

66143-4

66143-4

No. 66143-4-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

MICHAEL ROOSEVELT SMITH, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether entry into the bedroom closet fell within the protective sweep incident to arrest warrant exception under Maryland v. Buie where the defendant was arrested pursuant to the search warrant for his apartment and the bedroom closet adjoined the area where he was arrested and was an area from which an attack could have been immediately launched given the small size of the apartment.
2. Whether the protective sweep incident to arrest announced in Maryland v. Buie provides the "authority of law" required by the Washington State Constitution where state courts have acknowledged that exception to the warrant requirement and have followed that caselaw.
3. Where the bedroom closet fell within the scope of the warrant as an area to be searched, whether the lock box found in the bedroom closet was lawfully seized in plain view where a separate warrant to seize an item in plain view is not required and the lock box was immediately recognizable to the officers as evidence relevant to their drug investigation.
4. Where the bedroom closet fell within the scope of the warrant as an area to be searched, whether there was substantial evidence in the record to support the court's finding that the lock box was a logical place to keep documents of dominion and control and therefore its seizure fell within the scope of the search warrant.
5. Whether a defendant may raise for the first time on appeal the issue of whether there was probable cause to support a search for documents of dominion and control under the

search warrant where the issue was not raised at the suppression hearing below.

6. Were the appellate court to find that the evidence discovered in the lock box should have been suppressed, whether the two delivery convictions that happened three to three and a half months before the execution of the search warrants should be reversed where the evidence was overwhelming that the defendant was involved in those deliveries.

C. FACTS

1. Procedural Facts.

On December 17, 2009 Appellant Michael Smith was charged with three counts of Delivery of a Controlled Substance – Heroin, one count of Unlawful Possession of a Controlled Substance with Intent to Deliver – Heroin and one count of Possession of a Controlled Substance, - Suboxone. CP 120-22. The information was subsequently amended on September 24, 2010 removing one count of delivery, such that count I charged delivery of heroin on August 28th, 2009, count II delivery of heroin on September 4th, 2009, count III possession with intent to deliver heroin on December 15, 2009 and count IV possession of buprenorphine on December 15, 2009. CP 87-89. Smith moved to suppress evidence of drugs located inside a lock box found during execution of a search warrant on December 15, 2009, arguing that the search of the closet during execution of the first search warrant exceeded the scope of a protective

sweep and that seizure of the lock box exceeded the scope of the warrant, and raising a staleness argument regarding the second warrant which authorized a search of the lock box found in the closet. CP 102-117. Judge Snyder, who authorized the second search warrant, denied the suppression motion, and Smith was found guilty as charged by jury. CP 4-7; 61-62. Smith was sentenced to a standard range sentence all four counts, 110 months on Counts I, II and III and 24 months on Count IV. CP 19-28.

2. Substantive Facts.

In the summer of 2009 Christine Crapser contacted Det. Nelson about becoming an informant¹, and told him that she could buy heroin from “Mike” who was dealing drugs in Bellingham area. 4RP 12-13.² On August 20th, Det. Nelson and Crapser attempted to set up a controlled buy from Smith. While Det. Nelson was listening in, Crapser called “Mike,” whom she identified in court as Smith, about buying heroin, telling him that she “wanted to play basketball,” a common term for an eight ball of heroin³, and Smith told her the price would be \$130. 4RP 12, 25. Once

¹ The informant contract called for dismissal of two counts of delivery of a controlled substance if she completed controlled buys, provided information about the identity of targets, and testified truthfully. 4RP 17, 24-25.

² The State refers to the verbatim report of proceedings in the same manner Appellant does.

³ An eight ball is an eighth of an ounce of heroin. 2RP 54.

she was close to the arranged location, between Texas and Alabama streets, she called him again, and he told her to park in an alley on top of Alabama Street. 4RP 12-13, 25-26. After she had parked, someone other than Smith approached the car, a white male, who asked for a ride to the Lakeway area. 4RP 14. Crapser didn't know the man, so she left and called Smith afterwards, again with Det. Nelson listening in. 4RP 14, 27. When she told Smith that she didn't realize he was sending someone else and that she didn't want to deal with someone she didn't know, Smith told her the guy was a friend of his and that it was okay, that they'd get a hold of each other later. 4RP 14, 27. In the meantime, Sgt. Murphy had seen a white male leave Smith's apartment during the time of the attempted buy and then several minutes later saw the same man go back into the apartment. 2RP 102-04.

On August 28th, another controlled buy was set up for Crapser to purchase heroin from Smith. 2RP 53, 4RP 28. She called him and they discussed where and when to meet, having already agreed to the amount of drugs, an eight ball, and the price, \$130. 4RP 15, 27. She then drove to Texas and Alabama streets, but when she called him, Smith had her meet him near the 7-Eleven on Alabama. 4RP 15. When she arrived there she saw him standing on the sidewalk in front of the Little Bugs store. 4RP 15. As Det. Nelson drove by, he saw a black male matching Smith's

description on the corner. 4RP 28. Crapser parked, spoke with Smith, Smith reached in the car window and placed the drugs on her seat. Crapser paid him and then drove back to the police station. 4RP 15. Det. Laughlin observed the transaction via binoculars from a nearby surveillance position, about 100 feet away, and identified the person who reached into the car as Smith. 2RP 54-56, 78.

Another controlled buy was set up again on Sept. 4th and Crapser was outfitted with a body wire. 2RP 57-58, 4RP 29-30. Crapser called Smith on Sept. 4th and asked to “play basketball” again. Smith agreed and they arranged to meet on Toledo Street near Alabama. 2RP 58, 4RP 16, 29. Again, Crapser called Smith when she was close to the location and he told her he would be there shortly. 4RP 16. Smith then walked to his apartment parking lot, met up with a younger white male, they went back into his apartment and then left again. 2RP 107. Smith, along with the younger white male and a white male carrying a skate board, walked towards Crapser’s car from Alabama Street, and as they passed by the car, the white male contacted Crapser. 2RP 59, 4RP 16, 35, Ex. 13. The white male initially tried to contact her through the passenger window and then walked around to the driver’s side and handed her drugs in a Camel cigarette pack, and she handed him the money. 2RP 59, 4RP 16-17, Ex. 13. The white male then caught up with Smith and the other white male,

and they continued to walk down Toledo Street to Texas Street. 2RP 60-61, 4RP 16. The three of them then went back into Smith's apartment. 2RP 108. The transaction was videotaped. 2RP 59-60, Ex. 13.

On December 15, 2009 officers executed a search warrant for Smith's apartment on Texas Street whereby the officers were authorized to search for a black male in his late 20's named "Mike," who was about six feet tall, weighed about 180 pounds and had a goatee, and to search for documents of dominion and control. 4RP 62, 130; CP 126. Smith had \$715 in his wallet when he was arrested, alone, inside the apartment, and a W-2 form, digital scale and some crib notes were found in a shoe box under his bed. Seven empty Camel cigarette packages were found in the apartment. 2RP 62-65, 4RP 23-24, 36. The W-2 form showed that Smith only made about \$4000 for the entire year in 2008. 4RP 24. A lock box was found inside his bedroom closet in which heroin and buprenorphine was found, along with two empty Camel cigarette boxes and drug paraphernalia. 2RP 63, 65-69, 4RP 36. There was around 175 grams of heroin worth about seven to eight thousand dollars. 2RP 72-73.

Smith testified that he had lived at the Texas Street apartment since June 2009. 4RP 38. He denied delivering heroin to anyone in 2009, denied knowing Crapser and denied that he was the black male in the video. 2RP 121, 130, 4RP 40. He testified that the money in his wallet was his

financial aid money that he received while attending Whatcom Community College and that he didn't have a bank account, so he kept the money on him. 4RP 38-39. He also testified that the lock box belonged to a friend of his, Garrett, that he had told Garrett to come get it, and he had forgotten that the lock box was there. 4RP 39. He admitted though that at the forfeiture hearing he had testified the police had planted the lock box in his apartment and hadn't said anything about a "Garrett." 2RP 128. He also admitted that the cell phone number Crapser called was his number. 2RP 122. He accused the officers of removing the cigarettes out of the Camel boxes in order to build a case against him. 2RP 129.

D. ARGUMENT

Smith asserts that the seizure of the lock box was unlawful because the protective sweep conducted by the police exceeded the scope authorized by law and because the lock box did not fall within the scope of the warrant. He also asserts that the lock box could not be seized even if in plain view, that the officers needed a separate search warrant to seize the lock box. The intrusion into the bedroom closet was lawful under the protective sweep exception to the warrant requirement and also fell within the scope of the original warrant. The seizure of the lock box was lawful under the plain view doctrine because it was immediately recognizable as evidence relevant to the drug investigation. The seizure of the lock box

also fell within the scope of the search warrant as an item that was likely to contain documents of dominion and control. Smith does not assert otherwise, and did not contest that below, but does assert on appeal that there wasn't substantial evidence to support that finding by the court. There is substantial evidence in the record to support the court's finding. Therefore even if the entry into the closet was not lawful under the protective sweep incident to arrest exception, the entry into the closet and the seizure of the lock box fell within the scope of the search warrant.

Smith also contends there wasn't probable cause to support the search warrant's authorization to search for documents of dominion and control in Smith's apartment. He waived this issue by failing to raise it below. Smith asserts that erroneous denial of his suppression motion should result in reversal not only of the convictions related to the drugs found within the lock box but also the delivery convictions. Even if the Court were to find that the trial court erred in denying the motion, reversal of only counts III and IV would be warranted because the evidence was overwhelming that Smith delivered or participated as a principal or accomplice in the delivery of heroin in counts I and II.

1. The search of the closet was a part of a lawful protective sweep under both Article I Section 7 of the Washington State Constitution and the Fourth Amendment of the U.S. Constitution.

Smith challenges the trial court's denial of his motion to suppress evidence found in a lock box discovered during a protective sweep of his apartment's bedroom closet incident to his arrest. Specifically, he asserts that it wasn't a valid protective sweep under both state and federal law.

The protective sweep of the closet was lawful under Maryland v. Buie as incident to Smith's arrest. The closet adjoined the area where Smith was arrested and was a place from which an attack could be immediately launched. The trial court did not err in concluding that the protective sweep of the bedroom closet was reasonable and lawful under the circumstances.

A trial court's decision regarding a CrR 3.6 motion is reviewed on appeal to determine whether substantial evidence supports the findings of fact, and then whether those findings of fact support the trial court's conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Challenged findings of fact supported by substantial evidence are binding. O'Neill, 148 Wn.2d at 571. Substantial evidence is evidence in the record sufficient "to persuade

a fair-minded, rational person of the truth of the finding.” Hill, 123 Wn.2d at 644.

A trial court’s decision on the validity of a warrantless search is reviewed de novo. State v. Kypreos, 110 Wn. App. 612, 616, 39 P.3d 371, *remanded on other grounds*, 147 Wn.2d 1001 (2002). The State bears the burden of proving that a search was reasonable, or an exception to the warrant requirement applies, if a valid warrant did not authorize the search. State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). If a warrant authorized the search, the defendant bears the burden of establishing that the search was unreasonable. *Id.*; *accord*, State v. Weaver, 38 Wn. App. 17, 21, 683 P.2d 1136, *rev. denied*, 102 Wn.2d 1019 (1984).

Under the federal constitution when effecting an arrest inside a home or residence, law enforcement may, “without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The purpose of the sweep is to assure officers “that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.” *Id.* at 333. This type of protective sweep, incident to

arrest, is distinguishable from another type of protective sweep recognized by Buie, which must be based on reasonable suspicion⁴. United States v. Lemus, 582 F.3d 958, 965 n.2 (9th Cir. 2009), *cert. denied*, 131 U.S. 129 (2010). The protective sweep incident to arrest requires only two things: 1) that the area searched must immediately adjoin the area where the arrest occurred, and 2) the area searched must be one from which an attack could immediately be launched. *Id.* at 963. “If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety.” Hopkins, 113 Wn. App. at 959.

Such a protective sweep only extends to cursory inspections of places where a person could be found and may last only as long as necessary to dispel the suspicion of danger. Buie, 494 U.S. at 335; Hopkins, 113 Wn. App. at 959. They may be conducted while or after making an arrest to ensure officer safety. Buie, 494 U.S. at 334; *see also*, Lemus, 582 F.3d at 964 (officers permitted to search living room where defendant was arrested while entering into living room through sliding glass door because living room was immediately adjacent to area where defendant was arrested and was place from which an attack could

⁴ If the protective sweep extends beyond the immediately adjacent area, officers must have a reasonable belief, based on specific and articulable facts, that the area to be swept might harbor a person posing a danger to the officers on the scene. Buie, 494 U.S. at 337; Hopkins, 113 Wn. App. at 959-60.

immediately be launched even though officers could have immediately left the premises after the arrest). In determining whether an area is “immediately adjacent” courts consider the size of the building or dwelling in which the defendant was arrested. *See, e.g., In re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998) (small bedroom few feet down the hall from bedroom where defendant was arrested was “immediately adjacent”); *U.S. v. Lauter*, 57 F.3d 212 (2nd Cir. 1995) (bedroom was “immediately adjoining” area of arrest given small size of apartment).

Smith asserts that there wasn’t reasonable suspicion to believe that there were individuals who posed a danger to the officers within the apartment. Reasonable suspicion however is only required under *Buie* if the place that was searched or swept was not immediately adjacent to the place of arrest. The State is asserting that the protective sweep conducted here was incident to Smith’s arrest in an adjacent area and therefore justified without requiring any articulable reasonable suspicion.

Smith also asserts that a protective sweep can only be performed pursuant to an arrest warrant. That is not the case, it can be performed pursuant to an arrest within a dwelling. *See, State v. Sadler*, 147 Wn. App. 97, 126, 193 P.3d 1108 (2008) (protective sweep of areas in residence adjacent to area where defendant was taken into custody lawful); *State v. Smith*, 137 Wn. App. 262, 268, 153 P.3d 199 (2007), *aff’d on other*

grounds, 165 Wn.2d 511 (2009) (“police may make a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect”); State v. Boyer, 124 Wn. App. 593, 602, 102 P.3d 833 (2004), *rev. denied*, 155 Wn.2d 1004 (2005) (acknowledging weight of authority that limits protective sweeps to arrests or the execution of arrest warrants). The reason for permitting a protective sweep applies equally in the context of an arrest within a residence as well as execution of an arrest warrant within a residence:

The limited intrusion is justified by the ‘interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.’

United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997), *cert. denied*, 522 U.S. 1141 (1998). Moreover, the search warrant in this case was essentially the functional equivalent of an arrest warrant where the warrant authorized the officers to enter the apartment in order to find the person who matched “Mike’s” description, so that they could arrest him.⁵ CP 139.

Here, the court found that apartment 23 was a one bedroom apartment with a closet in the bedroom, that persons other than Smith who

⁵ After the 3.6 hearing the court orally found that the officers were not sure whether the person they encountered on the street near the apartment was the “Mike” who was the person involved in the drug deals and that was the reason they didn’t arrest him on the street. 3RP 29; CP 126, 134-35.

had been involved in the drug deals had been seen coming or going to the apartment, and the officers did not know whether any persons aside from Smith were inside the apartment before they started their surveillance of the apartment on December 15, 2009. CP 4-5, Uncontested Findings of Fact 2, 3, 4. The closet where the lock box was found was in close proximity to the area where Smith was arrested. CP 5, Finding of Fact (hereinafter “FF”) 5, 6.⁶ The closet was an area in which a person could hide and easily exit and surprise officers. CP 5, FF 5.

Additional testimony elicited shows that at least two other persons had been seen assisting “Mike” in dealing drugs and those persons had been seen at, or going in and out of, “Mike’s” apartment. 3RP 9-10, 15. The officers considered the large, walk-in, locked closet in the bedroom a potential threat because someone could have been hiding in the closet. 3RP 11. Smith refused to give them the key to open the closet, but one of the officers was able to easily open the lock with a pocket knife. 3RP 11-12, 20. The officers were not able to confirm via their contact on the street that the “Mike” they were looking for, the one associated with the drug

⁶ While Smith assigned error to the court’s findings no. 5, 6, 7 and 9, Smith does not contest the court’s findings in the context of this issue and does not brief whether there is substantial evidence to support those findings and therefore they should be treated as verities on appeal. *See, State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990) (party’s failure to adequately argue why finding of fact is erroneous waives that assignment of error).

dealing at the apartment, was in fact the defendant Michael Roosevelt Smith. 3RP 8, 14, 19-20.

The apartment was a single bedroom apartment, about 500-700 square feet, with a living area on the right of the front door entrance and a kitchen on the left. 3RP 21. The bedroom was located on the other side of the living area and the closet was on the right side of the bedroom about 5-10 feet from the entrance to the bedroom. *Id.* Smith was arrested inside the apartment.⁷ CP 4, Uncontested FF 1, 2; 3RP 16-17; CP 127, 131, 144.

The court found that the closet in the bedroom was in close proximity to where Smith was arrested and that a person could easily exit the closet and surprise the officers. These findings support the court's conclusion that the officers conducted a reasonable, lawful protective sweep of the apartment including the bedroom closet. CP 6-7, Conclusion of Law ("CL") 1, 2. The lock box was discovered during a lawful protective sweep of the closet incident to Smith's arrest in the apartment.

⁷ The court's oral finding was that the officers entered the apartment, found Mr. Smith, arrested him and then engaged in executing the warrant. 3RP 30. *See, State v. Bynum*, 76 Wn. App. 262, 266, 884 P.2d 10 (1994), *rev. denied*, 126 Wn.2d 1012 (1995) (court's oral findings can be used to supplement the court's written findings as long as they don't contradict the written findings).

2. The protective sweep is recognized by Washington State caselaw and therefore provides the “authority of law” in Art. I §7.

Smith argues that the protective sweep exception to the warrant requirement violates Article I, Section 7 of Washington’s Constitution because it does not provide the “authority of law” required by the state constitution. He does not, however, perform a Gunwall⁸ analysis with respect to this issue. Therefore, the protective sweep doctrine originally set forth in Buie, and recognized by both federal and state case law, provides the “authority of law” required by Article I, Section 7.

Both the federal and Washington State constitutions protect against unreasonable searches and seizures. State v. Bell, 108 Wn.2d 193, 195-96, 737 P.2d 254 (1987), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990). Washington’s constitution generally provides greater protection against warrantless searches and seizures than the Fourth Amendment. *Id.* at 196. Warrantless searches are unreasonable and violate the constitution unless they fall within an exception to the warrant requirement. *Id.*

Smith does not provide a Gunwall analysis of the differences between the state and federal constitutions to support a more protective

⁸ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

state analysis in the context of the protective sweep exception to the warrant requirement. Absent such an analysis an appellate court generally will not address an independent state constitutional ground. State v. Olivas, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993) (“under criteria announced in *Gunwall*, six nonexclusive factors must be briefed before this court will consider an independent state constitutional claim”); *see also*, State v. O’Neill, 148 Wn.2d 564, 584 n.9, 62 P.3d 489 (2003) (Gunwall analysis not necessary only where it is well settled that the particular exception to the warrant requirement is narrower under state law than the Fourth Amendment). This Court should decline to consider this alleged independent state constitutional ground.

Smith asserts that the protective sweep conducted here does not satisfy the “authority of law” required by Art. 1, Section 7 of the state constitution. Article 1, Section 7 provides that “[n]o persons shall be disturbed in his private affairs, or his home invaded, without authority of law.” State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). “Authority of law” is satisfied by a valid warrant. State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008); *accord* Morse, 156 Wn.2d at 7. “Authority of law” is also satisfied by recognized exceptions to the warrant requirement. Morse, 156 Wn.2d at 7. A protective sweep incident to arrest is a recognized exception to the warrant requirement. Smith, 137 Wn. App. at

268; State v. Boyer, 124 Wn. App. 593, 600, 102 P.3d 833 (2004), *rev. denied*, 155 Wn.2d 1004 (2005).

Washington courts have acknowledged the “protective sweep” under Buie, whether the “incident to arrest protective sweep” or the “reasonable suspicion protective sweep”, as lawful if incident to an arrest. *See, State v. Sadler*, 147 Wn. App. 97, 126, 193 P.3d 1108 (2008) (protective sweep of areas adjoining area where defendant was taken into custody, where search did not exceed cursory visual inspection of areas where someone could be hiding, was lawful); Smith, 137 Wn. App. at 268 (officers’ cursory search of home to ensure no one else present part of valid protective sweep where officers only searched those areas which could have concealed a person); Boyer, 124 Wn. App. 593 (refusing to uphold search as search warrant protective sweep, “given the weight of authority specifically limiting protective sweeps to arrests or to executions of arrest warrants); Hopkins, 113 Wn. App. 954⁹.

Smith asserts that no Washington court has recognized a protective sweep incident to a search warrant. The court in Boyer acknowledged and noted that the protective sweep exception has not been extended to the execution of search warrants in Washington and in most jurisdictions.

⁹ In a footnote, the court stated its analysis was limited to the federal constitution because the appellants had only cited to federal authorities. Hopkins, 113 Wn. App. n.2.

Boyer, 124 Wn. App. at 601. Observing that no Washington court has addressed a protective sweep *incident to execution of a search warrant*, the court held that even if such a sweep were permissible the search that occurred in the case exceeded the permissible scope of such a sweep. *Id.* at 602. While the officers here testified that it is their general practice to perform protective sweeps when executing a search warrant, the State is not asserting that the search of the closet was valid pursuant to a protective sweep incident to execution of a search warrant, but rather as incident to Smith's arrest in the apartment.¹⁰

3. Entry into the closet was also within the scope of the original search warrant and the locked box lawfully seized as an item in plain view and/or a container likely to contain documents of dominion and control.

The trial court also found that the seizure of the lock box was within the scope of the original warrant, either under a plain view theory or as a likely receptacle for documents of dominion and control. CP 4-7, FF 7, CL 2; 3RP 32-34. Smith does not contend that the *entry* into the closet was not within the scope of the warrant, but asserts that the officers

¹⁰ The court's conclusion that the protective sweep was lawful under the circumstances encompasses the State's argument that the sweep was lawful as incident to Smith's arrest. To the extent that the findings are construed as not to include such a conclusion, the State submits this argument as an alternative basis for upholding the search. *See, State v. Bobic*, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000) (A trial court's denial of a motion to suppress may be upheld on an alternative ground supported by the record.)

could not *seize* the lock box. He asserts that the plain view doctrine does not authorize seizure of the item and that the lock box was not contraband. He also asserts that there wasn't substantial evidence to support the court's finding that lock box was a logical location for a person to store documents of dominion and control. The plain view doctrine does not authorize seizure of contraband or evidence of a crime where the prior intrusion is justified by a warrant or an exception to the warrant requirement. Therefore, as the officers' entry into the closet fell within the scope of the original warrant, the seizure of the lock box was lawful as an item in plain view because they immediately recognized it as evidence relevant to their drug investigation. In addition, the lock box could be seized within the scope of the warrant as an item that obviously and by reasonable inference from the evidence was an item that logically could contain documents of dominion and control.

The entry into the closet was within the scope of the original warrant. Under the federal constitution, "[w]here a warrant has been issued, 'a lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.'" United States v. Martinez, 949 F.2d 1117, 1120 (11th Cir. 1992) (*quoting* United States v. Ross, 456 U.S. 798, 820-21, 102

S.Ct. 2157, 72 L.Ed.2d 572 (1982)); *see also*, State v. Llamas-Villa, 67 Wn. App. 448, 454, 836 P.2d 239 (1992) (“places which may be searched pursuant to a search warrant are not excluded due to the presence of locks or because some additional act of entry or opening may be required”). The search warrant authorized the officers to look in the closet because it was a place where documents of dominion and control might be found.

a. The lock box was appropriately seized as an item in plain view.

Smith contends that under the plain view doctrine officers cannot actually seize the incriminating evidence or contraband, that the officer must instead apply for a warrant to actually seize the item. That is not the law – under the plain view doctrine, under Washington law, officers may seize an item that they observe in plain view. Smith also contends that the item was not contraband, but items that may be seized pursuant to the plain view doctrine are not limited to contraband, they include any item that is immediately recognizable as incriminating evidence. Based on the information the officers had at the time the lock box was observed in the closet, the item was immediately recognizable as incriminating evidence and thus the seizure of the lock box fell within the plain view exception.

The plain view doctrine is one of a few “jealously and carefully drawn” exceptions to the warrant requirement. State v. Gibson, 152 Wn. App. 945, 954, 219 P.3d 964 (2009).

The ‘plain view’ doctrine is an exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. . . . The doctrine requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime.

O’Neill, 148 Wn.2d at 582-83; *see also*, Gibson, 152 Wn. App. at 954 (“‘plain view’ doctrine justifies a seizure only when the officer has lawful ‘access’ to the seized contraband under some prior Fourth Amendment justification and when the officer has probable cause to suspect that the item is connected with criminal activity”). Under the Washington State Constitution the discovery of the incriminating evidence must also have been inadvertent.¹¹ State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

Once the initial intrusion is determined to have been lawful, pursuant to a warrant or exception to warrant requirement, then contraband observed in plain view may be seized. Bell, 108 Wn.2d at 199; Horton v. California, 496 U.S. 128, 136-37, 142, 110 S. Ct. 2301,

¹¹ Inadvertence is not required under the federal constitution. *See*, Horton v. California, 496 U.S. 128, 130, 110 S. Ct. 2301, 2304, 110 L. Ed. 2d 112 (1990) (“even though inadvertence is a characteristic of most legitimate “plain-view” seizures, it is not a necessary condition”).

110 L. Ed. 2d 112 (1990); *accord*, State v. Hudson, 124 Wn. 2d 107, 114, 874 P.2d 160 (1994); *see also*, State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991) (officer's seizure of contraband did not violate the plain view doctrine); Gibson, 152 Wn. App. at 954 ("officer may seize evidence without a warrant if he has made a justifiable intrusion and inadvertently sights contraband in plain view"); State v. Hoggatt, 108 Wn. App. 257, 271, 30 P.3d 488 (2001) (plain view involves three stages, one of which is seizure, and as long as requirements of plain view are met a warrant is not necessary); United States v. Robles, 45 F.3d 1, 6 (1st Cir. 1995), *cert. denied*, 514 U.S. 1043 (1995) (" Law enforcement agents may seize evidence in plain view during a lawful search even though the items seized are not included within the scope of the warrant."). Under the plain view doctrine, items other than those listed in a search warrant may be seized if: 1) there was a prior justification for the intrusion into the area searched; 2) the incriminating evidence was inadvertently discovered; and 3) the item was immediately recognized as incriminating evidence or contraband. State v. Anderson, 41 Wn. App. 85, 96, 702 P.2d 481 (1985) *reversed on other grounds*, 107 Wn.2d 745 (1987).

Smith relies upon Justice Stewart's concurring opinion in Coolidge v. New Hampshire, 403 U.S. 443, 467-68, 91 S. Ct. 2022, 2039, 29 L. Ed. 2d 564 (1971), in arguing that items found in plain view may not be

seized. However, as noted in Horton v. California, Justice Stewart's opinion in Coolidge did not garner a majority:

Justice Stewart then described the two limitations on the doctrine that he found implicit in its rationale: First, that "plain view *alone* is never enough to justify the warrantless seizure of evidence,"; and second, that "the discovery of evidence in plain view must be inadvertent."

Justice Stewart's analysis of the "plain-view" doctrine did not command a majority, and a plurality of the Court has since made clear that the discussion is "not a binding precedent."

Horton v. California, 496 U.S. 128, 136, 110 S. Ct. 2301, 2307, 110 L. Ed.

2d 112 (1990) (internal citations omitted).¹² Moreover, Justice Stewart

himself recognized that once the initial intrusion to the area where the item

was seized was justified by a warrant or an exception to the warrant

requirement, there was no need to obtain a warrant to seize contraband.

Coolidge, 403 U.S. at 465. He further explained:

The 'plain view' doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as 'hot pursuit' or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful

¹² State v. Myrick, 102 Wn.2d 506, 514-515, 688 P.2d 151 (1984), cited by Smith for this same proposition, relies upon the same passage in Justice Stewart's opinion that has since been overruled. State v. Swetz, 160 Wn. App. 122, 134-35, 247 P.3d 802 (2011) cited by Smith cites to the same passage in Myrick that relied upon Justice Stewart's Coolidge opinion, and the case addresses the open view, as opposed to plain view doctrine.

search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

Id. at 467-68. Therefore, where officers immediately recognize an item as incriminating evidence, they are lawfully entitled to seize it under the plain view doctrine.

Smith also asserts that the lock box was not immediately recognizable as “contraband”, but concedes that the officers’ testimony could have supported probable cause to believe the box was potentially incriminating. Appellant’s brief at 31. An item does not need to be “contraband” in order for an officer to be entitled to seize it under the plain view doctrine. As long as there is probable cause to believe that the item is evidence, it may be seized. See, O’Neill, 148 Wn.2d at 583 (under plain view doctrine, officers may seize items immediately recognized as “incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime”); Gibson, 152 Wn. App. at 954 (officer may seize item under plain view doctrine where “officer has probable cause to suspect that the item is connected with criminal activity”).

While Smith assigned error to finding of fact 6, he did not argue that there was not substantial evidence to support that finding within the brief. Therefore, the court’s finding that the Det. Loughlin immediately

recognized the lock box as evidence relevant to the case should be taken as a verity on appeal. Sgt. Murphy testified at the hearing that she had been told by a girl who had been selling heroin for Smith that Smith had a lock box in which he kept his heroin, cash and other items, and the girl had had a similar lock box in which she had kept her heroin. 3RP 4-5. Det. Loughlin was aware of this information, in addition to being aware based on his training that such boxes are commonly used by drug dealers to hide drugs, crib notes and money. 3RP 12. Det. Loughlin testified he noticed the box when he entered the closet to make sure no persons were inside, and after seeing it notified Sgt. Murphy. 3RP 12. The officers immediately recognized the lock box as incriminating evidence in the case and lawfully seized it under the plain view doctrine.

b. The lock box was also an item in which documents of dominion and control would be found and therefore fell within the scope of the warrant.

The lock box also fell within the scope of the original warrant as an item likely to contain documents of dominion and control. Smith does not contend that it was unreasonable the officers seized the lock box as a potential receptacle for documents of dominion and control. Smith only contends that there isn't substantial evidence to support the court's finding that the lock box was a logical place to store documents of dominion and

control, asserting that the officers only testified that they thought it could contain drugs and money. While the officers may have seized the lock box in their thinking under a plain view theory, it was the defendant's burden below to establish that the officers' seizure of the lock box was unreasonable because the search warrant authorized seizure of documents of dominion and control, and the lock box fell within the scope of the search warrant. *See, Hopkins*, 113 Wn. App. at 958 (if a warrant authorized the search, the defendant bears the burden of establishing that the search was unreasonable). The judge's finding that documents of dominion and control could be found in such a lock box was a reasonable inference from the testimony and evidence before him, and therefore substantial evidence supports that finding.

As noted above, substantial evidence exists if the evidence is sufficient "to persuade a fair-minded, rational person of the truth of the finding." A court is entitled to make reasonable inferences from the testimony and/or evidence presented. *See, State v. Serrano*, 14 Wn. App. 462, 469, 544 P.2d 101 (1975) (court permitted to reasonably infer from testimony presented at suppression hearing that officer's actions were to protect himself from description of officer's and defendant's actions). Receipts for rent, letters bearing the address of the residence, driver's license, etc. are documents that have been found to be evidence of

dominion and control over a premises. Weaver, 38 Wn. App. at 19. Boxes and briefcases have been found to be possible receptacles for documents of dominion and control. *See, Robles*, 45 F.3d at 7 (box was a possible repository for items mentioned in the warrant, such as papers, documents and photographs, of which seizure was authorized); United States v. Gonzalez, 940 F.2d 1413 (1991), *cert. denied by Sanders v. U.S.*, 502 U.S. 1047 (1992) (search of locked briefcase valid because search warrant for residence where locked briefcase found authorized search for documents and currency which could have been contained within the briefcase).

Here at the application for the search warrant to open the lock box, heard by Judge Snyder, the box was described as a silver vault lock box, approximately 10 inches by 6 inches with a rolling keypad.¹³ CP 145. One officer testified at the suppression hearing that based on his experience drug dealers keep their cash and crib notes, as well as drugs, in such boxes, that they had been told Smith kept his cash in his lock box and that only one document of dominion and control had been found elsewhere in the apartment. 3RP 4-5, 12, 18; CP 151.

¹³ One of the items sought for in the second search warrant, the warrant for the lock box, were documents of dominion and control. CP 146.

There did not need to be testimony at the suppression hearing that the officers believed the lock box could contain papers of dominion and control – it was Smith’s burden with respect to this basis for upholding the search to show that it was unreasonable to conclude that the lock box could have held documents of dominion and control. Smith did not assert at the hearing that it was not reasonable to conclude that the lock box would contain documents of dominion and control, only that the officers had already found one such document and that the lock box was not mentioned in the warrant. 3RP 23-24. Moreover, if the officers believed that currency and crib notes could be found inside the lock box it was reasonable for the judge to infer that other papers, documents of dominion and control, could be found within the box. The dimensions of the lock box alone supported the judge’s finding that the lock box could have contained documents of dominion and control, *e.g.* bills, letters, etc. This evidence is sufficient to persuade a fair-minded person of the truth of the judge’s finding.

4. Smith waived his asserted issue regarding whether there was probable cause to support the search warrant for documents of dominion and control by failing to raise it below.

Smith admits that his assertion that there wasn’t probable cause to search for documents of dominion and control is a new basis for

suppression that he did not raise below. See Appellant’s Brief at 36 n. 13. Smith did not preserve this issue for appeal and probable cause to support issuance of a search warrant is not the type of issue that falls under the new four factor test exception to the preservation requirement under State v. Robinson.¹⁴ This Court should decline to review this issue.

Generally, Washington Courts do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). However, an exception may apply when a party raises a manifest error affecting a constitutional right. RAP 2.5(a)(3):

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a “ ‘manifest error affecting a constitutional right.’ ” ... This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. ... The principle also predates RAP 2.5(a). *See, e.g., State v. Silvers*, 70 Wash.2d 430, 432, 423 P.2d 539 (1967) (“Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts.”).

State v. Robinson, 171 Wn. 2d 292, 253 P.3d 84, 89 (2011) (internal citations omitted). “In fairness, the opposing party to a new issue should have an opportunity to be heard on it. This opportunity to be heard should

¹⁴ State v. Robinson, 171 Wn. 2d 292, 253 P.3d 84, 89 (2011).

not be delayed until the appellate stage, absent unusual circumstances.”

State v. McAlpin, 108 Wn.2d 458, 462, 740 P.2d 824 (1987).

With respect to suppression of evidence, the burden is on the defendant to request a suppression hearing and identify the issue for the trial court. CrR 3.6; State v. Gould, 58 Wn. App. 175, 185, 791 P.2d 569 (1990). A defendant’s failure to move to suppress evidence he asserts was unlawfully obtained waives any error associated with admission of the evidence. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); *see also*, State v. Lee, ___ Wn. App. ___, 2011 WL 3088167 (July 26, 2011) (“A failure to move to suppress evidence, however, constitutes a waiver of the right to have it excluded.”). A defendant also waives the ability to assert an issue on appeal if he failed to move for suppression *on that basis* in the trial court. State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *rev. denied*, 168 Wn. 2d 1027 (2010) (emphasis added); *accord*, United States v. Barrett, 703 F.2d 1076, 1086 n. 17 (9th Cir. 1983) (defendant may not assert a different ground for suppression on appeal than that which was raised at the trial court); *see also*, State v. Richards, 4 Wn. App. 415, 427, 482 P.2d 343 (1971) (claim of constitutional violation insufficient where issue raised on appeal required findings not made at trial court because trial court has responsibility to make findings of fact based on the legal objections raised below).

The insistence on preserving issues for appeal promotes the efficient use of judicial resources by permitting the trial court to correct errors, thereby avoiding unnecessary appeals. Robinson, 171 Wn.2d at 89. The preservation requirement was recently modified to permit certain, limited issues to be raised on appeal for the first time, but only when four factors have been met.

We recognize, however, that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency. Accordingly, we hold that principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. A contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion.

Id. at ¶ 21. The four factor test permits a defendant who, in reliance on binding precedence, declines to file a meritless motion to suppress evidence clearly barred by that precedence while discouraging defendants from bringing meritless motions in the first place. Id. at ¶ 23. Failure to meet one of the four factors means the issue was not preserved for appellate review. Lee at ¶ 12.

Smith's probable cause issue does not meet this four factor test and therefore his issue was not preserved for appeal. Whether probable cause supports a search warrant is not a novel issue and its parameters have not been recently changed by a new constitutional interpretation. Smith does not otherwise demonstrate how his new issue constitutes a manifest error of constitutional magnitude under RAP 2.5 in context of the facts of this case.

Moreover, there was probable cause for the search warrant to search the apartment for documents of dominion and control in order to determine who "Mike" was and that the apartment was his residence. "A judge's decision to issue a warrant is reviewed for abuse of discretion, and great deference is accorded that decision." State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217, 224 (2003). The facts are "evaluated in a common sense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant." *Id.* Probable cause exists if the facts "establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." Jackson, 150 Wn. 2d at 264; State v. Hampton, 114 Wn. App. 486, 60 P.3d 95 (2002), *rev. den.*, 149 Wn.2d 1023 (2003) (probable cause to support issuance of a search warrant exists if there are "facts sufficient for a reasonable person to conclude that evidence of criminal activity will be

found in the place to be searched.”). There must be a nexus between the alleged criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched. Hampton, 114 Wn. App. at 490. “Probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity.” State v. Maddox, 152 Wn. 2d 499, 510, 98 P.3d 1199, 1204 (2004). “Common sense is ‘the ultimate yardstick’ of probable cause.” Maddox, 152 Wn.2d at 512.

Here during testimony in support of issuance of the search warrant, Sgt. Murphy informed the commissioner that law enforcement was seeking a search warrant in order to find “Mike” at the apartment and for documents of dominion and control in order to confirm that the apartment was his residence. CP 134-35, 139. At the time officers had reason to believe that this “Mike” was dealing drugs in the vicinity of or from that apartment and that the apartment was his residence. CP 136-37, 139-41. Mike had been seen on his cell phone at that apartment while he had been arranging a drug deal. CP 137-38. If the apartment was indeed “Mike’s” residence, then it was reasonable for the commissioner to infer that documents would exist inside the apartment that would show his “dominion and control” over the apartment. A common sense review of the testimony provided to the commissioner shows that he did not abuse his discretion in finding probable cause to believe that documents of

dominion and control, showing that the residence belonged to “Mike,” would be found within apartment 23. *See, Maddox*, 152 Wn.2d at 510-11 (reasonable for court to infer from evidence that defendant was dealing drugs from his home that there would be evidence of drug dealing within the home). In order to convict Smith, the State had to prove that Smith, not some other “Mike,” was the one involved in delivering the drugs and proof that the apartment was Smith’s residence was evidence that Smith was that “Mike” where some of the activities related to the drug deals occurred at that apartment.

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999) cited by Smith, is inapposite. *Thein* does not hold that a judge may not make reasonable inferences from the evidence when reviewing an application for a warrant. *Thein* stands for the proposition that a judge may not reasonably infer that a person is dealing drugs from their home simply from the fact that the building is the dealer’s home where the evidence is that the person dealt drugs from a different location.

5. Even if the evidence found within the lock box should have been suppressed, Smith’s delivery convictions should be affirmed.

If this Court were to find that the trial court erred in upholding the seizure of the lock box and its subsequent search, then the items found within the lock box, the 175 grams of heroin and the buprenorphine, and

admitted at trial would have to be suppressed. The convictions for possession of heroin with intent to deliver and possession of buprenorphine, counts III and IV, then would have to be vacated. Suppression of those items, however, does not require vacation of the delivery convictions as the evidence was overwhelming that Smith was the one who delivered the heroin on Aug. 28th and was a principal or accomplice to the Sept. 4th delivery. In the context of arguing that suppression of the lock box would require vacation of all convictions since the four counts were joined for trial, Smith appears to argue that the trial court erred in denying his motion to sever. The court did not abuse its discretion in denying severance, and the fact that the counts were joined for trial does not require vacation of counts I and II even if counts III and IV were to be vacated.

Offenses properly joined may be severed if the court determines severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b). The failure to sever a consolidated trial is only reversible error upon a showing by the defendant that the court's decision was a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990). Defendants must show that a joint trial would be so manifestly prejudicial as to outweigh concerns for judicial economy. *Id.* at 718. In determining whether the

potential prejudice outweighs the concern for judicial economy, the court considers and balances the following factors: (1) the jury's ability to compartmentalize the evidence, (2) the strength of the State's evidence on each count; (3) the clarity of defenses as to each count; (4) the court's instruction to the jury to consider each count separately; and (5) the cross-admissibility of the evidence of the offenses charged even if not joined for trial. State v. Kalakosky, 121 Wn.2d 525, 537-39, 852 P.2d 1064 (1993). Even if evidence of one count would not be admissible in another, this does not as a matter of law provide a sufficient basis for showing that manifest prejudice would result from a joint trial. Bythrow 114 Wn.2d at 720.

The trial court did not err in denying Smith's motion for severance. As the incidents were alleged to have occurred on separate dates, it was and would have been easy for the jury to compartmentalize the incidents, and the jury was instructed to consider the charges separately. CP 69, (Inst. No. 4). While Smith admits that the State's case on counts III and IV, the possession of heroin with intent to deliver and the possession of buprenorphine, was strong, the State's evidence on the delivery counts was strong as well. The State had a video of one of the controlled buys, and although Smith asserts that the informant was generally an unreliable witness, her testimony was corroborated by the officers present during the

controlled buys. Smith's defenses on the counts were clear: his defense to the two controlled buys was that he was not the person who delivered the drugs and that it wasn't him, and his defense as to the presence of the lock box in his apartment was that it wasn't his, that it belonged to a friend of his, Garrett. The evidence of the heroin, etc. found in the apartment was cross-admissible in the delivery counts: the prior deliveries, both 3 to 3 1/2 months before, were circumstantial evidence of his intent regarding the heroin he possessed in his apartment, and the heroin found in his apartment was circumstantial evidence regarding his involvement in the controlled buys, particularly the Sept. 4th controlled buy where he did not personally deliver the drugs to the informant. *See, State v. Thomas*, 68 Wn. App. 268, 273, 843 P.2d 540 (1992), *rev. denied*, 123 Wn.2d 1028 (1994) (evidence of prior uncharged deliveries admissible to show intent regarding drugs defendant possessed when arrested); *State v. Hubbard*, 27 Wn. App. 61, 64, 615 P.2d 1325 (1980) (evidence of defendant's prior drug sale over six years before was relevant to rebut his denial of intent to sell a controlled substance; question of remoteness was matter for the sound discretion of trial judge). The trial court found that the controlled buys would be admissible to show Smith's intent regarding Count III, the possession with intent to deliver heroin count, and denied the motion.

2RP 35. The trial court did not abuse its discretion in denying Smith's severance motion.

Smith asserts that all four convictions would have to be reversed if the lock box were suppressed because the convictions were joined for trial and the evidence of the heroin found in the lock box would predispose the jury to convict on the delivery counts. Erroneous admission of other misconduct requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial.¹⁵ State v. Halstein, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). If the Court were to hold that the evidence contained within the lock box should have been suppressed, only counts III and IV would need to be suppressed because the evidence regarding the other two counts was quite strong, independent of the evidence of heroin and buprenorphine found in the lock box.

Here, each of the two deliveries were controlled buys, made to the cell phone number Smith admitted was his. The informant testified about each controlled buy and one unsuccessful attempt. She testified that Smith was the one who delivered the drugs to her at Little Bugs on Aug. 28th and

¹⁵ Even if a constitutional harmless error test were applied, the two delivery counts would not need to be reversed because the untainted evidence was so overwhelming that the jury would have found him guilty without the evidence of the heroin in the lock box. State v. Thomas, 91 Wn. App. 195, 203, 955 P.2d 420 (1998) ("Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.").

that Smith was the one with whom she set up the Sept. 4th buy and that she saw him approach the car, although he wasn't the one who handed her the drugs in the Camel cigarette package. 4RP 15-17. Det. Nelson corroborated the informant's testimony regarding the phone calls to set up the buys because he had listened in on them. An audiotape played for the jury corroborated the informant's description of the Sept. 4th delivery. 4RP 34-35. The videotape of the Sept. 4th delivery was admitted and played for the jury. 2RP 61, 73, 189-91.

The informant's testimony was further corroborated by the officers' personal observations. Det. Nelson testified that the black male that he observed at the Little Bugs store on Aug. 28th matched Smith's description. Det. Laughlin testified that through binoculars he observed Smith hand something through the informant's car window at the Little Bugs store. Sgt. Murphy identified Smith as the black male whom she saw on Sept. 4th approaching the informant's car. She also saw Smith on his cell phone on the landing outside his apartment before the delivery, she then saw him meet up with a younger white male in the parking lot, saw them go back into the apartment and then leave the apartment again to go to the buy and then saw them, along with another male, go back into the apartment. 2RP 106-08, 142-44. The officers testified that Smith was on

the cell phone that day the same time that the informant was talking to him on the phone. 2RP 106, 4RP 31.

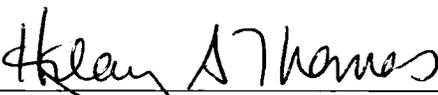
Det. Nelson testified further that Smith had \$715 in his wallet when he was arrested, a digital scale and some crib notes were found in a shoe box under his bed and seven empty Camel cigarette packages were found in the apartment. 4RP 23-24, 36. Even without the evidence of the heroin in the lock box found in Smith's apartment, the evidence was overwhelming that Smith either delivered and/or was an accomplice to the deliveries that occurred on Aug. 28th and Sept. 4th 2009.

The counts were properly joined for trial, and even if the drugs found in the lock box were suppressed, only counts III and IV would need to be vacated. The evidence on counts I and II was so strong that there isn't a reasonable probability that admission of the heroin found in Smith's apartment a few months after the deliveries materially affected the outcome of the trial on the delivery counts.

E. CONCLUSION

The State requests Smith's convictions for two counts of delivery of heroin, one count of possession of heroin with intent to deliver and one count of possession of buprenorphine be affirmed.

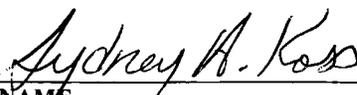
Respectfully submitted this 19th day of August, 2011.


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Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, SUSAN WILK, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

 08/22/2011
NAME DATE