NO. 99546-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ELWELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

SUPPLEMENTAL BRIEF OF RESPONDENT – STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. Did the trial court properly deny the motion to suppress a Pac-Man arcade machine that a police officer observed Elwell pushing along a public sidewalk on a dolly, covered by a blanket, where the officer immediately recognized Elwell as the burglar depicted in surveillance video stealing a Pac-Man machine and removing it on a stolen dolly, and believed the covered object was that machine?

2. Did the court properly exercise its discretion to allow Elwell to present a motion to suppress evidence that defense counsel had decided not to present?

3. Is there no basis to conclude that defense counsel's disagreement with Elwell's pro se arguments established divided loyalty constituting an impermissible conflict of interest?

4. Has Elwell failed to establish that his trial counsel was constitutionally ineffective, where the challenged actions were reasonable strategic decisions and Elwell has failed to establish prejudice?

B. STATEMENT OF THE CASE

On March 7, 2018, A. Cheek, the property manager of an apartment building in Seattle, was informed that a Pac-Man arcade machine was gone. 2RP 164-67, 170. On surveillance video from the

previous night, Cheek saw a man enter, break into the game room and leave with the machine in a cardboard box on a dolly. Ex. 1; 2RP 171. This video surveillance recording and still images were admitted at trial. Ex. 1-3; 2RP 172, 186-87. They show clear images of the burglar's face and clothing.[1] Ex. 1, Surveillance 1; Ex. 2 and 3, images 2-4.

The first video file showed the burglar get off an elevator and pry open a door. Ex. 1, Surveillance 1; 2RP 174-76. The second file showed the burglar in the hallway on the other side of that door. 2RP 176-77. He pried open the door to the game room at the far end of the hall and came back out, went in and out of another room, then moved out of sight. Ex. 1, Surveillance 2 at 1:15-1:45, 38:05-38:24, 42:59; 2RP 177-79.

The third file of the surveillance video showed the burglar return with a large cardboard box and a dolly, pry open the game-room door again and take the box and dolly inside. Ex. 1, Surveillance 3 at 1:32-3:39; 2RP 181. About 15 minutes later, he emerged with an arcade machine in the box on the dolly, which he pushed past the camera and out of sight. Ex. 1, Surveillance 3 at 18:20-19:30.

Seattle Police Officers Craig and Metcalf responded to Cheek's burglary report at about 12:50 p.m. and saw the video. 2RP 171, 184,

[1] Ex. 2 and 3 include the same images – Ex. 2 is a paper copy; Ex. 3 is a digital version. 2RP 186-87. Images in Ex. 3 are sharper, but Ex. 2 may be more convenient to review. The same is true as to Ex. 7 (paper) and 8 (digital). 2RP 201-02.

191-93, 217. At about 2:20 p.m. Craig saw Daniel Elwell on the street, less than a mile away from the burglary, and recognized him from the video. 2RP 194-97, 218. Elwell wore the same clothes as the burglar. Ex. 1 & 2, images 2-4, 29-31; Ex. 7 & 8, images 1-4; 2RP 194-95, 208-11.

As seen on police in-car and body-worn videos admitted at trial, Elwell was wheeling a dolly with a large object covered in a blanket down the sidewalk. Ex. 6, 9; 2RP 194-95. The object matched the shape and size of the stolen machine. CP 337; 2RP 195, 210. Officer Craig believed it was the stolen arcade machine. 2RP 210. Elwell claimed he had gotten it from the garbage. Ex. 6; 2RP 199-200. Craig pulled back the blanket and confirmed the object was the stolen machine. Ex. 6; 2RP 184-85, 200.

Elwell was convicted by jury of residential burglary. 2RP 281; RCW 9A.52.025. Elwell then was appointed new counsel, who moved for dismissal or a new trial, alleging that trial counsel was ineffective. CP 205-59; 2RP 298-99. The trial judge denied the motion, stating that none of the alleged errors was prejudicial because this was "an open-and-shut case." 2RP 318. The court imposed a standard range sentence. CP 300-05. The Court of Appeals affirmed the conviction in an unpublished opinion. State v. Elwell, 16 Wn. App .2d 1021, 2021 WL 321862 (2021).

C. ARGUMENT

1. THE SEIZURE OF STOLEN PROPERTY IN OPEN VIEW ON A PUBLIC SIDEWALK WAS LAWFUL.

Elwell claims the trial court erred in denying his motion to suppress evidence that the object he was wheeling down the street was the stolen Pac-Man machine. His claim that the machine was the fruit of an illegal search is meritless because there was no search — the machine was in a public place and was properly seized because it was immediately apparent to the officers that it was the stolen machine. The Court of Appeals correctly concluded that the machine was properly seized because it was in open view.

A trial court's findings of facts relating to a motion to suppress are reviewed for substantial evidence, "a sufficient quantity of evidence in the record to persuade a rational, fair-minded person of the truth of the finding." State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Elwell has not assigned error to any of the trial court's findings, so they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). A trial court's conclusions of law are reviewed de novo. Schultz, 170 Wn.2d at 753.

The trial court's unchallenged findings include the following facts. Officer Craig responded to a burglary call and was shown surveillance

video of a person taking an arcade machine and rolling the machine around on a dolly. CP 336-37. About nine hours later,[2] Craig recognized Elwell on the street as the person in the surveillance video. CP 337. Elwell was wheeling a large object covered in a red blanket down the street, which Craig believed was the stolen machine. CP 337. The object "exactly matched the size and shape of the arcade game seen on the surveillance video being stolen." CP 337. Craig unwrapped the blanket and a plastic bag on top, uncovering an arcade machine. CP 337.

The Court of Appeals correctly concluded that the machine's seizure was proper under the open view doctrine. Elwell, Slip op. at 6-9. Under the open view doctrine, if an officer detects something by using his or her senses, while lawfully present at the vantage point where those senses are used, no search has occurred. State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002). Craig was in a public place, so he was lawfully present and his view of the blanketed machine on a dolly was not a search.

Elwell claims the Court of Appeals concluded the machine was in open view only after the blanket was removed, but that is incorrect. The court concluded that removal of the blanket was not a search, holding that

[2] Nine hours is the time between the burglary recorded on the video and the sighting of Elwell. 2RP 174, 183 (video time stamp 4 to 5:30 a.m.), 218 (stop 2:20 p.m.). It was less than two hours between Craig viewing the video and sighting Elwell. 2RP 192-93, 218.

the machine was in open view despite the blanket because, given the circumstances, "there was a virtual certainty that the arcade machine was under the blanket." Elwell, Slip op. at 8.

The seizure of the blanketed arcade machine also was justified under the plain view doctrine, a well-established exception to the warrant requirement authorizing seizure of property under the Washington Constitution.[3] WASH. CONST. art. I, § 7; State v. Morgan, 193 Wn.2d 365, 369, 440 P.3d 136 (2019). "A plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity." Morgan, 193 Wn.2d at 371. The first component of the plain view doctrine certainly is satisfied when the police are in a public location, as in this case.

The Court of Appeals correctly noted that the plain view doctrine normally is applied to constitutionally protected areas but under either doctrine, there is no search if evidence is in open view. Elwell, Slip op. at 5-6. Case law interpreting the second component of the plain view doctrine thus is helpful in analysis of what constitutes open view under

[3] Although the trial court stated that stolen property does not fall within a person's private affairs, that statement referred to stolen property in open view. CP 337. See 2RP 312 (prosecutor referred to analysis as based on "plain view," 2RP 305-06 (defense counsel characterized this as the plain view doctrine in argument on the motion for new trial).
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either doctrine. The second component of the plain view doctrine is met if "'considering the surrounding circumstances, the police can reasonably conclude' that the subject evidence is associated with a crime." Morgan, 193 Wn.2d at 372 (quoting State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994)). "Certainty is not necessary." Id. at 372.

It was immediately apparent that Elwell was wheeling the stolen arcade game. Officer Craig saw a surveillance video that showed Elwell stealing it hours earlier, on a dolly; he recognized Elwell from the video and believed the item before him on the dolly was the machine stolen. CP 337; 2RP 208-11. The man before the officer on the street, wheeling an item of the same size on a dolly, was clearly the man in the video. Craig testified, "I see the exact person with an item that's the exact same size as the one that was stolen before wheeled around. I mean, it's quite obvious exactly what that item was…." 2RP 210. The man on the street had the same build and mustache, and wore the same clothing, down to the purple sweatshirt (with a big "W" on it) and a dark hoodie over it with white designs on the chest. Ex. 1; Ex. 2, images 2-4, 29-31; Ex. 7, images 1-4; 2RP 194-95, 208-11. As the Court of Appeals concluded, under these circumstances, having recognized Elwell as the burglar, Craig reasonably concluded that the item on the dolly was the stolen machine and its seizure was authorized. Elwell, Slip. op. at 7.

Draping a blanket over a machine does not prevent it from being recognized as stolen property. An item may be recognized as contraband even if its surface is not seen. Hudson, 124 Wn.2d at 118 (seizures based on tactile discoveries of contraband are lawful). As the trial court observed, "We had video of him walking down the street with what was clearly the Pacman on the dolly." 2RP 319.

Finally, if the court erred in denying the motion to suppress, the error was harmless. A constitutional error is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).[4] There is no doubt that the jury would have reached the same verdict if it had not heard testimony that the item under the blanket was the Pac-Man machine. There was a high quality surveillance video depicting clear images of Elwell pry open doors in the apartment building, break into the game room, get a box and dolly, return to the game room, box up the machine and roll it away on the dolly. Ex. 1-3; 2RP 174-83. Police video depicts Elwell, hours later and wearing the same clothing, rolling an item the same size down the street on a dolly, covered with a blanket. Ex. 6-9; 2RP 194-200. Even if the machine had

[4] The State is not required to prove that the evidence improperly admitted had no probative value, as Elwell argues in his petition for review. Pet. Rev. at 12.

never been recovered, the jury still would have had overwhelming evidence that Elwell was the burglar.

2. THE TRIAL COURT'S DECISION TO ALLOW ELWELL TO RAISE A SUPPRESSION ISSUE THAT HIS COUNSEL BELIEVED LACKED MERIT WAS NOT A DEPRIVATION OF COUNSEL.

Elwell contends that the trial court erred in allowing him to present a motion to suppress that his trial counsel believed was without merit. As the Court of Appeals recognized, the trial court had discretion to allow Elwell to do so, and this was an advantage to Elwell, not error.

Every criminal defendant has the constitutional right to representation by counsel, guaranteed by the Sixth Amendment.[5] U.S. CONST. amend. VI, XIV. A defendant also has the right to represent himself, if he unequivocally makes that request and knowingly, voluntarily and intelligently waives the right to counsel. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). The State agrees that Elwell did not make an unequivocal request to proceed pro se.

[5] Elwell cites the Washington Constitution, WASH. CONST. art. I, § 22, but does not argue that its guarantee differs from the Sixth Amendment.

Elwell had an experienced lawyer, Walter Peale. 2RP 9-10, 12-13, 300. On October 10,[6] Elwell said he would like a new attorney because Peale was asking to continue the trial date to accommodate Peale's recovery from a concussion and because of "other issues." 2RP 5. When the motion for substitution of counsel was heard on October 19, Elwell said he wanted a new lawyer because Elwell and Peale disagreed on some legal issues and it was hard to contact Peale. 2RP 8-11. The motion was denied. 2RP 13. Elwell does not challenge that ruling. Disagreement with counsel is not a basis for substitution of counsel. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). At trial on October 28, defense counsel stated that Elwell's desire for a new lawyer might still be an issue. 2RP 27-28. Elwell again stated that he and Peale disagreed about certain things but did not move for substitution of counsel. 2RP 29-34.

Decisions regarding trial tactics are matters for defense counsel, not the defendant, to decide. Cross, 156 Wn.2d at 606. The defendant decides the goals of litigation (plea or trial) and whether to exercise some specific constitutional rights (e.g., waiver of jury, whether to testify), and it is the attorney's responsibility to determine the means to pursue those goals. Id. at 606-07.

[6] The heading on 2RP 3 shows the date October 29; the Index indicates the hearing was October 10; the content and its place in the chronological series of hearings confirms that.

Thus, it was Peale's responsibility to decide not to pursue a motion to suppress the Pac-Man machine. Defense counsel is not required to pursue motions that he believes are meritless. State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011). The trial court agreed that the seizure was lawful, and the Court of Appeals affirmed that conclusion.

Elwell disagreed with his attorney's decision not to raise a suppression motion and wanted to raise a suppression issue on his own. 2RP 21, 26. He was not forced to proceed pro se — he was permitted to raise an additional motion that his attorney declined to raise. There is no Sixth Amendment right to "hybrid representation," with the defendant serving as cocounsel with his attorney. Bebb, 108 Wn.2d at 524. However, a trial court may allow a defendant's request for hybrid representation, in the trial court's sound discretion. State v. Harris, 48 Wn. App. 279, 283-84, 738 P.2d 1059 (1987); State v. Hightower, 36 Wn. App. 536, 541-43, 676 P.2d 1016 (1984).

The Seventh Circuit has noted that hybrid representation is not forbidden in the interest of the defendant. United States v. Oreye, 263 F.3d 669, 672-73 (7th Cir. 2001). The court concluded that in effect the defendant both had counsel at trial and represented himself and that was more representation than he was entitled to. Id. That is the situation here as well, and the advantage Elwell was permitted does not warrant reversal.

The trial judge allowed Elwell the advantage of presenting a legal issue his attorney declined to raise (with his attorney's assistance), and Elwell has not established that was an abuse of discretion.

3. DEFENSE COUNSEL'S STATEMENTS THAT HIS CLIENT WISHED TO RAISE ARGUMENTS THAT COUNSEL BELIEVED LACKED MERIT DO NOT ESTABLISH A CONFLICT OF INTEREST.

Elwell claims that his right to conflict-free counsel was violated because his counsel told the court that he (counsel) was not making legal arguments that Elwell wished to raise because counsel believed those arguments lacked merit. When Elwell asked his attorney to present Elwell's own arguments, counsel did so, but reiterated his own legal opinion. Counsel's statement of his own legal opinions did not create a conflict of interest.

"[A] conflict over strategy is not the same thing as a conflict of interest." Cross, 156 Wn.2d at 607. In Cross, the Court held that defense counsel's choice to present evidence regarding Cross's poor mental health, over Cross's objection, was a dispute only about trial strategy. Id. at 608. That holding illustrates that even critical decisions about trial strategy are the province of the defense attorney and disagreement does not establish an impermissible conflict with counsel.

In contrast, if there has been a complete collapse of the relationship between the defendant and the lawyer, the defendant has the right to substitute new counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Lack of accord does not constitute a complete collapse of the relationship. Cross, 156 Wn.2d at 606. Elwell does not claim that such a complete collapse occurred in this case and the record reflects that Elwell and his attorney had a cooperative relationship at trial. At Elwell's request, trial counsel agreed to question Officer Craig, argue Elwell's motion to suppress, and present Elwell's request for jury instructions on lesser crimes. 2RP 207, 222, 240-43. Elwell and his attorney often consulted during trial, and his attorney crafted proposed instructions on the lesser offenses. 2RP 23, 31, 211, 249, 251.

To establish a Sixth Amendment violation based on a conflict of interest, a defendant must demonstrate both that his attorney had an actual conflict of interest and that the conflict adversely affected his lawyer's performance. State v. Kitt, 9 Wn. App. 2d 235, 243, 442 P.3d 1280 (2019). If that two-part test is satisfied, prejudice is presumed. Id. An actual conflict of interest exists if a defense attorney "owes duties to a party whose interests are adverse to those of the defendant" in a substantially related matter. Id. at 244. There is no hint that defense counsel in this case owed a duty to anyone other than Elwell.

Elwell proposes that any conflict is an impermissible conflict of interest, but the cases he offers involve counsel's representation of other individuals. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (no Sixth Amendment violation although counsel represented multiple defendants); Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (representation of all three codefendants in robbery and rape case created actual conflict); State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) (no Sixth Amendment violation shown when counsel had in the past or concurrently represented various State and defense witnesses).

Elwell's reliance State v. Regan, 143 Wn. App. 419, 177 P.3d 783 (2008), also is misplaced. The court in Regan addressed whether an impermissible conflict existed when defense counsel testified against the defendant at trial and simply noted that the rule prohibiting conflicts is not limited to concurrent representation of codefendants by one attorney. 143 Wn. App. at 426-27. The rule prohibiting conflicts of interest does not extend to disagreements between defendant and counsel. Cross, 156 Wn.2d at 607; Stenson, 142 Wn.2d at 722.

Elwell also incorrectly claims that if an attorney takes a position against his client on the record, the attorney ceases to satisfy the role of

counsel as guaranteed by the Sixth Amendment.[7] Anders v. California,[8] on which he relies, does not so hold. Anders approved a procedure in which counsel on appeal would file a brief stating that, after review of the record, counsel found all possible issues frivolous, disapproving of counsel being permitted to state that opinion in a conclusory letter. 386 U.S. at 742-44. The Court again endorsed that procedure in Penson v. Ohio,[9] but found a violation of the right to counsel because the state court permitted counsel to withdraw and then considered issues it believed could have merit without the defendant being represented by any attorney. 488 U.S. at 81. Elwell was not left without counsel, and these cases do not condemn his counsel's honest statements of his legal opinions.

Defense trial counsel's opinion that the motion to suppress had no merit was revealed during pretrial motions in this case because Peale told the judge that Elwell wanted to raise it himself. 2RP 20-22. Revealing that opinion was necessary to give Elwell that opportunity and did not establish a conflict of interest. The trial court explicitly allowed Elwell to raise the two issues that defense counsel did not believe had legal merit, so

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[7] State v. Chavez, cited by Elwell, also does not hold that counsel's stating such a position created a conflict of interest; it addressed a claim of ineffective assistance of counsel. 162 Wn. App. 431, 434-37, 257 P.3d 1114 (2011).

[8] 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

[9] 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988).

the court necessarily was aware of counsel's opinion as to those issues. The only way to avoid revealing counsel's opinion would have precluded Elwell from raising them at all.

4. ELWELL HAS NOT ESTABLISHED THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

Elwell's claim that defense trial counsel provided ineffective assistance is meritless, both because counsel's performance was not deficient and because Elwell has not established a reasonable probability that the claimed errors would have changed the verdict. After the verdict a new attorney was appointed, who filed a motion for new trial with a laundry list of claims of ineffective assistance. 2RP 289-92, 299-309, 315. The trial court denied the motion, stating:

> The fundamental problem here is that Mr. Elwell had a very weak case, and there wasn't much that Mr. Peale could do for Mr. Elwell. There wasn't any prejudice to Mr. Elwell from anything that Mr. Peale did. This was -- to use the colloquial phrase "an open-and-shut case." We had video of Mr. Elwell burglarizing the apartment building. We had video of him walking down the street with what was clearly the Pac-Man on the dolly. I mean, even if you were to suppress the Pac-Man, there's the dolly he took from the burglary that you could see on the tape that was there that morning.

2RP 318-19.

To establish ineffective assistance of counsel, a defendant must show both that the representation was deficient, i.e., that it "fell below an

objective standard of reasonableness based on consideration of all the circumstances," and that deficient representation prejudiced the defendant. Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). Judicial scrutiny of counsel's performance must be highly deferential. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Courts begin with a strong presumption that the representation was effective, including a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90.

Counsel's representation is not required to conform to the best practices or even the most common custom, as long as it is competent. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). A reviewing court is required not just to give defense attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

The required showing of prejudice is made only if there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112. Speculation that a

different result might have followed is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

Although Elwell does not contend that Peale was unable to provide effective representation, he implies that Peale was impaired, relying on State v. Lopez, 190 Wn.2d 104, 410 P.3d 1117 (2018). Lopez was a radically different situation, where the trial court concluded that defense counsel's performance was severely impaired by ongoing severe mental illness. Id. at 107. Lopez held that the serious, "clear and debilitating" deficiencies in representation warranted a new trial. Id. at 126-27.

In contrast, here Peale suffered a concussion, a temporary injury, eight weeks before trial, on September 3. CP 10-12. On September 17, Peale obtained the continuance of the trial date that he believed was necessary to recover. 1RP 3-4. On October 10, he was granted another continuance to allow additional recovery time. 2RP 3-6. At the October 19 omnibus hearing, Peale said he had improved considerably and was ready. 2RP 14. On the day trial began, October 29, he said he was confident he was able to proceed. 2RP 29.

In denying the motion for new trial, Judge North stated that he was familiar with Peale, that Peale had tried cases before the judge in the past, and that Peale appeared fine to the court. 2RP 315. There is no indication that counsel's history of a concussion affected him in any way at trial.

There is no basis to consider that historical fact in evaluating the claim of ineffective assistance. What matters is counsel's actual performance.

Elwell's first claim is that trial counsel was deficient because he did not move to suppress the Pac-Man machine. That choice was not deficient because such a motion was meritless, as the lower courts found. Counsel does not have a duty to pursue "strategies that reasonably appear unlikely to succeed." Brown, 159 Wn. App. at 371. Further, Elwell must show that the suppression motion probably would have been successful to establish that he was prejudiced by the decision not to raise it. State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002). The trial court found the seizure lawful. CP 336-38; 2RP 311-12, 318. Thus, the record establishes that a suppression motion would have failed.

Even if the motion had been granted, Elwell cannot show prejudice because the remaining evidence of his guilt was overwhelming, as discussed above. Elwell was caught on video committing the burglary; he was caught on video hours later, in the same clothing, rolling the same dolly with an object the same size as the machine. Ex. 1-3, 6-9; 2RP 174-83, 194-200. Elwell cannot show the outcome would have been different even if the jury did not hear what was under the blanket.

Elwell next claims that Peale was deficient because he suggested that the court rely on trial testimony to decide the suppression issue. That

was a reasonable strategic decision because counsel believed the suppression motion would be denied, as it was. Moreover, because no evidence was excluded, Elwell cannot have been prejudiced by the timing.

Elwell's third claim is that Peale was deficient because he did not challenge admission of Officer Craig's body camera video. The State addressed this claim in its briefing in the Court of Appeals and Elwell's Petition for Review includes no argument regarding it. The Court of Appeals was correct in rejecting this claim. Elwell has never explained how this decision was prejudicial. A second video recording was admitted, from Officer Metcalf's in-car camera, showing Elwell with the blanketed machine. Ex. 9; 2RP 220-21. Elwell cannot establish that excluding Craig's recording would have changed the verdict.

D. CONCLUSION

The State respectfully asks this Court to affirm Elwell's conviction.

DATED this 5th day of August, 2021.

Respectfully submitted,

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By: _____
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