

71191-1

71191-1

No. 71191-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CORNELIUS RITCHIE,

Appellant.

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

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BRIEF OF APPELLANT

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## A. INTRODUCTION

Cornelius Ritchie was convicted of five counts of possession of a controlled substance with intent to deliver based on his mere proximity to drugs located in a public place over which he had no dominion and control. After observing Mr. Ritchie crouch down near a building, two community corrections officers discovered an eyeglasses case that held 27 pills containing four different controlled substances. Mr. Ritchie was placed under arrest and the contents of his cell phone searched without a warrant. Various text messages from Mr. Ritchie's cell phone were improperly admitted during trial for the purpose of establishing his propensity to deliver controlled substances.

Mr. Ritchie's convictions were based on insufficient evidence and contravene the due process clause of the Fourteenth Amendment. The warrantless search of Mr. Ritchie's cell phone, in which he has an increased privacy interest as recognized by the United States Supreme Court in *Riley v. California*, violated the Fourth Amendment. Other errors during trial separately warrant reversal of Mr. Ritchie's convictions and remand for a new trial. Lastly, two of Mr. Ritchie's convictions violate double jeopardy and the trial court exceeded its authority when imposing sentencing conditions.

B. ASSIGNMENTS OF ERROR

1. Mr. Ritchie's convictions violate due process because the evidence was insufficient to allow any rational trier of fact to find the elements beyond a reasonable doubt.

2. The warrantless search of Mr. Ritchie's cell phone violated the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution.

3. Mr. Ritchie's rights to a fair trial and to be presumed innocent were violated when the prosecutor informed the jury during opening statements that Mr. Ritchie was currently incarcerated.

4. The trial court's admission of unrelated text messages suggesting that Mr. Ritchie had delivered controlled substances on previous occasions was manifestly unreasonable and prejudicial.

5. The trial court's admission of suspected marijuana and hashish, as well as a recorded telephone call, was manifestly unreasonable and prejudicial.

6. Cumulative error materially affected the outcome of the trial and violated Mr. Ritchie's right to a fair trial.

7. Mr. Ritchie's convictions for two separate counts of possession of oxycodone with intent to deliver violate double jeopardy.

8. The trial court exceeded its sentencing authority when it prohibited contact with an individual who was unrelated to the crimes for which Mr. Ritchie was convicted.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to prove possession where Mr. Ritchie was merely observed in proximity to the contraband? Was there insufficient evidence to establish that Mr. Ritchie intended to deliver the controlled substances where there were no indicia of drug dealing?

2. A search of a cell phone is distinguishable from other types of searches. Modern cell phones implicate privacy concerns far beyond those implicated by the search of other personal effects because of their immense storage capacity. Does the United States Supreme Court's recent decision in *Riley v. California* require a community corrections officer to obtain a warrant before searching the contents of a probationer's cell phone?

3. Every criminal defendant is entitled to a fair trial by an impartial jury, which includes the right to the presumption of innocence. The trial court has a constitutional duty to shield the jury from learning of a defendant's custody status. Was Mr. Ritchie's right to be presumed innocent violated when the prosecutor informed the jury during opening statements that Mr. Ritchie has remained in custody since his arrest?

4. ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. The State bears a substantial burden to show admission of prior misconduct is appropriate for a purpose other than propensity. Did the trial court's admission of text messages unrelated to the controlled substances with which Mr. Ritchie was charged violate ER 404(b), where its only purpose was to establish that Mr. Ritchie was predisposed to selling drugs?

5. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination more or less probable. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Did the trial court abuse its discretion by admitting suspected marijuana and

hashish that were found near the controlled substances at issue? Did the trial court err in permitting a recorded telephone conversation to be played for the jury where Mr. Ritchie refers to marijuana, hashish, and a text message that the trial court had already determined was inadmissible?

6. Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. When viewed together, did the errors that occurred in Mr. Ritchie's trial create a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict?

7. Double jeopardy protects a defendant from being punished multiple times for the same offense. When the legislature has defined the scope of a criminal act, a defendant may not be convicted twice under the same statute for committing just one unit of the crime. Does Mr. Ritchie's conviction for two counts of possession of oxycodone with intent to deliver violate double jeopardy, where both charges arose out of the same incident and were based on two different pills containing oxycodone found in one location?

8. A court may only impose a sentence that is authorized by statute. The Sentencing Reform Act authorizes a trial court to impose crime related prohibitions. Did the trial court exceed its authority when it prohibited contact with Esther Bower as a condition of Mr. Ritchie's sentence, where Ms. Bower was neither a victim nor a witness to the crimes for which Mr. Ritchie was convicted?

C. STATEMENT OF THE CASE

On May 17, 2013, Community Corrections Officers (CCOs) Grace Schultz and Nicholas Bajema located Cornelius Ritchie using a global positioning system (GPS) monitor that he was wearing as a condition of his community custody. 2 RP 88.<sup>1</sup> Mr. Ritchie was first observed walking on a Whatcom Creek trail with a woman later identified as Brittany Clossen. 3 RP 330; 5 RP 460. The CCOs noticed nothing out of the ordinary as they monitored the pair and their movements. 2 RP 154.

The CCOs then drove to 1801 Cornwall and watched the pair exit the wooded area. 2 RP 90-92. Mr. Ritchie walked through a parking lot and crouched down near a building. 2 RP 97. The CCOs

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<sup>1</sup> The verbatim report of proceedings (RP) is consecutively paginated and referred to by the volume number listed on the cover page. The opening statement is contained in a separate volume and referred to by date.

could not tell what Mr. Ritchie was doing and were unable to see his hands. 2 RP 150-51, 182. Mr. Ritchie then returned to the trail and left the area. 2 RP 108. A few minutes later, he arrived at the Department of Corrections (DOC) office, where he was scheduled to meet with CCO Schultz. 1 RP 8.

The CCOs checked the area where Mr. Ritchie had crouched down and saw the following items partially hidden by the vegetation: a silver purse, a black case for eyeglasses, and a black film canister. 2 RP 108. They searched these items and discovered suspected marijuana inside the silver purse, suspected hashish inside the film canister, and different colored pills inside the eyeglasses case. 2 RP 120, 125, 130. The CCOs collected these items and returned to DOC to meet with Mr. Ritchie. 2 RP 186.

CCO Schultz immediately required that Mr. Ritchie submit to a urinalysis test, which returned negative for controlled substances. 1 RP 8; 2 RP 134. Nevertheless, Mr. Ritchie was then taken into custody for violating conditions of his supervision. 1 RP 8, 2 RP 186. The CCOs told Mr. Ritchie about the items they had found in the area where he had been observed. 2 RP 134-34, 186.

Mr. Ritchie was cooperative and answered their questions politely, but also expressed his astonishment that he was being taken into custody. 2 RP 188. Mr. Ritchie explained that he never possessed the items and was unaware of their contents. 2 RP 155, 186. Mr. Ritchie testified that he had seen other people looking at something by the building and he went to see what was in the bushes. 3 RP 335. Mr. Ritchie did not touch the items and did not know what was inside them until told by the CCOs when he was placed under arrest. 3 RP 336.

Without a warrant, the CCOs seized Mr. Ritchie's cell phone and searched its contents. 2 RP 191. CCO Schultz photographed content she saw on the cell phone, including text messages. 2 RP 204; Ex. 33. They also searched Mr. Ritchie's duffel bag and residence without a warrant, finding no controlled substances or any other indicia of drug dealing. 2 RP 161, 200.

Five counts of possession of a controlled substance with intent to deliver were submitted to the jury.<sup>2</sup> CP 44-46, 75-76. These charges

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<sup>2</sup> The charging document shows that Mr. Ritchie was actually charged with six counts of possession of a controlled substance with intent to deliver, including count five that alleged possession of methadone. CP 46. However, no testimony regarding methadone was introduced at trial. *See* 2 RP 212. During discussions regarding jury instructions, the defense made a motion to dismiss count five and the State conceded that dismissal was appropriate. 3 RP 343. However, rather than printing a new verdict form, the parties agreed to let the prosecutor address the charge during closings and simply scribble out count five on the verdict form.

stemmed from 27 pills located in the eyeglasses case, which included: (1) one peach tablet and one white tablet that contained oxycodone, (2) 18 orange tablets that contained amphetamine, (3) three tablets that contained hydrocodone, and (4) four blue tablets that contained diazepam. 2 RP 212. The jury returned guilty verdicts on all counts. CP 75-76. The court sentenced Mr. Ritchie to 90 months on each count to be served concurrently with one another. CP 131-32.

E. ARGUMENT

- 1. These convictions violate due process because there was insufficient evidence for any rational trier of fact to find the elements beyond a reasonable doubt.**

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *Id.* at 16. Such

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3 RP 344; CP 76.

inferences must be “logically derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” *Bailey v. Alabama*, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). As discussed below, there was insufficient evidence to prove the elements of both possession and intent to deliver, requiring reversal and dismissal of these convictions.

a. There was insufficient evidence to establish possession.

Possession is defined in terms of personal custody or dominion and control. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (citing *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

Possession may be either actual or constructive. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). In closing argument, the prosecuting attorney explained that he was not alleging constructive possession and instead argued that Mr. Ritchie actually possessed the controlled substances. 3 RP 397. However, because the jury was instructed on both actual and constructive possession, both are addressed below.

i. *There was no evidence that Mr. Ritchie actually possessed the pills contained in the eyeglasses case.*

Actual possession means that the controlled substances are in the personal custody of the person charged. *Callahan*, 77 Wn.2d at 29.

Actual possession requires physical custody. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996).

In *State v. Hults*, law enforcement searched a residence that they had observed the defendant frequenting and discovered a large quantity of marijuana. 9 Wn. App. 297, 298, 513 P.2d 89 (1973). The defendant's fingerprints were located on the marijuana packaging. *Id.* at 299. The court concluded that "the defendant's access and proximity to the cache of marijuana and his fingerprints on 2 or 3 of the kilos is totally insufficient to establish actual possession." *Id.* at 300. Because the defendant did not have the marijuana on his person at the time of the arrest, "no serious issue of actual possession" was presented. *Id.*

In *State v. Callahan*, law enforcement entered a houseboat and found the defendant sitting near various drugs and paraphernalia. 77 Wn.2d at 28. The defendant admitted that he had handled the drugs earlier. *Id.* at 29. However, the court determined there was insufficient evidence that the drugs were in the personal custody of the defendant as required:

There was no evidence introduced that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that he had handled the drugs earlier. Since the drugs were not found on the defendant, the only basis upon which the

jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

*Id.* (citing *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958)).

In *State v. Spruell*, law enforcement found the defendant's fingerprint on a plate that had held cocaine. 57 Wn. App. 383, 386, 788 P.2d 21 (1990). The court reasoned that the fingerprint on the plate proved only that the defendant had touched the plate. *Id.* Because touching the plate would only establish passing control, the evidence did not establish actual possession. *Id.*

Unlike the defendants in *Spruell* and *Hults*, there was no evidence of Mr. Ritchie's fingerprints on any of the items found. Unlike the defendant in *Callahan*, Mr. Ritchie did not admit to handling the items. Mr. Ritchie had never been seen with these items before. 2 RP 154. They were in a public area near a building, not an area exclusively used by Mr. Ritchie. At most, the evidence showed mere proximity to the items, which is insufficient to establish actual control as required. The evidence failed to prove that Mr. Ritchie ever

had personal custody of the drugs and consequently failed to prove actual possession.

ii. *There was no evidence that Mr. Ritchie had dominion and control over the items found.*

“Constructive possession” means that the person charged with possession exercised dominion and control over the contraband. *Staley*, 123 Wn.2d at 798. “Courts determine whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001) (citing *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). Constructive possession cases are fact sensitive. *George*, 146 Wn. App. at 920.

In order to establish constructive possession, “the State must prove more than passing control; it must prove actual control.” *State v. Robinson*, 79 Wn. App. 386, 391, 902 P.2d 652 (1995) (citing *Staley*, 123 Wn.2d at 801). Mere proximity to drugs and evidence of momentary handling will not support a finding of constructive possession. *George*, 146 Wn. App. at 920; *Spruell*, 57 Wn. App. at 388-89. “The rule is that ‘where the evidence is insufficient to establish dominion and control of the premises, mere proximity to drugs and evidence of momentary handling is not enough to support a

finding of constructive possession.” *George*, 146 Wn. App. at 920 (quoting *Spruell*, 57 Wn. App. at 388). Knowledge of the presence of a controlled substance is also insufficient to prove dominion and control. *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977).

In *Spruell*, the evidence was also insufficient to establish constructive possession. 57 Wn. App. at 389. The defendant was simply present in the kitchen where drugs were found. *Id.* at 388. “There was no evidence relating to why [the defendant] was in the house, how long he had been there, or whether he had been there on days previous to his arrest.” *Id.* Because the evidence was consistent with the defendant being a mere visitor to the house, there was no basis for finding that he had dominion and control over the drugs and thus his conviction was reversed and dismissed. *Id.* at 388-89.

In *State v. Cote*, the evidence was insufficient to prove constructive possession where the defendant was a passenger in a truck containing components of a methamphetamine lab. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). The defendant’s fingerprint was found on a Mason jar containing chemicals in the back of the truck. *Id.* His conviction was reversed because the fingerprint only proved that the defendant touched the jar. *Id.* Mere proximity and touching is

insufficient to establish dominion and control and thus there was no evidence of constructive possession. *Id.*

In *State v. George*, the defendant was a backseat passenger in a vehicle where law enforcement located drug paraphernalia on the floorboard near where he was seated. 146 Wn. App. at 912-13. Again, the court held that there was insufficient evidence to establish constructive possession based on proximity alone. *Id.* at 923. There was no evidence about the defendant's past use or ownership of drugs or paraphernalia and no such items were found on his person. *Id.* at 922. There was no evidence of dilated pupils, odor on his person, matches, or a lighter to suggest that the defendant had been smoking marijuana. *Id.* There was no fingerprint evidence linking the defendant to the paraphernalia and he made no admissions. *Id.* Therefore, the State had only shown proximity, which could not on its own prove dominion and control. *Id.*

Mr. Ritchie did not have dominion and control over the items in the public area where they were located. Mr. Ritchie's GPS did not ever place him in that particular area prior to his arrest. 2 RP 200-01. There was no fingerprint evidence linking Mr. Ritchie to the items. There was no evidence that he ever touched the items. There was no

evidence establishing who placed those items in the bushes or when they were placed there. No other contraband was found on Mr. Ritchie's person, in his duffel bag, or at his residence. At most, the evidence established that Mr. Ritchie was in mere proximity to the contraband when he crouched down near the bushes.

No rational juror could find that the totality of these circumstances establish Mr. Ritchie's dominion and control over the drugs found in the eyeglasses case. There was therefore insufficient evidence to establish constructive possession. Because the evidence failed to prove either actual or constructive possession, Mr. Ritchie's convictions violate due process and require reversal.

b. There was insufficient evidence to prove intent to deliver.

“Washington case law forbids the inference of an intent to deliver based on bare possession of a controlled substance absent other facts and circumstances[.]” *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Mere possession of drugs, without more, does not raise the inference of the intent to deliver. *State v. Reichert*, 158 Wn. App. 374, 391, 242 P.3d 44 (2010). “The courts must be careful to preserve the distinction and not turn every possession of a minimal amount of a controlled substance into a possession with intent to

deliver without substantial evidence as to the possessor's intent above and beyond the possession itself." *Brown*, 68 Wn. App. at 485.

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession. *Id.* Where intent to deliver is inferred from possession of a large quantity of a controlled substance, some other factor must be present. *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000) (citing *State v. Hutchins*, 73 Wn. App. 211, 216, 868 P.2d 196 (1994)).

Washington courts have recognized certain indicia of intent to deliver controlled substances. A defendant's possession of a substantial amount of cash is a factor that may indicate intent to deliver. *Campos*, 100 Wn. App. at 224. Scales and ledgers are also factors that support an inference of intent to deliver. *Id.* at 223; *State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002). A lack of packing material, separate packaging, scales, and drug paraphernalia weigh against an inference of intent to deliver. *Hutchins*, 73 Wn. App. at 218.

In *State v. Brown*, an experienced police officer testified that 20 rocks of cocaine was more than a person would carry for personal use. 68 Wn. App. at 485. The defendant did not have a weapon, a

substantial sum of money, scales, packaging, or other paraphernalia indicative of sale or delivery. *Id.* Moreover, the cocaine was not separately packaged and officers observed no actions suggesting sales, delivery, or solicitation. *Id.* This evidence was insufficient to establish an intent to deliver beyond a reasonable doubt. *Id.*

None of Mr. Ritchie's actions observed by the CCOs suggested that Mr. Ritchie intended to deliver *any* controlled substances, let alone those found in the eyeglasses case. The CCOs searched Mr. Ritchie's person, his duffel bag, and his residence and found no evidence indicative of drug dealing or an intent to deliver. 2 RP 200. There was no evidence of cash, scales, packaging, paraphernalia, weapons, or ledgers. This evidence is insufficient to establish the inference that Mr. Ritchie intended to deliver the pills located by the CCOs. As such, his convictions violate due process and reversal is required.

A defendant whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)). Consequently, this Court should reverse and dismiss all charges with prejudice.

**2. The warrantless search of the contents of Mr. Ritchie's cell phone unreasonably invaded his private affairs contrary to the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution.**

RCW 9.94A.631(1) provides, "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." This statute, insofar as it may be interpreted to allow a community corrections officer to search the content of an offender's cell phone without a warrant, is unconstitutional as applied to Mr. Ritchie.

The touchstone of the Fourth Amendment is reasonableness. *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). The reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 18-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)). Article 1, section 7 provides greater protection of individual rights and places greater emphasis on the right

to privacy than the federal constitution. *State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994).

A probation search is permissible if conducted pursuant to a state law that satisfies the Fourth Amendment's reasonableness standard. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). "The Fourth Amendment's reasonableness standard balances the special law enforcement needs supporting the state law scheme against the probationer's privacy interests." *United States v. Conway*, 122 F.3d 841, 842 (9th Cir. 1997). Appellate courts review the validity of a warrantless search de novo. *State v. Kypreos*, 110 Wn. App. 612, 616, 39 P.3d 371 (2002) (citing *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir. 1996)).

- a. A search of digital information contained in a cell phone implicates a substantially greater individual privacy interest than other types of searches.

Washington courts have held that a probationer has a reduced expectation of privacy because of the State's continuing interest in supervising them. *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984). However, a probationer's "diminution of Fourth Amendment protection can only be justified to the extent actually necessitated by the legitimate demands of the operation of the parole process." *Id.*

(quoting *State v. Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973)).

The privacy interest implicated by the search must therefore be balanced against the degree to which it is needed to achieve the legitimate governmental interest at issue. *See Knights*, 534 U.S. at 119.

In its recent decision in *Riley v. California*, the United States Supreme Court recognized the powerful privacy interest an individual has in the contents of their cell phone and held that a cell phone cannot be searched incident to an arrest without a warrant. \_\_\_ U.S. \_\_\_, 124 S. Ct. 2473, 2485 (2014). Like probationers, an arrestee has a “reduced privacy interest upon being taken into police custody.” *Id.* at 2488. “An individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.” *United States v. Robinson*, 414 U.S. 218, 237, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (Powell, J., concurring).

“The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” *Riley*, 134 S. Ct. at 2488. Not every search is “acceptable solely because a person is in custody.” *Maryland v. King*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1 (2013). Similarly, not every search is acceptable solely because the person is on probation.

“Modern cell phones are not just another technological convenience ... with all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’” *Riley*, 134 S. Ct. at 2494-95 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). A search of a cell phone is distinguishable from other types of searches:

Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee’s pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

*Id.* at 2488-89. Cell phones differ quantitatively and qualitatively from other objects that may be on a person. *Id.* at 2489. “Many of these devices are in fact microcomputers” that could just as easily be called “cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.” *Id.* One of the most distinguishing features of cell phones is their immense storage capacity. *Id.*

The ability of a cell phone to store vast amounts of information has significant consequences for privacy. *Id.* It collects many distinct types of information in one place, which reveal much more in

combination than any isolated record. *Id.* “The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.” *Id.* Privacy interests are also implicated because internet search and browsing history can be found on these types of devices. *Riley*, 134 S. Ct. at 2490. Furthermore, data on a cell phone can reveal a person’s movements with great precision. *Id.* Prior to the digital age, people did not carry a “cache of sensitive personal information with them as they went about their day.” *Id.*

Allowing the government to scrutinize such records on a routine basis is dramatically different from allowing it to search “a personal item or two in the occasional case.” *Id.* A cell phone search will typically expose to the government far more than the most exhaustive search of a house, since a phone contains not only sensitive records previously found in a home, but a “broad array of private information never found in a home in any form – unless the phone is.” *Id.* at 2491.

The United States Supreme Court has now recognized that individuals have an increased privacy interest in the contents of their cell phones. While other types of searches have previously been

deemed reasonable under RCW 9.94A.631(1), Mr. Ritchie's increased privacy interest in the content of his cell phone has not yet been subjected to the *Griffin* reasonableness test that applies to probationary searches. *Riley* has made clear the significant privacy interest at stake, which must be balanced against the legitimate governmental interests.

b. Mr. Ritchie's privacy interest in the content of his cell phone outweighs any government interests.

A state's probation system presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements. *Griffin*, 483 U.S. at 873-74. The government has an interest in rehabilitating probationers, imposing restrictions upon them, assuring that those restrictions are observed, and protecting the community from harm. *Id.* at 875.

Requiring a warrant to search the content of a probationer's cell phone would not interfere with the probation system and its purposes. If a CCO suspects a violation of conditions, he or she may arrest the offender without a warrant. RCW 9.94A.631(1). If a CCO has reason to suspect that a cell phone contains evidence of criminal activity, he or she could seize it and apply for a warrant. *See Riley*, 134 S. Ct. at 2486. Warrantless searches into the content of a cell phone are not necessary

for a community corrections officer to carry out his or her supervisory responsibilities effectively.

Mr. Ritchie's privacy interest in the vast amount of content contained within his cell phone outweighs any legitimate governmental interest in unlimited access to the content of the cell phone and, as such, the search was unreasonable. RCW 9.94A.631(1) as applied to Mr. Ritchie, which permits a community corrections officer to require an offender to submit to a search of his "personal property" is unconstitutional as applied to Mr. Ritchie.

- c. The warrantless search of Mr. Ritchie's cell phone may be challenged for the first time on appeal.

While Mr. Ritchie did not move to suppress the evidence obtained from the unlawful search of his cell phone, review is appropriate. Under RAP 2.5(a)(3), an appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Because an issue involving an unlawful search is one of manifest constitutional error, it may be addressed for the first time on appeal. *See, e.g., State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010) (defendant's failure to file motion to suppress before trial did not waive issue of whether his constitutional rights were violated under

intervening decision); *State v. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005) (appellant did not waive error based on bad search warrant because it involved constitutional issue); *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (appellate court can review suppression issue where adequate record exists, even in the absence of motion and trial court ruling).

“[W]hen an adequate record exists, the appellate court may carry out its longstanding duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.” *Contreras*, 92 Wn. App. at 313 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). The record here is sufficient to establish the circumstances of the unlawful search. CCO Schultz testified that she seized Mr. Ritchie’s cell phone and immediately searched its contents. 2 RP 191; Ex. 33. She took photographs of the screen of the cell phone, which were admitted into evidence at trial. 2 RP 192.

In addition to review under RAP 2.5(a)(3), Mr. Ritchie satisfies the requirements for an exception to the principle of issue preservation. *See State v. Robinson*, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). Issue preservation does not apply if the following 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. *Id.*

*Riley* was decided after Mr. Ritchie was sentenced and provides a new controlling constitutional interpretation of the significant privacy interests implicated by cell phone searches. "A 'new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.'" *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). Therefore, Mr. Ritchie qualifies for an exception to the principle of issue preservation. As such, this court should review the challenge to the warrantless search of Mr. Ritchie's cell phone.

- d. This Court should reverse with instructions to suppress the evidence obtained from the cell phone search and all fruits.

Evidence obtained pursuant to an unconstitutional search and fruits of an illegal search must be suppressed. *State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 (1992); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The admission of

evidence obtained in violation of the Fourth Amendment “is constitutional error and presumed prejudicial.” *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). The State bears the burden of demonstrating the error is harmless. *Id.* Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *Id.*

The State put forth no evidence other than the text messages obtained from the cell phone to establish the intent to deliver element. Absent the evidence unlawfully seized from the cell phone and its fruits, the State cannot prove beyond a reasonable doubt the result would have been the same. Accordingly, this Court should reverse.

**3. Mr. Ritchie’s right to be presumed innocent was violated when the prosecuting attorney informed the jury during his opening statement that Mr. Ritchie had been in custody since his arrest.**

Every criminal defendant is entitled to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV § 1; Const. art. I, §§ 3, 21, 22. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation

in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). “It is the duty of the court to give effect to the presumption by being alert to any factor that could ‘undermine the fairness of the fact-finding process.’” *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (quoting *Estelle*, 425 U.S. at 503).

Violations of the right to an impartial jury and the presumption of innocence are reviewed de novo. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). Whether a particular practice had a negative effect on the judgment of jurors receives “close judicial scrutiny.” *Estelle*, 425 U.S. at 504. The likely effects are evaluated “based on reason, principle, and common human experience.” *Id.*

The presumption of innocence guarantees that every criminal defendant is “brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Due process requires the trial judge to be “ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The court's

duty to shield the jury from learning of a defendant's custody status is a constitutional mandate. *Gonzalez*, 129 Wn. App. at 901.

In *State v. Gonzalez*, the trial court informed the jury that the defendant was in custody because he could not afford to post bail. *Id.* at 898. The defendant made a motion for a mistrial, which was denied. *Id.* at 899. The conviction was reversed because drawing the jurors' attention to the fact that the defendant was indigent and incarcerated was manifest constitutional error. *Id.* at 901. "This strikes at the very heart of the presumption of innocence." *Id.* at 903.

The facts here are analogous to those in *Gonzalez*. The prosecuting attorney informed the jury of Mr. Ritchie's custody status during his opening remarks:

After, after the Department of Corrections community corrections officers found these items and made initial determination of what these things were, they arrested the defendant and he's been in custody since.

10/15/13 RP 5. Mr. Ritchie objected to these improper comments and moved for a mistrial. 10/15/13 RP 5, 8. While acknowledging that this comment was prejudicial, the trial court denied the motion. 10/15/13 RP 8, 9.

Informing the jury that Mr. Ritchie was in custody at the time of trial is inherently prejudicial because of the unmistakable inference of

the need to separate him from the community at large. *See State v. Jaquez*, 105 Wn. App. 699, 709, 20 P.3d 1035 (2001). The fundamental right to a fair trial demands minimum standards of due process. *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). When a trial right as fundamental as the presumption of innocence is abridged, reversal is required. *Id.* The improper comment was made at the very outset of trial, tainting the lens through which the jury viewed the entire trial. This court should consequently reverse and remand for a new trial.

**4. The trial court's admission of text messages unrelated to crimes with which Mr. Ritchie was charged and suggesting drug dealing on previous occasions was manifestly unreasonable.**

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

The trial court improperly admitted the following text messages:

May 3, 2013:

I texted you at around that time for I was going to come pick you up if you came to town. Drive you home and

get your ass smoked the fuck out. And give ya some hash and pills so you party party with you friends and roommates. Lol<sup>[3]</sup>

May 12, 2013:

Hey so my roomies are really interested in doing something harder that pot, like e and [I] heard you mention it once plus [I] dont know anyone else so . . if thats a possibility will you let me know? Hehe is that weird? I feel like [I] shouldnt feel awk about that but idk? :)<sup>[4]</sup>

May 12, 2013:

Well, you should of asked sooner and I could of just gave you some E. plus you shouldn't feel awk asking me about anything. What I will do is call the bitch who usually has it and ask her for some. Enough for two or three people right. Know you want to get in on that right. Lol. So does this sound good.<sup>[5]</sup>

May 15, 2013:

Jess, hey you. Might need to come over tomorrow and do some stuff. People who will meet me there don't want lots of people around if you know what I mean. This will be around 10 am. So it is cool to come over then if need be. Plus remember. You are my #1 go to girl on all my product. You and Brian. Hit me up.<sup>[6]</sup>

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<sup>3</sup> All text messages provided to Mr. Ritchie in discovery were addressed in his motions in limine. CP 36-42. This text message was addressed in motion in limine 5(a) and was referred to as such in the trial court's ruling. CP 36; 1 RP 55.

<sup>4</sup> This text message was addressed in motion in limine 5(b) and was referred to as such in the trial court's ruling. CP 36; 1 RP 55.

<sup>5</sup> This text message was addressed in motion in limine 5(c) and was referred to as such in the trial court's ruling. CP 36; 1 RP 55.

<sup>6</sup> This text messages was addressed in motion in limine 5(f) and was referred to as such in the trial court's ruling. CP 39; 1 RP 55-56.

May 17, 2013:

This idiot loves you to. Very much so. Plus wanted to tell you that our pills are all money makers and were looking at like 600 bucks. That's 300 each for they and the money from them are ours. Okay. Promise.<sup>[7]</sup>

CP 36, 39-41; 1 RP 55-56. The court admitted an exhibit containing the substance of all the text messages deemed admissible. Ex. 34.<sup>8</sup> As discussed below, these text messages were not relevant, unduly prejudicial, and used only for the purpose of establishing Mr. Ritchie's propensity to deliver controlled substances.

a. The text messages were not relevant.

Evidence that is not relevant is not admissible. ER 402. To be relevant, evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). This definition includes facts which offer direct or circumstantial evidence of any element or defense. *Id.*

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<sup>7</sup> This text messages was addressed in motion in limine 5(j) and was referred to as such in the trial court's ruling. CP 40; 1 RP 56. The court ruled this text was inadmissible, but it was presented to the jury in violation of the court's ruling. 1 RP 56; Ex. 34.

<sup>8</sup> Ex. 34 is attached as Appendix A.

- b. The text messages should have been excluded because of their prejudicial nature.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. In doubtful cases the scale should be tipped in favor of the defendant and exclusion of evidence. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (2003) (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Firstly, the trial court ruled that the text message that includes “our pills are all money makers and we’re looking at like 600 bucks” was *not* admissible. 1 RP 56. When going through its rulings on the defense’s motion to exclude each text message, the court said, “And (j); the motion is granted because I think the prejudicial effect of the statement is not outweighed by its evidentiary value especially given the difficulty in deciphering what was being said in that text.” *Id.* However, the exhibit containing the content of the text messages included this text message in violation of the court’s ruling. Ex. 34.

The prejudicial effect of this text message is established by the trial court's ruling.

Secondly, the texts messages are dangerously misleading, susceptible to misinterpretation, and invite the jury to determine guilt on an improper basis. These messages informed the jury that Mr. Ritchie had engaged in conversations regarding unrelated controlled substances prior to his arrest. This prejudicial effect significantly outweighed any limited probative value of these messages and the trial court erred when admitting them into evidence.

c. The admission of the text messages violated ER 404(b).

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421. Accordingly, the State bears a “substantial burden” to show admission of prior misconduct is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Evidence of a prior act may be admissible for purposes other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident.” ER 404(b). Before a trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. Close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

i. *The trial court failed to identify the purpose for admitting the text messages and did not engage in the required balancing test on the record.*

To avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). The record must in some way show that the court, after weighing the consequences of admission, made a conscious determination to admit or exclude the evidence. *Id.* (citing *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

The court did not identify the purpose of the text message evidence, balance its probative value against its prejudicial effect, or in

any way state its reasons for admitting this evidence on the record.<sup>10</sup> 1  
RP 55-56. Rather, the court heard argument, took a recess, and then  
simply stated which text messages were admissible and which were not.  
*Id.* “Without such balancing and a conscious determination made by  
the court on the record, the evidence is not properly admitted.” *Tharp*,  
96 Wn.2d at 597. Failure to engage in this balancing process is error.  
*State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996).

The Supreme Court has stated that it “cannot overemphasize the  
importance of making such a record.” *Jackson*, 102 Wn.2d at 694. The  
process of articulating prejudice and comparing it to probative value  
ensures a thoughtful consideration of their relative weight. *Id.*  
However, a failure to articulate the balance between probative value  
and prejudice does not necessarily require reversal. *Carleton*, 82 Wn.  
App. at 686. There are two circumstances in which failure to weigh  
prejudice on the record under ER 404(b) is harmless error. *Id.*

The first circumstance is when the record is sufficient for the  
reviewing court to determine that even if the trial court had weighed the  
evidence’s probative value against its prejudicial effect, the evidence

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<sup>10</sup> The court sometimes provided explanations regarding the reasons for  
granting the defense’s motion and excluding a text message. *See* RP 55-56.  
However, the court did not similarly provide an explanation when denying the  
defense’s motion and finding a text message admissible. *See id.*

still would have been admitted. *Id.* (citing *State v. Gogolin*, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986)). As previously discussed, the text messages have little, if any, probative value, which was undoubtedly outweighed by their highly prejudicial nature. If the trial court had properly considered the relative weight of probative value and prejudice, it would have likely excluded the text messages. Consequently, the first circumstance in which a failure to articulate balancing may be harmless is inapplicable.

The second circumstance is when, considering the other untainted evidence, the appellate court concludes that the jury would have reached the same verdict even if the trial court had excluded the evidence. *Carleton*, 82 Wn. App. at 686. There was no other evidence presented that established Mr. Ritchie's intent to distribute. The prosecutor relied on these text messages in closing argument when he asserted that he had proven the intent to distribute element beyond a reasonable doubt. 3 RP 424. The jury would have likely reached a different verdict if these text messages had been properly excluded. Because neither of the two circumstances are present, the trial court's failure to weigh prejudice on the record was not harmless error and requires reversal.

ii. The text messages were not evidence of a common scheme or plan.

The State argued that these text messages established a common scheme or plan. 1 RP 43. “To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

Caution is called for in application of the common scheme or plan exception for prior bad acts. *DeVincentis*, 150 Wn.2d at 18. The degree of similarity between the prior act and the charged act must be substantial. *Id.* at 20. To be admissible as a common scheme or plan, the prior misconduct must show a strong indication of a design, not a disposition. *See id.* at 25 (citing *Lough*, 125 Wn.2d at 858-59). Prior acts involving possession of drugs with intent to deliver cannot be used to show subsequent intent to deliver absent facts substantially similar to those of the prior offense and sufficient to establish a common design. *State v. Wade*, 98 Wn. App. 328, 337, 989 P.2d 576 (1999).

The State cannot show any similarities between the conduct inferred from the text messages and Mr. Ritchie's conduct on the date of his arrest. The text messages discussed ecstasy, but there was no ecstasy in the eyeglasses case. 2 RP 212. The text messages do not establish any facts substantially similar as required, such as a tendency to keep drugs in certain types of containers or hide drugs in public areas. As such, these text messages did not qualify for the common scheme or plan exception to the general prohibition against admitting evidence of prior bad acts.

*iii. The text messages were improperly admitted for the purpose of establishing Mr. Ritchie's propensity to deliver controlled substances.*

“In no case ... regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The State argued that the text message evidence establishing prior conversations about drug transactions were admissible to prove that Mr. Ritchie intended to sell the pills in the eyeglasses case. 1 RP 32, 35. The State made clear its intent to use this evidence to establish Mr. Ritchie's propensity to engage in drug dealing:

Well, Your Honor, the allegations that we have is that the defendant is, I mean he's charged with possession with intent and essentially we are calling the defendant a drug dealer. Here we have someone who is asking for something harder than pot mentioning that he or she had heard about E and knew that the defendant had talked about it once.

1 RP 32. The State further elucidated its position:

The defendant is charged with possession with intent to deliver. We are not talking about E specifically, but the fact he's willing to provide E is something that the jury should know because we believe the Defendant is engaged in. He has eight, nine, ten different drugs in his possession,<sup>[11]</sup> that we believe are in his possession at the time he's contacted, and the fact that he's talking about one more because that's what someone else wants they are going talking about money, giving, talking about instead of pot something harder, I think that's all relevant, all relevant to this case to show the defendant had the intent to deliver the other items.

1 RP 35.

In *State v. Wade*, the court considered whether it is legally appropriate to infer from a defendant's past drug dealing the intent to deliver in the present act. 98 Wn. App. at 335. This evidence may not be admitted to show propensity:

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<sup>11</sup> The prosecutor's assertion that Mr. Ritchie had as many as ten different drugs in his possession is a gross misstatement of the evidence. The testimony at trial showed that the crime lab found four different controlled substances in the eyeglasses case: oxycodone, amphetamine, hydrocodone, and diazepam. 2 CP 212.

Wigmore describes the nature of this inference as at least a three-step process because “an act is not evidential of another act”; there must be an intermediate step in the inference process that does not turn on propensity. “[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X as now charged.”

*Id.* (quoting Wigmore on Evidence § 192, at 1857). Using the defendant’s prior delivery of controlled substances to prove current intent invited the jury to infer that because the defendant had the intent to distribute drugs previously, he must therefore possess the same intent now. *Id.* at 336. This is the exact inference that ER 404(b) forbids because it depends on the defendant’s propensity to commit a crime. *Id.* “This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person’s guilt or innocence.” *Id.*

The prosecutor clearly articulated that the purpose of admitting the text messages was to establish this forbidden inference. 1 RP 32, 35. The facts here are comparable to those in *Wade* and the admission of these text messages is correspondingly improper. The text messages were admitted to establish the inference that because Mr. Ritchie previously had conversations about delivering drugs, he was

predisposed to have the same intent on the current occasion and therefore he acted in conformity therewith. Admission of this propensity evidence was manifestly unreasonable.

- d. The admission of the text messages was prejudicial error and requires reversal.

Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *Tharp*, 96 Wn.2d at 599. Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

There was no evidence introduced at trial that indicated Mr. Ritchie had any intent to deliver the controlled substances found in the eyeglasses case. In his rebuttal closing, the prosecuting attorney emphasized the text message evidence:

Delivery means any transfer. It does not mean money has to be transferred. Trading pills, that's what he's doing, that's delivery. Giving away pills is delivery, he's providing pills, he's talking about in his first text that you're going to see in Exhibit No. 34 that's what he's doing, that's delivery. And I think it's pretty clear later on in Exhibit 34 that he has the intent to deliver. He's trying to set up a delivery, we cross examined the defendant about that.

3 RP 424. The prosecutor is unmistakably arguing that the text messages establish that Mr. Ritchie is a drug dealer and thus he must have had the intent to deliver these drugs based on this propensity. Because there was no other evidence establishing any intent to deliver and because the prosecutor emphasized this text message evidence in closing, there is a reasonable probability that the outcome would have been different if this evidence had not been erroneously admitted. The error is prejudicial and requires reversal.

**5. The trial court's admission of suspected marijuana and hashish, as well as a recorded telephone conversation, was manifestly unreasonable.**

The trial court abused its discretion when it admitted the suspected marijuana and hashish into evidence. The trial court also erred when it admitted the contents of a recorded telephone call between Mr. Ritchie and an unidentified individual. During the telephone call, Mr. Ritchie discussed the contents of a text message that the court had already deemed unduly prejudicial and thus inadmissible at trial. Ex. 35; 1 RP 56. Mr. Ritchie also referenced the marijuana and hashish found in proximity to the pills in the eyeglasses case. Ex. 35. As discussed below, admission of this evidence was manifestly unreasonable and constitutes prejudicial error.

- a. The evidence pertaining to the marijuana and hashish was not relevant.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. The fact that marijuana was discovered in the silver purse and that hashish was found in the film canister is not probative of whether Mr. Ritchie possessed the pills in the eyeglasses case or whether he intended to deliver those pills.

The discussion regarding the marijuana and hashish on the recorded telephone call is also not relevant. In permitting this evidence, the court stated:

In my view Mr. Ritchie’s statements to the effect that the containers contained marijuana and [hashish] again goes to the question of possession and knowledge of the contents of the containers and that’s directly pertinent to the elements the State has to prove here. Clearly Mr. Ritchie will not suffer criminal consequences in this proceeding for possession marijuana or possessing marijuana or [hashish]. First of all it’s not clear that it is marijuana or [hashish], and secondly he’s not charged with possession of them.

2 RP 260-61. The court then reasoned that since the telephone conversation regarding marijuana and hashish was being admitted, the marijuana and hashish itself was also admissible. 2 RP 263. The court

indicated that if the State had not connected the marijuana and hashish with the recorded telephone call, the evidence would not have been admitted. *See id.*

The trial court's ruling reveals its fundamental misunderstanding of the evidence. The trial court reasoned that because Mr. Ritchie discussed the marijuana and hashish in the telephone call, it tended to establish that he knew the contents of the items found by the CCOs. 2 RP 260. However, both CCO Bajema and CCO Schultz had already testified that they informed Mr. Ritchie at the time of his arrest about what drugs they had found. 2 RP 134-35, 186. Therefore, Mr. Ritchie's knowledge of the presence of the marijuana and hashish is not probative of possession because the CCOs told him about their presence. Neither the presence of the suspected marijuana and hashish, nor Mr. Ritchie's reference to them in a telephone call, were relevant to the elements of the crimes charged.

- b. The prejudicial nature of this evidence greatly outweighed any probative value.

Because the marijuana and hashish had no probative value, the prejudicial effect of informing the jury about these other elicited substances found in proximity to the controlled substances at issue required exclusion of the evidence.

The admission of the portion of the jail phone call discussing the text message that referenced pills and money also violated ER 403.<sup>12</sup> Mr. Ritchie can be heard talking about this text message on the recorded telephone call. Ex. 35 (4:50 to 6:37). The court had already determined that the substance of the text itself was inadmissible because “the prejudicial effect of the statement is not outweighed by its evidentiary value especially given the difficulty in deciphering what was being said in that text.” 1 RP 56. Since the court had already determined that the prejudicial nature of the text message outweighed any probative value, the trial court abused its discretion when admitting Mr. Ritchie’s recorded discussion regarding this text.

c. The admission of this evidence was prejudicial and merits reversal.

The jury placed great weight on the recorded telephone conversation, as demonstrated by their request to hear it again during their deliberations. CP 74; 4 RP 435. In ruling that the jury would have the opportunity to have this evidence repeated for them, the trial

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<sup>12</sup> This text message was addressed in motion in limine 5(j) and read:

This idiot loves you to. Very much so. Plus wanted to tell you that our pills are all money makers and were looking at like 600 bucks. That’s 300 each for they and the money from them are ours. Okay. Promise.

CP 40; Ex. 34.

court reasoned, “I know we often don’t play testimony, but this particular tape was pretty pivotal in the factual arguments made by both parties so I think it’s appropriate to say yes to this request.” 4 RP 436.

There is a reasonable probability that the outcome of the trial would have been different had the error not occurred, as illustrated by the court’s comments and the jury’s request to revisit this evidence. The error is therefore prejudicial and reversal is required.

**6. Cumulative trial errors denied Mr. Ritchie his constitutional right to a fair trial.**

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that the defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668

(1984) (accumulated evidentiary errors committed by the trial court and violations of discovery rules by prosecutor necessitated new trial).

The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

**7. Mr. Ritchie was punished multiple times for the same offense in violation of double jeopardy.**

Mr. Ritchie's convictions for two counts of possession of oxycodone with the intent to deliver as charged in counts four and six violate double jeopardy. *See* CP 45-46. The proper interpretation and application of the double jeopardy clause is a question of law which is reviewed de novo. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008) (citing *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007)).

A double jeopardy violation may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998) (citing *State v. O'Connor*, 87 Wn. App. 119, 123, 940 P.2d 675 (1997)).

The double jeopardy provisions in the state and federal constitutions protect citizens from multiple punishments for the same crime. U.S. Const. amend. V; Const. art. I, § 9; *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). Double jeopardy is implicated regardless of whether sentences are served concurrently or consecutively. *Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *State v. Calle*, 125 Wn.2d 769, 774-75, 888 P.2d 155 (1995).

Determining whether a double jeopardy violation has occurred depends on the unit of prosecution that the Legislature intended as the punishable act under the specific criminal statute. *See Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955); *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982). The Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct. *Bell*, 349 U.S. at 82.

The inquiry is to determine the act or course of conduct that the Legislature has defined as the punishable act for possession of a controlled substance with the intent to distribute. “When the Legislature defines the scope of a criminal act (the unit of prosecution),

double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.” *Adel*, 136 Wn.2d at 634 (citing *Bell*, 349 U.S. at 83-84 (double jeopardy violated when defendant convicted on two counts of transporting women across state lines when two women were transported at the same time)). If the Legislature fails to designate the unit of prosecution within the criminal statute, any resulting ambiguity must be construed in favor of lenity. *Id.* at 635 (citing *Bell*, 349 U.S. at 84 (doubt is resolved against turning a single transaction into multiple offenses)).

The Washington Supreme Court has previously held that double jeopardy barred multiple convictions for simple possession of marijuana based on drugs being stashed in multiple places. *Id.* (unit of prosecution for crime was possession 40 grams of marijuana or less, regardless of where or in how many locations drug was kept). Similarly, double jeopardy barred multiple convictions for possession of methamphetamine where some drugs were found on the defendant’s person and more were found at his house. *State v. Chenoweth*, 127 Wn. App. 444, 463, 111 P.3d 1217 (2005), *aff’d* 160 Wn.2d 454, 158 P.3d 595 (2007) (unit of prosecution test and rule of lenity require conclusion that convictions violate double jeopardy).

Here, counts four and six in the charging document alleged that on May 17, 2013, Mr. Ritchie possessed oxycodone with the intent to deliver that controlled substance in violation of RCW 69.50.401. CP 45-46. “Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). The CCOs found different colored pills inside the eyeglasses case. 2 RP 120; 3 RP 339. Included in these pills was one peach tablet and one white tablet, both of which were found to contain oxycodone. 2 RP 212. In closing argument, the prosecutor asked the jury to convict Mr. Ritchie of both counts because there were “actually two different oxycodones.” 3 RP 396.

The double jeopardy violation here is even more apparent than in *Adel* and *Chenoweth*, where the controlled substances were found in separate locations. Mr. Ritchie’s two convictions stem from two oxycodone pills found in a single location. These convictions for possession with intent to deliver oxycodone arising out of the same incident violate double jeopardy. When a conviction violates double jeopardy principles, it must be wholly vacated. *In re Pers. Restraint of Strandy*, 171 Wn.2d 814, 820, 256 P.3d 1159 (2011) (citing *State v.*

*Turner*, 169 Wn.2d 448, 466, 238 P.3d 461 (2010); *Womac*, 160 Wn.2d at 658). This Court should reverse and remand with directions to vacate one of the offending convictions.

**8. The trial court’s prohibition against contact with Esther Bower was not statutorily authorized and consequently should be stricken.**

A court may only impose a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). The Sentencing Reform Act authorizes the trial court to impose “crime related prohibitions.” RCW 9.94A.505(8). These crime related prohibitions, which are independent of conditions of community custody, may be imposed for the maximum sentence of a crime. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). “Crime related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(10). Sentencing conditions are reviewed for an abuse of discretion and must be reasonably crime related to be upheld. *Riley*, 121 Wn.2d at 36-37.

Washington courts are reluctant to uphold no contact orders with classes of persons other than the victim of the crime. *State v. Warren*, 165 Wn.2d 17, 33, 195 P.3d 940 (2008). Esther Bower did not testify at

trial and was never mentioned during the trial testimony. She was not observed with Mr. Ritchie on May 17, 2013, the date of his arrest.<sup>13</sup>

Esther Bower was mentioned for the first and only time during sentencing.<sup>14</sup> The prosecuting attorney recounted unproved allegations that Mr. Ritchie made threats toward Ms. Bower, while recognizing that he ultimately did not pursue any witness tampering charge.<sup>15</sup> 5 RP 461. In response, Mr. Ritchie correctly pointed out to the court that any alleged threats that may have been made were not properly before the court. 5 RP 466.

The trial court exceeded its sentencing authority when ordering as part of the judgment and sentence that Mr. Ritchie have no contact with Esther Bower for 10 years. *See* CP 135. There is no reasonable relationship between Mr. Ritchie's drug convictions and the order

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<sup>13</sup> Brittany Clossen was the woman seen walking with Mr. Ritchie on the Whatcom Creek trail prior to his arrest. 3 RP 330; 5 RP 460.

<sup>14</sup> At the sentencing hearing, the prosecutor accused Mr. Ritchie of a number of unrelated crimes, while at the same time acknowledging that he declined to bring criminal charges. *See* 5 RP 460-61. The only comment that he made with regard to the controlled substance charges for which Mr. Ritchie was being sentenced was, "On the face of this these crimes look like just a chippy possession and someone who is not a real drug dealer, but we believe in many ways what he has done is worse." 5 RP 462.

<sup>15</sup> The State had initially filed a charge of tampering with a witness in the second amended information. CP 26. However, this charge was dismissed when the State filed the third amended information. CP 44-46.

# APPENDIX A

Type sent Date Friday, May 03, 2013 9:22:34 PM (UTC)

To +19073140347 From

Date Read

Content I texted you at around that time for I was going to come pick you up if you came to town. Drive you home and get your ass smoked the fuck out. And give ya some hash and pills so you could party party with you friends and roommates. Lol

Handle ID 97 Account e:



Type read Date Sunday, May 12, 2013 2:23:47 PM (UTC)

To From +19073140347

Date Read Sunday, May 12, 2013 2:28:30 PM (UTC)

Content Hey so my roomies are really Interested in doing something harder than pot, like e and i heard you mention it once plus i dont know anyone else so..if t

Handle ID 97 Account e:

Type read Date Sunday, May 12, 2013 2:24:54 PM (UTC)

To From +19073140347

Date Read Sunday, May 12, 2013 2:28:30 PM (UTC)

Content ats a possibility will you let me know? Hehe is that wierd? I feel like i shoudnt feel awk about that but idk? :)

Handle ID 97 Account e:

Type sent Date Sunday, May 12, 2013 3:00:13 PM (UTC)

To +19073140347 From

Date Read

Content Well you should of asked sooner and I could of just gave you some E. plus you shouldn't feel awk asking me about anything. What I will do is call the bitch who usually has it and ask her for some. Enough for two or three people right. Know you want to get in on that right. Lol. So does this sound good.

Handle ID 97 Account e:

Type sent Date Wednesday, May 15, 2013 12:25:47 AM (UTC)

To +13605942383 From

Date Read

Content Jess, hey you. Might need to come over tomorrow and do some stuff. People who will meet me there don't want lots of people around if you know what I mean. This will be around 10am. So is it cool to come over then if need be. Plus remember. You are my #1 go to girl on all my product. You and Brian. Hit me up.

Handle ID 116 Account e:

Type sent Date Friday, May 17, 2013 12:53:13 AM (UTC)

To +13603256467 From

Date Read

Content This idiot loves you to. Very much so. Plus wanted to tell you that our pills are all money makers and were looking at like 600 bucks. That's 300 each for they and the money from them are ours. Okay. Promise.

Handle ID 108 Account e:

Type sent Date Friday, May 17, 2013 7:47:42 AM (UTC)

To grace.scholtz@doc.wa.gov From

Date Read

Content Am out side the building waiting to see if I can talk to you. Wanted to know about this GPS and if its coming off today like it should. Please respond to me soon. Or actually take a couple minutes and talk to me. Thank you.

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 71191-1-I
	)	
CORNELIUS RITCHIE,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                   |  |
|---|-------------------|--|
| <input checked="" type="checkbox"/> WHATCOM COUNTY PROSECUTOR'S OFFICE<br>[Appellate_Division@co.whatcom.wa.us]<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>E-MAIL BY<br>AGREEMENT OF<br>PARTIES |
| <input checked="" type="checkbox"/> CORNELIUS RITCHIE<br>768963<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362    | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                                |

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF AUGUST, 2014.

X \_\_\_\_\_ 