because of "other issues." RP 5, 8-12. He explained he and Mr. Peale disagreed over trial strategy, advice, and his attorney's failure to challenge the search. Mr. Elwell highlighted his concerns about Mr. Peale's ability to represent him, given his head injury. RP 8-13. The court denied the motions for new counsel. RP 13.

Mr. Elwell made a third request for a new attorney when Mr. Peale refused to litigate suppression, even though the court ordered a CrR 3.6 hearing. CP 318. Mr. Peale and the prosecutor acknowledged Mr. Elwell had a conflict with his attorney. CP 14, 323. Mr. Peale told the court he

would not file the motion because "there is not a meritorious claim to be made," but said Mr. Elwell could address the search "on his own." RP 21.

Mr. Elwell did not ask to act as his own attorney and again asked the court to appoint him new counsel. RP 27-30. Instead of granting his request, the court told Mr. Elwell, "you can make that motion even though Mr. Peale is not pursuing it on your behalf." RP 31. The court did not engage in any colloquy about the nature and classification of the charge or the penalty Mr. Elwell faced, did not inform him he would be bound by technical rules in his presentation of his motion to suppress, and did not discuss any of the dangers and disadvantages of self-representation.

Mr. Elwell filed a pro se motion to suppress the Pac-Man machine and again requested new counsel. CP 47-60; RP 156. The court ignored the request for a new attorney. At Mr. Peale's suggestion, the court agreed to conduct the suppression hearing during the trial, in front of the jury, rather than hold a separate CrR 3.6 hearing before trial. RP 22-26.

The State ultimately objected to questions concerning the officer's stop of Mr. Elwell and the search of his property. RP 203. Instead, after the jury heard police recovered the Pac-Man machine from Mr. Elwell, the court excused the jury and had the State recall the officer to continue Mr. Elwell's 3.6 motion. RP 204-07. Faced with the prospect of arguing the motion himself, Mr. Elwell acquiesced to Mr. Peale asking questions and

arguing the motion based on Mr. Elwell's pro se motion to suppress. RP 207, 222. The court denied Mr. Elwell's motion to suppress. CP 337; RP 227. The jury convicted Mr. Elwell of residential burglary. CP 61.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals expanded the open view doctrine beyond the limits of this narrow exception to article I, section 7.

The trial court denied Mr. Elwell's motion to suppress the Pac-Man machine recovered from him in a warrantless search because it ruled individuals lack the ability to suppress stolen property. CP 337. Rather than analyze the propriety of the search, the court found, "The right to privacy does not extend to stolen items," and concluded, "Because there is no reasonable expectation of privacy in stolen items, there is no basis to suppress." CP 337. The court reasoned Mr. Elwell could not challenge the warrantless search because the object the police ultimately uncovered turned out to be stolen property. CP 337.

The court erred because Washington's constitution protects against *any* disturbance of private affairs "without authority of law." Const. art. I, § 7. Article I, section 7 requires courts to suppress the fruits of a warrantless search except where the government proves the search falls within a narrowly and jealously drawn exception to the warrant requirement. *State v. Villela*, 194 Wn.2d 451, 458, 450 P.3d 170 (2019).

The police disturbed Mr. Elwell's private affairs when they stopped him, unwrapped the blanket, moved items, and uncovered the Pac-Man machine without a warrant. A search of an individual's personal effects is unquestionably a disturbance of one's private affairs. *State v. Parker*, 139 Wn.2d 486, 498-99, 987 P.2d 73 (1999); *State v. Alexander*, 10 Wn. App. 2d 682, 687-89, 449 P.3d 1070 (2019), *review denied*, 195 Wn.2d 1002 (2020). The nature of the property uncovered in a warrantless search cannot retroactively excuse the search from the reach of article I, section 7. *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975); *State v. Grundy*, 25 Wn. App. 411, 416, 607 P.2d 1235 (1980).

The Court of Appeals accepted the State's alternate justification and ruled the boxed up, blanketed, concealed Pac-Man machine was in open view. Slip op. at 4-9. Therefore, it held the trial court properly denied suppression because, under the open view exception, the officer "did not conduct a search by removing the Pac-Man machine's covering." Slip op. at 6. The court ignored that the item police observed Mr. Elwell pushing down the street was a closed, covered box, wrapped in a blanket. Instead, it pretended Mr. Elwell was pushing a visible Pac-Man machine down the street.

When an officer's senses detect "an exposed object" in open view, no search occurs. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761

(1991); *accord State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004) (where person placed gun on table in meeting, he "voluntarily exposed" it to public, and it was in open view). But the open view doctrine does not stretch so far as to allow police to *create* the openness of the view. When an officer views an object from a place he is permitted to be, and the object is open and visible, the object is "not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution." *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (internal quotations omitted). For example, an officer who looks through the uncovered window of a house from the front porch and observes marijuana and scales on the table does not conduct an unlawful search because the objects are in open view. *Id.*

"To look at the exterior of an object from a lawfully obtained vantage point, *without moving the object*, is neither a search nor a seizure." *State v. King*, 89 Wn. App. 612, 622, 949 P.2d 856 (1998) (emphasis added). In *King*, police were lawfully in apartment based on consent when they saw a visible gun. 88 Wn. App. at 615, 620. The court held seizing the visible gun as a safety measure and then looking at the model and serial number on the gun was not a search or a seizure because it was already in view. *Id.* at 622. However, where an item is not open and

visible, the open view exception does not apply. *See State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

Similarly, the plain view exception also excuses a warrantless search where police "are immediately able to realize the evidence they see is associated with criminal activity." *State v. Morgan*, 193 Wn.2d 365, 371, 440 P.3d 136 (2019), *cert. denied*, 140 S. Ct. 1243 (2020). It must be "immediately apparent" that the object police seize is associated with a crime. *Id.* at 371-72. Objects police need to move or manipulate for the object's criminal nature to be apparent do not fall under this exception. *Arizona v. Hicks*, 480 U.S. 321, 328-29, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); *State v. Johnson*, 104 Wn. App. 489, 501-02, 17 P.3d 3 (2001).

The Court of Appeals relied on *State v. Courcy*, 48 Wn. App. 326, 739 P.2d 98 (1997), to rule the Pac-Man machine was in open view. Slip op. at 5-9. In *Courcy*, the court held police did not need a warrant to open a bindle of cocaine because "it was immediately apparent to the experienced officers the bindle contained contraband." *Id.* at 330. The distinctiveness of the packaging, its "customary use" to hold drugs, and the officer's extensive experience in detecting drugs permitted the officer to seize the bindle. *Id.* at 327-29. "Because of the appearance of the container itself, the contents were in effect in open view," and no search occurred. *Id.* at 330.

The narrow holding of *Courcy* does not apply here. First, the officer did not have extensive training and experience in identifying stolen arcade machines. Second, nothing about the packaging marked the object Mr. Elwell possessed as unique to contraband. Although the waist-high, rectangular object matched the size of the stolen arcade machine, this was not a unique shape or size. In fact, it matched the exact shape and size of any object concealed within a rectangular moving box. The Court of Appeals erred in relying on *Courcy*.

The Court of Appeals also mistakenly relied on *Arkansas v. Sanders*, as well as other federal cases following it. 442 U.S. 753, 764 n.13, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). Slip op. at 6-9. *Sanders* held police needed a warrant to search luggage taken from a car. 442 U.S. at 766. In a footnote, the court observed containers whose contents "can be inferred from their outward appearance," may not require a warrant. *Id.* at 764 n.13. But *Sanders* interpreted warrant requirements under the much broader Fourth Amendment. *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012); *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). It does not control the narrower open view exception under the more protective article I, section 7 standard.

Here, the Pac-Man machine was not in open view, and its unlawful nature was not immediately apparent. Officer Craig did not see Mr. Elwell

rolling a Pac-Man machine down the street. Instead, Officer Craig "saw Mr. Elwell wheeling a large object down the street." CP 337. Although the object was the same size and shape as a Pac-Man machine, this was not a unique size and shape. Officer Craig did not see the Pac-Man machine and did not know it was the Pac-Man machine until he unwrapped the red blanket, removed the plastic wrapping, and moved several objects from the top of the box. CP 337; Ex. 6.

Where police need to move the item to reveal its unlawful nature, the item's incriminating nature is not immediately apparent, and it is not in open view. *Compare State v. La Pierre*, 71 Wn.2d 385, 386-87, 428 P.2d 579 (1967) (stolen items, unwrapped and visible inside of cart, were in plain view), *with State v. Murray*, 84 Wn.2d 527, 534-35, 527 P.2d 1303 (1974) (television not in plain view where not immediately apparent it was stolen property until officer moved it and checked serial numbers). Here, the police did more than merely observe "that which [was] there to be seen." *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). Instead, the officer took action to make the Pac-Man machine visible.

Contrary to the Court of Appeals' opinion, the officer's reason to suspect the covered object was the Pac-Man machine does not excuse the search from the warrant requirements of article I, section 7. Instead, the officer's observation might support a warrant to conduct the search. *State*

v. O'Neill, 148 Wn.2d 564, 582-86, 62 P.3d 489 (2003). But his reasonable suspicion is not itself an exception to the warrant requirement.

Finally, the court erred in concluding any error was harmless. A constitutional error is harmless only if the State shows beyond a reasonable doubt any reasonable jury would have reached the same result without the illegally admitted evidence. *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). Evidence police recovered the very Pac-Man machine from Mr. Elwell that someone stole from the building could not have had anything but a prejudicial effect. The admission of this unconstitutionally obtained property provided the additional evidence that may have pushed jurors to believe Mr. Elwell committed the burglary. Contrary to the opinion, the video from the building does not overcome the presumption of prejudice. Slip op. at 9. The jury was not required to conclude the person on the video was Mr. Elwell.

The Court of Appeals impermissibly expanded the scope of warrantless searches by its mistaken interpretation of the open view doctrine to permit an exception where the police create the openness of the view. The opinion conflicts with article I, section 7 and opinions of this Court. This Court should accept review. RAP 13.4(b)(1), (3).

2. The court denied Mr. Elwell his right to counsel at a critical stage when it forced him to litigate his suppression motion pro se where he did not request to proceed pro se and did not knowingly, intelligently, and voluntarily waive counsel.

The Sixth and Fourteenth Amendments and article I, section 22 provide all people accused of crimes with the right to the assistance of counsel. Our constitutions protect the right to representation to such an extent that courts must presume people do not waive the right. *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

To overcome this presumption and to validly waive the right to counsel, a person must make a timely and unequivocal request to represent himself. *Madsen*, 168 Wn.2d at 504. The court must then assess whether the accused understands the request and that, by the nature of the request, he is knowingly, intelligently, and voluntarily waiving his Sixth Amendment right to counsel. *Id.*; *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). In order for a person to knowingly, intelligently, and voluntarily waive his right to counsel, he must be aware of the dangers and disadvantages of self-representation. *Faretta*, 422 U.S. at 835-36; *Acrey*, 103 Wn.2d at 208-09.

The court deprived Mr. Elwell of his right to representation by counsel when it required him to proceed pro se on his motion to suppress,

without any request to do so, and without a knowing, intelligent, and voluntary waiver of his right to counsel. Faced with a request from Mr. Elwell for new counsel so he could litigate his motion to suppress, the court foisted self-representation on Mr. Elwell in the absence of any request to do so. Rather than honor Mr. Elwell's request for conflict-free representation at a critical stage, the court instead attempted to avoid the issue by telling Mr. Elwell he could make the motion on his own.

Absent an unequivocal request and valid waiver, a court's suggestion that the accused proceed pro se or its act requiring him to proceed pro se in lieu of appointing him an attorney to which he is entitled does not satisfy the right to counsel. For example, in *Penson v. Ohio*, the court permitted the appellant's attorney to withdraw on an *Anders* motion but did not find the appeal frivolous. 488 U.S. 75, 78, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Rather than grant the appellant's request to appoint new counsel, the court offered the appellant additional time to file his own brief pro se. *Id.* The Supreme Court found the refusal to appoint new counsel denied the appellant his constitutional right to counsel. *Id.* at 81. The offer for the appellant to submit a brief pro se did not cure the right to counsel violation because "the criminal appellant is entitled to representation" on his appeal. *Id.* at 84.

The Court of Appeals tried to avoid the blatant violation of Mr. Elwell's right to representation by claiming he received the benefit of "hybrid representation." Slip op. at 15. But Mr. Elwell did not request "hybrid representation." Mr. Elwell requested representation by counsel, and every action he took reflected his desire to exercise his right to counsel, not to proceed pro se. Mr. Elwell made no less than four requests for the appointment of new counsel. RP 3-6, 8-12, 27-30, 204-05; CP 60. The court's sua sponte decision for Mr. Elwell to proceed pro se, rather than with counsel, on his motion to suppress was in error.

Rather than "indulge in every reasonable presumption *against* a defendant's waiver of his or her right to counsel," the Court of Appeals affirmed the trial court's abandonment of this principle *in favor of* a waiver. *Madsen*, 168 Wn.2d at 504 (emphasis added). The opinion departs from established precedent and is contrary to a defendant's right to representation at all critical stages. Because the court denied Mr. Elwell his constitutional right to counsel at a critical stage, this Court should accept review. RAP 13.4(b)(1), (3).

3. The court denied Mr. Elwell his right to conflict-free counsel when it forced him to proceed with an attorney who repeatedly took positions against him on the record.

The Sixth Amendment right to counsel requires conflict-free counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed.

2d 333 (1980). The conflict of interest may occur in "*any situation* where defense counsel represents conflicting interests." *State v. Regan*, 143 Wn. App. 419, 426, 177 P.3d 783 (2008) (quoting *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983)). When an attorney takes a position against his client on the record, he ceases to act in his "role of an active advocate in behalf of his client" as required by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Taking a position against a client may include an attorney distancing himself from his client or making clear his client's position is frivolous. For example, in *Anders*, the Supreme Court found counsel's action in advising the court the appeal was meritless was inconsistent with his "role of an active advocate" because the "role as advocate requires that [the attorney] support his client's appeal to the best of his ability." 386 U.S. at 744. An attorney may seek to withdraw if the appeal lacks merit, but he may not continue representation while maintaining the appeal is frivolous. *Penson*, 488 U.S. at 83-85; *State v. Nichols*, 136 Wn.2d 859, 861, 968 P.2d 411 (1998).

In *State v. Chavez*, the court reversed and found counsel failed to act as an advocate where he argued his client's motion lacked merit. 162 Wn. App. 431, 434-37, 257 P.3d 1114 (2011). In that case, substitute

counsel was appointed on a CrR 7.8 motion following discovery of a potential conflict between the defendant and the attorney who represented him on the guilty plea. *Id.* at 436.

The court found the defendant "was not represented" where his attorney submitted a motion stating "he could not find any assignment of error that would support a meritorious challenge," presented the defendant's objections "in a way that clearly distanced counsel from his client," and "suggested . . . that his client's position was frivolous." *Id.* Representation by an attorney who takes a position directly contrary to his client's interests violates a defendant's right to conflict-free counsel.

Here, Mr. Elwell's attorney repeatedly took positions against Mr. Elwell on the record and ceased to advocate actively on Mr. Elwell's behalf. He undermined Mr. Elwell's case by informing the court the suppression and other issues were meritless and emphasized he argued them only at Mr. Elwell's request. RP 21-31 159, 240-49; CP 14, 323. He distanced himself from the motion to suppress, in particular, by labeling it "Mr. Elwell's position." RP 26, 224-25.

Mr. Peale's actions in actively advocating against Mr. Elwell and undermining his arguments created an actual conflict that left him "not represented." *Chavez*, 162 Wn. App. at 439-40. By prefacing the arguments with disclaimers that Mr. Elwell's request lacked merit and was

not viable, Mr. Peale undermined the very position he argued. RP 21-31; CP 19, 323; *Chavez*, 162 Wn. App. at 439. By taking positions against his client, Mr. Peale ceased to perform his role of "an active advocate" as required by the Sixth Amendment. *Anders*, 386 U.S. at 744.

The accused cannot receive the fair and effective adversarial process the Sixth Amendment right to counsel strives to achieve when his attorney is not operating as "an effective advocate." *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Mr. Elwell did not receive conflict-free representation. This error requires reversal of Mr. Elwell's conviction. *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S. Ct. 1173, 55 L. Ed. 2d. 426 (1978). This Court should accept review. RAP 13.4(b)(1), (3).

4. Mr. Elwell received ineffective assistance of counsel.

In addition to the errors discussed above that independently require reversal of Mr. Elwell's conviction, Mr. Elwell's attorney performed ineffectively by (1) not moving to suppress the property seized from him in a warrantless search, (2) suggesting the parties litigate the motion in front of the jury, and (3) not moving to exclude the audio surveillance the police improperly recorded in violation of their own Department Policy.

The Court of Appeals ruled Mr. Peale did not perform deficiently by refusing to file a motion to suppress because the court properly denied

Mr. Elwell's pro se motion. Slip op. at 17. But Mr. Elwell was entitled to have his motion researched and written *by counsel* who would subject the State's case to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The court cannot judge Mr. Peale's performance based on the court's resolution of the motion the court forced Mr. Elwell to file pro se.

Next, the Court of Appeals bootstraps the argument that requesting the court litigate the motion in front of the jury, such that jury hears the very evidence the motion seeks to suppress, was a reasonable trial strategy because the motion was unlikely to succeed. It supports this conclusion by noting the motion did, in fact, fail to succeed, and therefore, Mr. Elwell was not prejudiced. Slip op. at 17-18.

Any potential strategic reason that might exist to excuse an attorney's questionable performance must be a *reasonable* strategic reason. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). No reasonable trial strategy supports litigating a motion to suppress in front of the jury after it has heard the potentially suppressible evidence. This performance was deficient.

Mr. Peale's deficient performance prejudiced Mr. Elwell. Admission of the item stolen in the burglary was a crucial piece of evidence. The State used the police's recovery of the Pac-Man machine from Mr. Elwell to argue it confirmed his identity as the person on the video. RP 262, 266, 270. The failure to move to suppress, the suggestion to litigate suppression in front of the jury, and the failure to move to suppress the body camera footage of the search are prejudicial for the same reasons the wrongly denied motion to suppress is prejudicial. There is a reasonable probability that, had the jury not heard this evidence, the result of the trial would have been different. *Strickland*, 466 U.S. at 688.

E. CONCLUSION

This Court should accept review under RAP 13.4(b).

DATED this 2nd day of March, 2021.

Respectfully submitted,

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APPENDIX A

February 1, 2021, Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL ETHAN ELWELL, Appellant.	No. 79738-7-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Daniel Elwell appeals his conviction and sentence for residential burglary. He says the trial court erred in denying his motion to suppress a stolen arcade machine and in denying his request for lesser-included offense instructions. He next asserts the trial court denied him his right to counsel by forcing him to represent himself on his suppression motion without a valid waiver of counsel, and that for various reasons his trial counsel performed ineffectively. Elwell also contends that his trial counsel's statement that he did not agree with the merits of the suppression motion and lesser-included offense motion deprived him of the right to conflict-free representation. Finally, he asserts in a Statement of Additional Grounds (SAG) that the trial court erred in denying his request for a Drug Offender Sentencing Alternative (DOSA). We disagree with his arguments and affirm.

I. BACKGROUND

One night, Elwell broke into a Seattle apartment building and stole a Pac-Man arcade machine. He also stole a dolly, which he used to move the machine. The next day, building management called the police and showed Officers Brandon Craig and Jason Metcalf security camera footage that depicted Elwell prying open doors and wheeling out an arcade machine on a dolly.

About two hours after the visit, Officer Craig was driving less than a mile away from the building and saw the person from the video—Elwell—on the street with a large object wrapped in a red blanket. With his body-worn video camera on, Officer Craig stopped his car, approached Elwell, and asked, "There wouldn't happen to be a [Pac-Man] machine in there[,] would there be?" Elwell responded that he found it "in the garbage." Officer Craig pulled off the blanket and some plastic wrapping underneath it, uncovering the Pac-Man machine. The State charged Elwell with residential burglary.

The King County Division of Public Defense (DPD) appointed Walter Peale to represent Elwell. Before trial, Elwell moved to discharge the lawyer due to Peale's incapacity and unavailability resulting from a concussion and disagreements as to how to proceed at trial, including whether to move to suppress the Pac-Man machine based on the claimed search. The trial court denied Elwell's motion.

Peale stated in his trial memorandum and in court that he did not see a viable suppression motion and that Elwell disagreed. In a discussion with the court, Peale stated that he did not believe that suppression of the machine would

be "dispositive." Peale suggested that the trial court allow the State to present the evidence related to the claimed search in front of the jury, and then rule whether to suppress the evidence outside the jury's presence. He also suggested that if the court decided to suppress the evidence, it should instruct the jury to disregard the evidence related to the claimed search.

The trial court allowed Elwell to file a suppression motion on his own. Elwell filed the motion, in which he also said, "[T]he court should appoint counsel to represent Elwell on this motion since current appointed counsel refuses to do so." The trial court neither appointed such counsel nor conducted a colloquy regarding self-representation.

At the suppression hearing, Peale presented Elwell's argument but distanced himself from it by calling it "Elwell's position." The trial court denied Elwell's motion to suppress.

Peale also informed the court that at Elwell's request, he would make an argument that the trial court should instruct the jury on the lesser-included offenses of criminal trespass and theft. Peale made clear that the argument was Elwell's and not his, though he would be presenting it to the court. After Peale presented the argument, the trial court denied Elwell's request to instruct the jury on lesser-included offenses.

The jury found Elwell guilty of residential burglary.

After trial, Peale withdrew as Elwell's counsel and DPD assigned Vanessa Martin to replace him. Martin twice moved for a new trial—first, on ineffective assistance of counsel (IAC) grounds; and second, on grounds that the trial court

should have suppressed the body camera footage. The trial court denied the motions. Elwell requested a DOSA, which request the trial court denied.

Elwell appeals and filed a SAG.

II. ANALYSIS

A. Motion to Suppress

Elwell says the trial court erred by denying his motion to suppress the Pac-Man machine. The State responds that the plain and open view exceptions to the warrant requirement justified Officer Craig lifting the covering off the machine, and that even if the trial court erred, any error was harmless. We conclude the trial court did not err because the open view exception applies. Also, any error would be harmless.

We review a trial court's denial of a motion to suppress to determine whether substantial evidence supports the challenged findings of fact and if those findings support the conclusions of law. State v. Campbell, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). We accept unchallenged findings of fact as verities on appeal. Id. We review de novo the trial court's legal conclusions resulting from a suppression hearing. Id. And we may affirm on any ground supported by the record, even if the trial court made an erroneous legal conclusion. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

"The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution generally prohibit searches and seizures absent a warrant or a recognized exception to the warrant requirement." State v. Hendricks, 4 Wn. App. 2d 135, 141, 420 P.3d 726 (2018). The State

bears the burden of establishing by clear and convincing evidence that an exception applies. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Courts must suppress evidence obtained through an unconstitutional search. State v. Monaghan, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

In denying Elwell's motion, the trial court found that "Officer Craig recognized [Elwell] as the person he saw on the surveillance video from the apartment building based on [Elwell's] clothing, [Elwell's] face, and because he was rolling a large item around on a dolly that was roughly the same size as the arcade machine seen on the video." It also found that the covered object that Elwell wheeled on the street "exactly matched the size and shape of the arcade game seen on surveillance video being stolen from the apartment building." The trial court determined that "[t]here is no basis that a reasonable person would have an expectation of privacy in a stolen item. The right to privacy does not extend to stolen items." It also concluded that "[t]here was no right to privacy in the object being rolled down the street, because its nature was so apparent," and "[b]ecause there is no reasonable expectation of privacy in stolen items, there is no basis to suppress."[1]

The State says the plain and open view exceptions to the warrant requirement justified the claimed search. But where an officer views contraband from an area that is not constitutionally protected—as here, a public street—the open view doctrine may apply, and the plain view doctrine does not. State v.

[1] On appeal, the State bases its argument regarding the motion to suppress on the open and plain view exceptions rather than strictly asserting that Elwell had no reasonable expectation of privacy in the Pac-Man machine.

Courcy, 48 Wn. App. 326, 328, 739 P.2d 98 (1987).[2] Under either doctrine, "no article 1, section 7 or Fourth Amendment search has occurred if evidence is in open view of officers." Id.

We conclude that under the open view exception, Officer Craig did not conduct a search by removing the Pac-Man machine's covering. "Something detected by an officer's senses, from a nonintrusive vantage point, is in 'open view.'" State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (quoting State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). "The exposed object is not 'subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.'" Id. (quoting Seagull, 95 Wn.2d at 902). Arkansas v. Sanders further explains when an individual has no reasonable expectation of privacy in an object:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.

442 U.S. 753, 764 n.13, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) abrogated on other grounds, California v. Acevedo, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991).

In Courcy, Division Three of this court applied Sanders and the open view doctrine to conclude that the police did not need a warrant to open a paper

[2] Yet as noted by Division Two of this court in State v. Dykstra, "[t]he 'open view' and 'plain view' doctrines are similar, and in some instances, the analysis under each is also similar." 84 Wn. App. 186, 191 n. 4, 926 P.2d 929 (1996).

"bindle" containing cocaine. 48 Wn. App. at 329–32. The court determined that "because it was immediately apparent to the experienced officers the bindle contained contraband, Mr. Courcy did not have a reasonable expectation of privacy which would prevent opening the bindle or field testing it." Id. at 330. The court noted that the evidence suggested that paper bindles are commonly used to store cocaine, and that the officers who seized the bindle had experience in identifying such packaging. Id. at 331–32. The court also concluded that opening the bindle did not violate article I, section 7 because there was a virtual certainty that the container, in the circumstances viewed, held contraband, as if transparent. Id. at 332. In reaching that conclusion, it reasoned that "[t]he distinctive nature of this container, coupled with the defendant's furtive gesture when it became apparent Officer Cruz had seen it, left Mr. Courcy no legitimate expectation of privacy in the contents of the bindle." Id.

Here, since the officer could easily infer that Elwell possessed the arcade machine from the object's outward appearance and the surrounding circumstances, the open view exception applies.[3] Officer Craig's body camera video shows Elwell wearing the same patterned and hooded sweatshirt as the individual in the security camera footage, the same sweatshirt with a "W" on it under the hooded sweatshirt, and the same shoes. The individuals in the two videos look physically similar. Officer Craig stated at trial that he "immediately

[3] The appendix below includes two images from the surveillance video: Photo 1 shows Elwell's face and clothes from inside the apartment building and Photo 2 shows Elwell wheeling the Pac-Man machine out of a room. It also includes an image from the body-worn camera video, Photo 3, which shows Elwell on the street in the same clothes.

recognized" Elwell as the suspect in the burglary, noting the similarity in clothing, facial resemblance, and the object on the dolly. Officer Craig saw Elwell on the street less than a mile away from the apartment building, just about two hours after watching the surveillance footage.

Elwell was wheeling the large object on a dolly and the individual in the security camera footage steals a dolly to wheel out the arcade machine. When asked whether the object was a Pac-Man machine, Elwell did not answer in the negative; instead, he stated that he had found it in the garbage. And the trial court found that the object that Elwell wheeled down the street exactly matched the size and shape of the arcade game seen on the surveillance video. Elwell does not challenge this finding, so we treat it as a verity on appeal. See Campbell, 166 Wn. App. at 469.

Unlike in Courcy, the object covered by a blanket did not have a nature uniquely associated with contraband. And the object did not have a distinctive shape, like a gun case, as noted by Sanders. But given the circumstances outlined above, there was a virtual certainty that the arcade machine was under the blanket.[4] Thus, as in Courcy, the nature of the container and the

[4] In United States v. Epps, the Eleventh Circuit followed Sanders and concluded that police did not need a warrant to search a pillowcase with pink stains on it, where police suspected it contained dye packs and other items associated with a bank robbery. 613 F.3d 1093, 1099 (11th Cir. 2010). Police saw the defendant running away from a vehicle like one reported stolen and associated with the robbery, and the defendant pointed a gun at the police after they directed him to stop. Id. The court reasoned that the pillowcase "was one of those containers that 'by [its] very nature cannot support any reasonable expectation of privacy,'" because police could infer the pillowcase's contents from its outwardly visible stains and the circumstances under which they obtained it. Id. (alteration in original) (quoting Sanders, 442 U.S. at 764 n. 13, 99 S. Ct. 2586); see also United States v. Huffhines, 967 F.2d 314, 319 (9th Cir. 1992) (applying Sanders and holding that no warrant required for search of an opaque bag containing gun, where

circumstances under which police encountered it left no reasonable expectation of privacy in its contents. Lifting the covering off the arcade machine did not constitute a search under the Fourth Amendment or article I, section 7.[5]

And even if the trial court should have suppressed the evidence, the error was harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

Even if the jury did not learn what was underneath the covering, as discussed above, there was significant other inculpatory evidence, including the security camera footage depicting Elwell committing the charged crime. We are convinced that beyond a reasonable doubt that any reasonable jury would have convicted Elwell without the error, so it was harmless.

officer testified he could tell what was in the bag by looking at it, since there is no reasonable expectation of privacy in a container if its contents can be discerned from its outward appearance). While these cases do not apply the open view exception, they nevertheless apply the Sanders rule about when a person has a reasonable expectation of privacy in a container, an important consideration in open view analysis.

[5] Elwell's argument purports to challenge both a search and seizure of the Pac-Man machine. But Elwell does not claim that Officer Craig lacked probable cause to seize the machine or treat the seizure as analytically different from the claimed search. And even if he did, we would likely conclude probable cause existed, given the same circumstances outlined above. See Courcy, 162 Wn. App. at 328–29 (concluding officer had probable cause to seize the bindle where he had personal experience identifying cocaine in similar containers and where defendant pulled bindle to his chest after the officer saw it).

B. Lesser-Included Offenses

Elwell says the trial court erred by failing to instruct the jury on the lesser-included offenses of trespass and third degree theft. The State responds that third degree theft is not a lesser-included offense of burglary, and that the facts did not support a conviction of the lesser-included offense of trespass. We conclude that third degree theft is not a lesser-included offense of residential burglary, and even if it were, the trial court acted within its discretion in denying Elwell's request for a third degree theft instruction. We also conclude the trial court did not abuse its discretion by denying his request for a trespass instruction.

RCW 10.61.006 grants defendants the right to a lesser-included offense instruction. State v. Henderson, 180 Wn. App. 138, 143, 321 P.3d 298 (2014). Under the two-prong Workman[6] test, the defendant may receive such an instruction if (1) "the lesser-included offense consists solely of elements that are necessary to conviction of the greater, charged offense," and if (2) "the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). "When evaluating whether the evidence supports an inference that the lesser crime was committed, courts view the evidence in the light most favorable to the party who requested the instruction." State v. Henderson, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015).

[6] State v. Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978).

A trial court properly denies the instruction if no jury could have rationally found the defendant committed the lesser crime but not the greater. Id. at 746.

If the trial court's rationale for deciding a jury instruction request rested on a factual determination—typically, the Workman test's second prong—we review for abuse of discretion, and view the evidence in the light most favorable to the requesting party. Condon, 182 Wn.2d at 315–16; State v. Fernandez-Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000). If it rested on a legal conclusion—the first prong—we review de novo. Condon, 182 Wn.2d at 316. The trial court provided the following rationale for denying the instructions:

> I'll deny the lesser-includeds. I don't think that even taking the evidence in the light most favorable to Mr. Elwell there's a reasonable way to determine that the lesser-included or the lesser crime is committed and not the greater. Either he's guilty of residential burglary or he's not, but there isn't any basis for a lesser-included crime here.

The trial court's rationale thus rested on a factual determination, so we review its ruling for an abuse of discretion.

1. Third degree theft

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). A person is guilty of third degree theft if they commit theft of property worth less than $750. RCW 9A.56.050(1).

Because third degree theft does not consist solely of elements necessary for a residential burglary conviction, it is not a lesser-included offense of

residential burglary.[7] The State conceded that third degree theft is a lesser-included offense of residential burglary at trial. But such a legally erroneous concession does not bin us. See State v. Knighten, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). And we may affirm the trial court on any ground supported by the record. Avery, 103 Wn. App. at 537.

And even if third degree theft were a lesser-included offense of residential burglary, viewing the evidence in the light most favorable to Elwell, no jury could have rationally found that he committed third degree theft and not residential burglary. The security camera footage shows the same person that Officer Craig stopped on the street wheeling an arcade machine out of a room in the building. It also shows Elwell trying to pry open doors the moment he comes on screen, which elicits the inference that he entered or remained unlawfully in the dwelling. That the building manager later reported the machine as stolen also supports an inference of unlawful presence. The body camera footage shows Elwell with an object of the same size and shape. The security camera footage and body camera footage eliminate the possibility that he merely committed theft and not burglary.

[7] See State v. Smith, noted at 173 Wn. App. 1032, 2013 WL 815908 at *1–2 (2013) (concluding that third degree theft is not a lesser-included offense of second degree burglary); see GR 14.1 ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

2. Criminal trespass

A person commits criminal trespass if they knowingly enter or remain unlawfully in a building. RCW 9A.52.070(1).

No jury could have rationally found that Elwell committed criminal trespass but not residential burglary, even when viewing the evidence in the light most favorable to him. The security camera footage shows Elwell trying to pry open doors the moment he comes on screen. His attempt to do so shows not just that he entered or remained unlawfully but also that he intended to commit a crime inside the building. See State v. Allen, 127 Wn. App. 945, 951, 113 P.3d 523 (2005) (holding that damaged doors, removed windows, and smashed walls showed the defendant's intent to commit a crime within a building and not just to trespass). The footage does not show Elwell leaving the building, but it shows him wheeling an arcade machine out of a room, which shows his intent to leave the building with it. And as the body camera footage shows, Officer Craig later found the Pac-Man machine in Elwell's possession. These facts establish that Elwell did not just remain or enter the building unlawfully, but that he did so with an intent to commit a crime in it, eliminating the possibility that he merely committed trespass and not burglary.

The trial court acted within its discretion by rejecting Elwell's request to instruct the jury on the lesser-included offenses.

C. Sixth Amendment

Elwell makes multiple claims under the Sixth Amendment of the United States Constitution. First, he says the trial court denied him his right to counsel

when it forced him to represent himself in his suppression motion. Next, for various reasons, he says he received IAC.[8] We disagree with Elwell on all these claims.

1. Waiver of counsel

Elwell says that the trial court denied him his right to counsel by forcing him to represent himself in his suppression motion without his requesting to do so and without his knowingly, intelligently, and voluntarily waiving his right to counsel. The State responds that the trial court need not have appointed Elwell a second attorney to make the suppression argument and that it properly allowed "hybrid representation." We agree with the State.

Criminal defendants have state and federal constitutional rights to representation by counsel. U.S. CONST. amend. VI, XIV, CONST. art. I, § 22. Courts must "indulge in 'every reasonable presumption' against a defendant's waiver of his or her right to counsel." State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (quoting In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)). "When a defendant requests [self-represented] status, the trial court must determine whether the request is unequivocal and timely." Id. If the request is unequivocal and timely, "the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy." Id.

[8] Elwell says that his right to conflict-free counsel was violated when Peale claimed that his suppression motion lacked merit. While he refers to this as a Sixth Amendment conflict of interest claim, we see it more as an IAC claim and thus address it in the IAC section below.

Trial counsel need not pursue lines of argument that appear unlikely to succeed. State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011). And a trial court may, but need not, allow hybrid representation, under which a defendant serves as co-counsel with their attorney. State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987).

The State concedes that Elwell did not unequivocally request to represent himself, and the trial court did not conduct a colloquy.

But the trial court properly allowed hybrid representation. Peale need not have pursued the suppression motion since it appeared unlikely to lead to the dismissal of the State's charges, both because it lacked merit and because any resulting error would be harmless. As the State says, the trial court did not force Elwell to proceed self-represented; it allowed him to raise an additional issue that his attorney declined to raise. And Elwell cites no law requiring the trial court to procure a timely, unequivocal, knowing, intelligent, and voluntary waiver of counsel before allowing hybrid representation. Nor does he cite any law requiring the trial court to appoint him a new attorney if he represents himself in making certain arguments without waiving his right to counsel. Notably, while Elwell wrote his own suppression motion, Peale helped him make the argument to the court at the suppression hearing. We conclude the trial court did not deny Elwell his right to counsel.

2. IAC

Elwell says that Peale performed ineffectively on three grounds: (1) failing to move to suppress the fruits of the police's search; (2) suggesting to the trial

court that the jury hear the evidence related to the suppression motion, and then instruct the jury to disregard the evidence if it decided to suppress the fruits of the search, and (3) failing to move to suppress Officer Craig's body camera footage. He also says that an improper conflict of interest arose when Peale stated to the court that Elwell's suppression motion and lesser-included offense argument lacked merit, which argument we treat as an IAC claim. We reject these claims.

IAC claims "present mixed questions of law and fact." State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (quoting In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)). We review a trial court's factual findings related to ineffective assistance issues for substantial evidence and review de novo the legal conclusions flowing from those findings. Lopez, 190 Wn.2d at 116–17. Evidence is substantial if it could persuade a fair-minded and rational person of the truth of the finding. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

We presume effective representation and the defendant bears the burden of showing they did not receive effective representation. State v. Chavez, 162 Wn. App. 431, 437–38, 257 P.3d 1114 (2011). To prevail on an IAC claim, a defendant must show their "lawyer's representation fell 'below an objective standard of reasonableness' and the 'deficient representation prejudiced the defendant.'" Id. at 438 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To show prejudice, a defendant must show that "there is a reasonable possibility that, but for counsel's deficient performance, the outcome of the proceeding would have been different." State v. Carson, 184 Wn.2d 207,

227, 357 P.3d 1064 (2015) (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). But trial counsel need not pursue lines of argument that appear unlikely to succeed. Brown, 159 Wn. App. at 371.

a. Failure to move to suppress the Pac-Man machine

Elwell says Peale performed ineffectively by failing to move to suppress the Pac-Man machine. As discussed above, the trial court properly denied the motion to suppress. Thus, Peale acted reasonably by deciding not to write the motion. Also, even though Peale did not write the motion, Elwell did—and Peale presented oral argument on it—which undercuts any claim of prejudice. And even if Peale had been more effective than Elwell in writing a suppression motion and the trial court suppressed the Pac-Man machine, as discussed above, the jury still would have convicted Elwell considering the other evidence showing his guilt.

b. Suggestion about suppression motion

Peale suggested that the trial court allow the State to present evidence related to the claimed search in front of the jury, then rule whether to suppress outside its presence. He also suggested that if the court decided to suppress the evidence, it should instruct the jury to disregard the evidence related to the search. He argued that if the trial court suppressed the Pac-Man machine, the court could properly presume the jury followed its instructions. Elwell says that this constituted ineffective assistance, since no competent attorney would willingly submit prejudicial evidence to the jury with the hope that the jury could later ignore it.

But Elwell cannot claim prejudice. A jury is presumed to follow the trial court's instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). In assessing a claim of prejudice in an IAC context, we must presume a jury acted according to the law. State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 694–95, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Elwell cannot base a claim of prejudice on a presumption that the jury would not have heeded the trial court's instruction to disregard the evidence in question. Also, since the trial court properly denied Elwell's suppression motion, any concern about the jury improperly hearing prejudicial evidence is unwarranted.

c. Failure to move to suppress the body camera footage

Elwell asserts Peale performed ineffectively by failing to move to suppress Officer Craig's body camera footage because the officer never informed Elwell that he was recording him. Elwell offers three legal grounds for this claim. But we reject it on each ground, since on two grounds he has not shown deficient performance and has not shown prejudice on any ground.

Elwell points to RCW 10.109.010(1)(d), which requires law enforcement agencies to develop policies on when officers will inform members of the public that they are being recorded. He also points to the Seattle Police Department Manual, which requires officers to give such a notification. Finally, he points to Lewis v. Department of Licensing, in which, based on Washington's privacy act, chapter 9.73 RCW, the court ruled that recordings between officers and individuals in traffic stops were inadmissible because the officers did not inform

the individuals that they were recording them. 157 Wn.2d 446, 451–52, 139 P.3d 1078 (2006).

Neither RCW 10.109.010(1)(d) nor any police manual requires a court to suppress evidence where an officer gave no notification, so Peale did not perform deficiently on these grounds. And although the Lewis court ruled as inadmissible certain videos where officers did not notify the defendants that they were being recorded, here, Elwell does not argue what the effect of the video's exclusion would have been, and he bears the burden of showing prejudice in an IAC claim. 157 Wn.2d at 472–73. And showing prejudice would be difficult, given the security camera footage and Officer Craig's testimony that he discovered the Pac-Man machine in Elwell's possession. Elwell has not shown prejudice on any ground.

d. Conflict-free representation

Elwell says that Peale's stating that he did not agree with the merits of Elwell's motion to suppress the Pac-Man machine or his lesser-included offense argument deprived him of his right to conflict-free representation. The State responds that Peale's stating his opinion about the merits did not create a conflict of interest. Because Elwell was not denied effective representation, we reject his argument.

As addressed above, while Elwell couches this claim in conflict of interest terms, more accurately, it raises IAC issues. See Chavez, 162 Wn. App. at 437–38 (treating a claim that trial counsel characterized a defendant's motion as meritless as IAC). "A conflict of interest may amount to ineffective assistance of

counsel where it adversely affects a client's interests." Id. at 438. A lawyer's conflict of interest may require reversal without a showing of actual prejudice if an actual conflict of interest affected their performance, or if the trial court should know of a particular conflict but then fails to inquire. Id.

"An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." State v. Kitt, 9 Wn. App. 2d 235, 244, 442 P.3d 1280 (2019) (quoting State v. White, 80 Wn. App. 406, 411–12, 907 P.2d 310 (1995)). "To show that the conflict adversely affected [their] lawyer's performance, the defendant must show that the conflict either 'cause[d] some lapse in representation contrary to the defendant's interests' or 'likely affected particular aspects of counsel's advocacy on behalf of the defendant.'" Kitt, 9 Wn. App. 2d at 243 (second alteration in original) (internal quotation marks omitted) (quoting State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008)).

Relying on Chavez, Elwell says Peale's actions raised a conflict of interest. There, the defendant's original lawyer moved to withdraw from representing the defendant on a motion to withdraw a guilty plea to violations of a no-contact order. The lawyer explained that he could not ethically argue the motion, as he expected he might become a witness in the case given his conversations with the defendant and a person protected by the no-contact order, and an attorney cannot be both advocate and witness. Chavez, 162 Wn. App. at 436, 444 n.3 (Korsmo, A.C.J., in dissent); see also RPC 3.7 cmt. 1 ("Combining the roles of advocate and witness can prejudice the tribunal and the

opposing party and can also involve a conflict of interest between the lawyer and client."), 6 ("[I]f there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7."). The trial court granted the motion and appointed substitute counsel to represent the defendant on the plea withdrawal motion. Id. at 436. The new lawyer moved to withdraw the plea but "characterized the motion as [the defendant]'s alone and without merit, and submitted 'for consideration of possible errors made by his attorney pursuant to Anders v. California.'"[9] Id. He also stated that he could not "find any assignment of error that would support a meritorious challenge to the entry of the guilty plea." Id. at 436. The trial court denied the motion to withdraw the plea. Id.

On appeal, Division Three of this court agreed with the State that no evidence showed the original counsel had a conflict. Id. at 439. But it noted that such counsel "was 'in the best position to determine when a [disabling] conflict exists'" and that substitute counsel had not developed a factual basis for the court to decide if original counsel had a disabling conflict, which presumably would provide a more informed position to decide the plea withdrawal motion. Id. at 438–39 (alteration in original) (quoting Mickens v. Taylor, 535 U.S. 162, 167, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). It also concluded that although a criminal defense attorney need not assert claims they consider frivolous, by laying out the defendant's objections in a way that clearly distanced counsel from his client and suggesting to the trial court that his client's position was frivolous,

[9] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

the new lawyer denied Chavez effective representation. Id. at 439–40. And it emphasized that:

> [a] so-called Anders brief is an appellate procedure that is not appropriate for a trial court. The Anders procedure covers the appellate situation where an attorney feels an entire appeal is without merit and therefore wants to withdraw. Applying this procedure to a discrete issue in a trial court is a misapplication, no matter how an attorney characterizes the motion.

Id. (Internal citations omitted.)

Here, by contrast, Peale did not file an Anders brief. He stated in his trial brief that he did not see a "viable challenge to the 'search.'" He also stated that Elwell disagreed with his assessment and would ask permission to raise the issue to the court. In a pretrial discussion, Peale stated that he did not believe a suppression motion would be meritorious, since "suppression of the evidence obtained by the search [would not] be dispositive." But at the suppression hearing, Peale argued for suppression of the Pac-Man machine on Elwell's behalf. He distanced himself from himself from the suppression argument by calling it "Elwell's position," but otherwise appears to have made a genuine effort at arguing for suppression at Elwell's request, based on Elwell's self-written motion. Peale also distanced himself from the lesser-included offense argument by making statements such as "Elwell would ask me to submit lesser-includeds," but still advanced the argument on Elwell's behalf. See State v. Argomaniz-Camargo, noted at 4 Wn. App. 2d 1049, 2018 WL 3455729 at *2–3 (2018) (concluding that the defendant's lawyer did not deny representation in violation of Chavez where they "squarely put before the trial court both the evidence and the

argument needed to address his client's motion," even though the lawyer "noted that nothing in the discovery provided any additional support for [the defendant's] theory."); see GR 14.1. Peale's actions informed the court that the arguments were Elwell's alone, but unlike in Chavez, he did not suggest that either argument was frivolous. And in Chavez, although the first lawyer withdrew because he perceived a conflict, substitute counsel chose not to pursue a motion to withdraw the defendant's guilty plea or to develop a record related to original counsel's claim of a potential conflict. But here, Peale reasonably decided not to pursue the suppression argument, as addressed above, and, given all the evidence suggesting Elwell's guilt, need not have developed a record to show why the motion would not have succeeded or been dispositive. Elwell was not denied effective representation, so this claim fails.

D. SAG

Elwell says in his SAG that the trial court erred by denying his request for a DOSA, as it based its decision on the State's extrajudicial information about dismissed and reduced charges against him. We disagree.

In opposing Elwell's request for a DOSA, the State referenced Elwell's criminal history, including cases against him that it had dismissed. A court may not sentence a defendant based on untested facts. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). The trial court may rely on admitted, proved, or acknowledged facts to determine whether to grant a DOSA. Id. at 338–39. "'Acknowledged' facts include all those facts presented or considered during sentencing that are not objected to by the parties." Id. And the "real facts"

doctrine prohibits a trial court from considering charged crimes dismissed as a part of a plea agreement. State v. McAlpin, 108 Wn.2d 458, 465–67, 740 P.2d 824 (1987); accord, State v. Kelly, noted at 126 Wn. App. 1042, 2005 WL 762626 at *2 (2005); see GR 14.1.

But it does not appear the referenced charges were dismissed as a part of a plea agreement. And Elwell did not object to the State's introduction of his criminal history, including dismissed charges. Thus, the parties acknowledged these facts and trial court did not improperly rely on extrajudicial facts in denying Elwell's request for a DOSA.

We affirm.

Chun, J.

WE CONCUR:

Mann, C.J.

Duggan, J.

APPENDIX

Photo 1

Photo 2

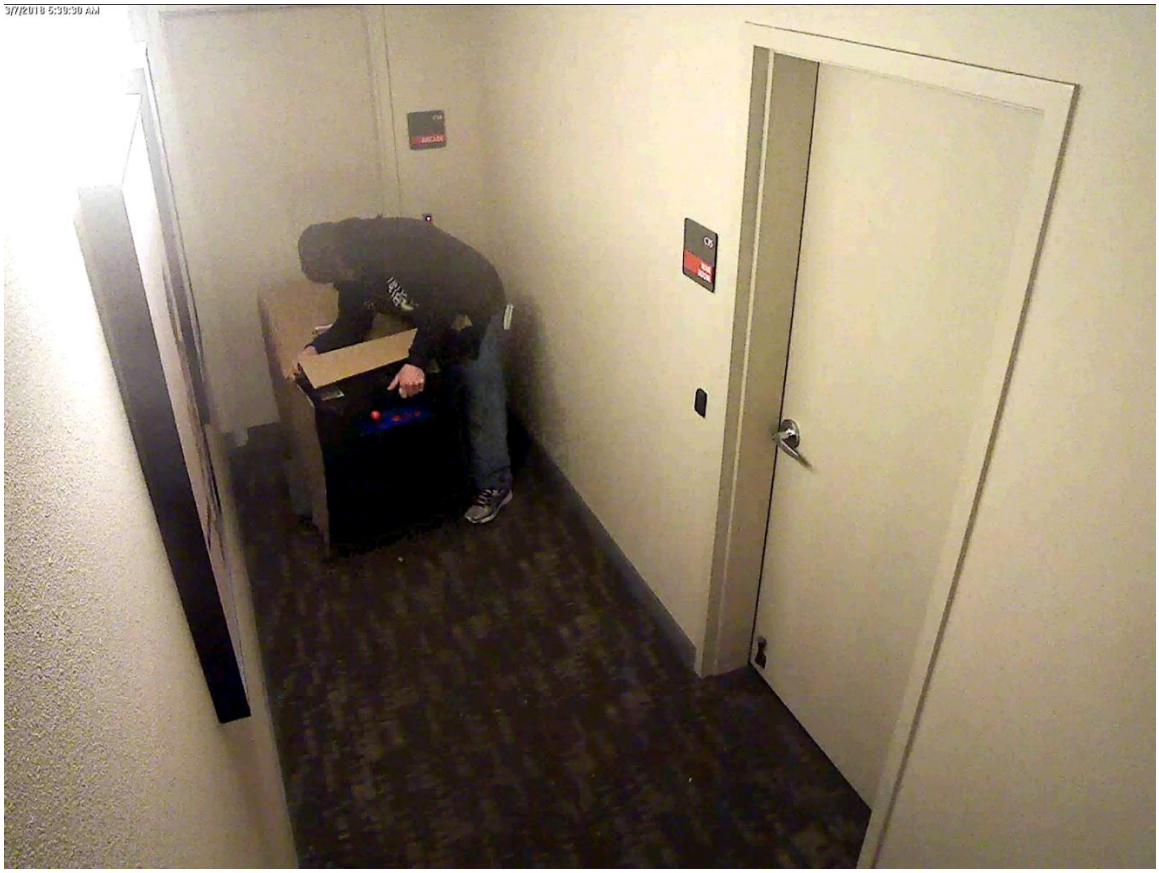

Photo 3

DECLARATION OF FILING AND MAILING OR DELIVERY

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☒ respondent Donna Wise, DPA
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 2, 2021
Washington Appellate Project

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