

71191-1

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No. 71191-1-I

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

STATE OF WASHINGTON, Respondent,

v.

CORNELIUS RITCHIE, Appellant.

BRIEF OF RESPONDENT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether, in examining the evidence in the light most favorable to the state, there is sufficient evidence to support the jury's determination that Ritchie possessed with intent to deliver a controlled substances when there was more evidence introduced below than mere proximity to the contraband.
2. Whether Ritchie waived his right to assert for the first time on appeal, the holding of *Riley v. California* should be extended to require community corrections officers to obtain search warrants for cell phone searches when Ritchie failed to challenge the search of his cell phone below or develop the record as to the basis for the community corrections officers search and where, *Riley* is not material to this case because Ritchie's phone was not searched incident to arrest but pursuant to alleged violations of the conditions of Ritchie's release into the community as a sex offender.
3. Whether the prosecutor's passing remark in opening statements that Ritchie was incarcerated deprived Ritchie of a fair trial such that this case should be reversed when this isolated remark was cumulative to much of the evidence presented at trial including that Ritchie was on community supervision with the department of corrections at the time of the alleged offense and made phone calls from jail after he was arrested.
4. Whether the trial court acted within its discretion to admit relevant evidence related to proving Ritchie constructively possessed controlled substances and intended to distribute these drugs where the admitted text messages and phone recording made relatively near and time before and after Ritchie's arrest, further connected Ritchie to the controlled substances found and his intent to sell them and were not admitted to impermissibly permit the jury to

convict him based on a predisposition to sell drugs as cautioned by the court during closing arguments.

5. Whether this Court should remand this matter back to the sentencing court to vacate one of Ritchie's two convictions for possession of oxycodone with intent to deliver based on Ritchie's double jeopardy challenge and whether this Court should strike a no contact order provision related to a potential witness to for the state but otherwise unrelated to the underlying offense.

C. FACTS

On May 17th 2013, at approximately 10 am, community Corrections Officer Grace Sholtz sent an email out to Cornelius Ritchie via his cell phone requesting he report to her office. RP 100. Ritchie was under community supervision by the Department of Corrections as a sex offender following his release from prison two months prior to this incident for multiple felonies and on CCO Sholtz's case load at this time. RP 173, 460. During a pre-trial CrR 3.5 hearing, CCO Bajema testified he was helping CCO Sholtz bring Ritchie in predicated on an alleged unrelated incident that occurred the previous evening. RP 6.

Ritchie responded right away to CCO Sholtz' request to report but then did not immediately come in to meet with Sholtz. Noticing that Ritchie's GPS monitoring device reflected he was already downtown, CCO Sholtz and Bajema left their DOC office and went out to find him.

RP 86, 88, 179. Sholtz and Bajema drove downtown Bellingham near Whatcom creek to the area the GPS device reported Ritchie was. Once out of their car, CCO Bajema saw Ritchie walking on the other side of the creek with a female. RP 180, 89, 100. CCO Bajema and Sholtz then drove to the other side of the creek, where Ritchie was to better determine what Ritchie was doing. RP 92.

While still in their car in a parking lot along the other side of Whatcom creek, Bajema and Sholtz again saw Ritchie and the female walking briskly on the trail toward Cornwall Avenue. RP 92. CCO Bajema continued driving along the backside of a parking lot behind some area business that abut Whatcom creek trail toward Ritchie. After going around a parked recreation vehicle, he noticed Ritchie was no longer walking with a female on the trail but was alone off the trail, crouched down in a corner behind the mobile music business facing the brush. RP 96. Ritchie was sitting down resting on his calves, facing and reaching into the brush. RP 105. While CCO Bajema could see Ritchie reaching into the bushes with his arms and moving them around under the brush, he couldn't see what Ritchie's hands were doing. RP 151, 182, 183. After moving his arms under the brush/bushes, Ritchie stood up, hopped over the pavement and back onto the trail meeting back up with his female

companion and returning the same direction he had just come, heading toward the department of correction offices. RP 108, 117, 182-3.

After Ritchie left the area, CCO Bajema and Sholtz went over to the back corner of mobile music to try and discern what Ritchie had been doing. There, out of plain sight hidden in and around the vegetation and brush, officers found a small silver purse, a black reading glass case and a black film canister. RP 108-09. It appeared someone had tried to cover these items loosely with sticks and leave debris. RP 109. The items were only partially covered up. Id.

Inside the black eye case officers found 27 several pills of different colors and shapes including a peach tablet and white tablet identified as containing oxycodone, 18 orange tablets that contained amphetamine, three tablets that contained hydrocodone and four blue tablets containing diazepam. 2 RP 212. Inside the small purse were containers that appeared to hold a green leafy substance consistent with marijuana and in hashish. RP 120, 185. While examining the items found in the brush, CCO Sholtz was then notified Ritchie was at her department of corrections office waiting to meet with her. RP 133.

CCO Sholtz confronted Ritchie with her observations and the drugs found. Ritchie confirmed he had looked for the items hidden in the brush but said he was only checking these items out because his female

friend told him about them. RP 186. When pressed however, Ritchie also acknowledged that he did try to further conceal and hide the items. RP 134, 155.

Following Ritchie's arrest for community custody violations, CCO Sholtz searched Ritchie's belongings. Ritchie routinely carried his belongings with him in a back pack and duffel bag. RP 198. Sholtz also searched Ritchie's cell phone determining there were several texts within the two weeks preceding Ritchie's arrest that mentioned pills, getting money for pills or hashish and marijuana. In one such text message sent their "pills are all money makers and we're looking at like 600 bucks, that's 300 each for they and the money from them are ours. Okay. Promise." RP 217-18. Investigators also subsequently confirmed Ritchie used his phone for internet searches on May 16th 2013 –the previous day, to identify pills similar to those found in the eyeglass container in the brush. RP 220. Ritchie denied that the drugs found were his stating instead, that he was told about the drugs and only went to look. RP 134. When confronted with the CCO's observations, Ritchie acknowledged he did further conceal and hide the containers in the brush before getting back on the trail. RP 134. At trial, a jail phone call was introduced wherein Ritchie referred to the hashish and marijuana, found in containers with the other controlled substances, as his. RP 242, 258.

Ritchie testified that he knew nothing about the drugs in the brush. RP 334, 335. He claimed his friend Brittany told him about them, that he went and looked but did not touch or do anything with them. *Id.* Ritchie admitted he made all of the texts introduced at trial. RP 377.

Following a jury trial, Cornelius Ritchie was convicted of five counts of possession of a controlled substance with intent to deliver. 75-76. Ritchie was given a mid-range sentence to 90 months on each count to be served concurrently. CP 131-32. The state did not seek an exceptional sentence even though Ritchie was just released from prison and on community custody supervision at the time of this offense. RP 462.

D. ARGUMENT

- 1. Looking at the evidence in the light most favorable to the state there is sufficient evidence in the record to support the jury's determination that Ritchie possessed with intent to deliver the controlled substances hidden off of the Whatcom creek trial that he was observed and admitted to covering up with debris.**

Ritchie asserts there is insufficient evidence in the record to support his convictions for five counts possession of a controlled substance with intent to deliver. *Br. of App.* at 10. Specifically, Ritchie asserts there is insufficient evidence to establish possession or intent to deliver beyond mere proximity to these drugs.

In the context of reviewing a challenge to the sufficiency of the evidence, the question is “whether, after examining the evidence in the light most favorable to the State, any rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wash. 2d 333, 338-39, 851 P.2d 654 (1993) (*emphasis added*). In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Id. at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Hernandez, 85 Wash. App. 672, 675, 935 P.2d 623 (1997).

The [trier of fact] “is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.” State v. Bencivenga, 137 Wash. 2d 703, 707, 974 P.2d 832 (1999) (*quoting State v. Jackson*, 112 Wash. 2d 867, 875, 774 P.2d 1211 (1989)). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wash. 2d 634, 638, 618 P.2d 99 (1980). It is the role of the trier of fact, not the appellate court, to resolve conflicts in the testimony and to evaluate the credibility of witnesses and the persuasiveness of the evidence. State v. Carver, 113 Wash. 2d 591, 604,

781 P.2d 1308 (1989), opinion amended on reconsideration (Apr. 13, 1990), amended, 113 Wash. 2d 591, 789 P.2d 306 (1990). Where evidence conflicts the appellate courts need only decide whether the evidence most favorable to the prevailing party supports the finding. State v. Nieto, 119 Wash. App. 157, 164-65, 79 P.3d 473 (2003).

To prove unlawful possession of a controlled substance, the state must prove only the “nature of the substance and the fact of possession.” State v. Bradshaw, 152 Wn.2d Intent to deliver may be inferred where the evidence shows both possession and facts suggestive of a sale. State v. Hagler, 74 Wash. App. 232, 236, 872 P.2d 85 (1994). Mere possession of a controlled substance without more, is insufficient to support an inference of intent to deliver. Hagler, 74 Wash. App. at 236.

Ritchie first asserts there is insufficient evidence to support that he either constructively or actually possessed the controlled substances seized in this case or that there is sufficient evidence to support the jury determination that he possessed these drugs with intent to deliver.

a. Possession

Possession may be actual or constructive. State v. Summers, 107 Wash. App. 373, 389, 28 P.3d 780, 760 (2001) review granted, cause

remanded, 145 Wash. 2d 1015, 37 P.3d 289 (2002) and opinion modified on reconsideration, 43 P.3d 526 (Wash. Ct. App. 2002). Actual possession occurs when a suspect has physical custody of the item, whereas constructive possession occurs if the defendant has dominion and control over the item. State v. Jones, 146 Wash. 2d 328, 333, 45 P.3d 1062 (2002). Constructive possession need not be exclusive. Summers, 107 Wash. App. at 389. When a person has dominion and control over the premises, it creates a rebuttable presumption that the person has dominion and control over the items on the premises. Summers 107 at 389, State v. Cantabrana, 83 Wash. App. 204, 206, 921 P.2d 572 (1996). The ability to convert an object to actual possession is an aspect of dominion and control. State v. Echeverria, 85 Wash. App. 777, 934 P.2d 1214 (1997).

The state agrees no drugs were found on Ritchie's person. When considering the reasonable inferences available to the jury however, there is nonetheless sufficient circumstantial evidence to support finding Ritchie was in constructive 'possession' based on Ritchie's observed behavior combined with his admissions linking him directly to the pills and items found with the pills hidden in the brush.

Even though Ritchie hid the drugs in a public location, he nonetheless remained in constructive possession of these drugs because he knew where they were hidden, could convert them to his actual possession

and his text messages demonstrate he necessarily planned to convert the pills he hid in order to sell them. Additionally, Ritchie admitted in his jail phone call that the hashish and marijuana found with the pills he was accused of possessing, were his. These facts, combined with the CCO's observations and Ritchie's admission that he did try to hide the containers containing all of the drugs found in the brush, allowed the jury to logically infer then, that the pills belonged to Ritchie.

Even a momentary handling is sufficient to establish possession if there are "other sufficient indicia of control" State v. Staley, 123 Wash. 2d 794, 802, 872 P.2d 502 (1994) or the momentary handling is terminated by police intervention. Summers, 107 Wash. App., 385. Scope of review in a circumstantial case like this is limited to a determination of whether the state has produced sufficient evidence tending to establish circumstances from which the jury could reasonably infer the fact to be proved. State v. Dugger, 75 Wash. 2d 689, 690, 453 P.2d 655 (1969). If that quantum of evidence exists then there is some proof this element and the weight to be given to this evidence becomes a question for the jury. State v. Randecker, 79 Wash. 2d 512, 487 P.2d 1295 (1971). Determining whether there is sufficient evidence to demonstrate constructive possession requires the court to examine the totality of the situation to

determine if there is sufficient evidence to support the jury's determination that Ritchie constructively possessed the pills hidden in the brush.

In State v. Hults, 9 Wash. App. 297, 298, 513 P.2d 89 (1973), relied on by Ritchie, the state appealed the trial court's decision to dismiss a felony drug possession charge predicated on insufficient evidence. Hults was charged for possessing drugs found pursuant to a search warrant of a home Hults frequented. The drugs were not found on Hults person, thus the court concluded actual possession was not an issue but constructive possession, *citing* State v. Callahan, 77 Wash. 2d 27, 459 P.2d 400 (1969), was. Based on the circumstantial evidence presented by the state; that the defendant frequented the home during the few days immediately preceding the execution of the search warrant, the defendant's vehicles and musical instrument parked and in the home and many items of personal correspondence belonging to the defendant were also located within the home, the appellate court determined, examining this evidence in the light most favorable to the state, that there was sufficient evidence to support Hults' conviction. The court predicated this conclusion on the analysis that a jury could infer from the cumulative circumstantial evidence (Hults behavior that he held this house out as his home, with his personal belongings) that Hults had sufficient dominion and control over

the premises to infer dominion and control over the illegal drugs found within.

In State v. Portrey, 102 Wash. App. 898, 10 P.3d 481 (2000), the defendant also similarly challenged the sufficiency of the evidence supporting a conviction for possession of more than 40 grams of marijuana. Like Ritchie and as in Hults, Portrey was observed near but not in actual possession of the drugs for which he was charged. Portrey was however, found by deputies hidden near a cluster of marijuana plants in an undeveloped hilly area with no fence lying on the ground, wearing camouflage jacket, near several clusters of marijuana plants discovered during helicopter surveillance of the area.

As in this case, Portrey did not own the property the plants were located on. His house however, was about 200 yards away from where he was lying down and there were numerous trails from his home to the area where the plants were discovered. Deputies observed that each of the plants discovered had a length of black tubing at its base. When Portrey's home was searched, nothing incriminating was found except a roll of black tubing similar to that observed at the base of each marijuana plant. Portrey's conviction was nonetheless affirmed; the appellate court noting this evidence was sufficient to support the jury's determination that

Portrey constructively possessed all of the marijuana plants found in this undeveloped property.

Contrary to Ritchie's argument, his conviction is not based on mere proximity to the drugs discovered hidden in the brush. Instead it is predicated on an accumulation of observed facts, admissions and the inference that his actions and admissions suggest. Ritchie's text messages and pill searches on his phone demonstrate he was in possession of the pills, wanted to know their value and was planning on selling them. Ritchie also admitted that the "weed and hash" found with the pills were his and that he did try to cover up the containers holding the drugs with debris prior to coming into the department of corrections for his appointment. Officers observed no other persons from the time Ritchie was crouched down in the corner reaching and doing something under the brush to their subsequent discovery.

As in Portrey, this circumstantial evidence of Ritchie's handling and control of the various pills reflected by his admissions and actions provides evidence beyond mere proximity to support Ritchie's conviction. Viewing this evidence in the light most favorable to the state based on the totality of circumstances presented, there is sufficient to support the jury's finding that Ritchie possessed the various pills containing controlled substances on May 17th 2013.

b. Intent to deliver

Next Ritchie contends there is insufficient evidence to prove he possessed the controlled substances found ‘with intent to deliver’ because “Washington case law forbids the inference of an intent to deliver based on bare possession of a controlled substance absent other facts and circumstances.[.]’Br. of App. at 16, *citing State v. Brown*, 68 Wn.App. 480, 483, 843 p.2d 1098 (1993). Ritchie claims that because officers found no scales, packaging, ledgers or paraphernalia, there is insufficient evidence to infer Ritchie intended to deliver the drugs he was squirreling away.

Ritchie’s cell phone, like a ledger, provided additional facts and circumstances to support Ritchie’s conviction. Ritchie testified that he owned the phone found on his person and admitted he alone used his phone and sent the text messages admitted at trial wherein he wrote about his pills being little money makers. Ritchie’s written texts were corroborated by investigators who discovered Ritchie had engaged in pill identification searches on May 16th 2013 identifying pills similar to those controlled substances found hidden in the brush. Looking at these facts, along with Ritchie’s texts made within the previous two weeks pertaining

to providing pills or hashish to third parties, in the light most favorable to the state, support the jury's determination that Ritchie possessed the controlled substance pills with intent to deliver.

2. Ritchie waived his right to challenge the search of his cell phone by his community custody officer for the first time on appeal by not raising this issue below pursuant to RAP 2.5(a).

Next, Ritchie contends for the first time on appeal the warrantless search of the contents of his cell phone by his community corrections officer predicated on community custody violations unreasonably invaded his private affairs under the fourth amendment of the United States Constitution and article 1, section 7 of the Washington Constitution. Br. of App. at 19. Specifically, Ritchie asserts RCW 9.94A.631(1) is unconstitutional in light of the recent United States Supreme Court decision in Riley v. California, __ U.S. ___, 124 S.Ct 2473, 2485(2014).

Ritchie did not preserve this issue for appeal pursuant to RAP 2.5(a) and Riley contrary to Ritchie's broad assertions, is not material or controlling in this case because Ritchie was on community custody and the search of his cell phone was directly related to allegations that Ritchie was in violation of the conditions of his release, as opposed to a search conducted incident to arrest. Moreover, because Ritchie did not move to suppress the cell phone content evidence below to determine if the CCO's

search was reasonable and satisfied the Fourth Amendment pursuant to Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) or the Washington state Constitution, the record was never developed regarding the details and specific basis for the CCO's search of Ritchie's cell phone. The record merely alludes to the fact that Ritchie was on community custody supervision as a sex offender and called into to see his CCO initially based on unknown events that occurred the evening of May 16th, unrelated to the discovery of drugs at issue in this case. *See*, RP 6. Without more, even if Riley was considered material to this case, review without a reference hearing would be inappropriate.

Generally, Washington Courts do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wash. 2d 322, 334-35, 899 P.2d 1251 (1995), as amended (Sept. 13, 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 Wash. 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 not be delayed until the appellate stage, absent unusual circumstances.”

State v. McAlpin, 108 Wash. 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 Wash. 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 Wash. 2d 460, 468, 901 P.2d 286 (1995); *see also*, State v. Lee, 162 Wash. App. 852, 259 P.3d 294 (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 Wash. App. 716, 731, 214 P.3d 168 (2009) (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. Richard, 4 Wash. 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 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.

Ritchie contends the recent decision in *Riley v. California*, ___ U.S. ___, 124 S.Ct. 2473, 2485 (2014) is a new case, issued after Ritchie was convicted, that is material and controlling to Ritchie’s case. In *Riley*, the Supreme Court determined, predicated on privacy interests under the U.S. Constitution, that the contents of a cell phone found on an arrestee may not be searched incident to arrest absent of warrant. Ritchie’s cell phone was not searched incident to arrest. Thus, the *Riley* case is not controlling.

Ritchie seemingly acknowledges this but complains the “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.” Br. of App. at 24, *citing Griffin v. Wisconsin*, 483 U.S. at 873. Ritchie could have challenged his cell phone search pursuant to *Griffin*, but chose not to. Instead, for the first time on appeal, Ritchie asks this court to extend the holding in *Riley* and consequently, of *Griffin*, and find, on the limited undeveloped facts in this case, that a search of a parolee’s cell phone when on supervision requires a search warrant. (There is no record of what the conditions of Ritchie’s release were or the basis for any

violations or the search of Ritchie's cell phone and other personal possessions. The only facts presented were that he was on community custody as a sex offender, there was an alleged incident on May 16th and then officer's observed Ritchie covering up containers containing drugs). This Court should decline Ritchie's invitation, hold Riley is not controlling in this case and preclude Ritchie from raising this suppression issue for the first time on appeal based on a limited record.

- a. *Ritchie had a diminished right of privacy because he was under community supervision and thus subject to warrantless search by his Community Corrections Officer.*

Even if this Court determines Riley could be construed as material, review of Ritchie's suppression issue for the first time on appeal should ultimately be declined because the search in this case was conducted by Ritchie's community correction officer based on suspicions that Ritchie violated the conditions of his release into the community. The Fourth Amendment of the United States does not prohibit an officer from conducting a suspicious-less search of a parolee. Samson v. California, 547 U.S. 843, 857, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006). Moreover, in Washington, a community corrections officer may require an offender

to submit to a search of his person, residence, automobile or other personal property if the CCO has reasonable cause to believe that the offender violated a condition or requirement of community supervision. Nonetheless, a parolee's diminished expectation of privacy is constitutionally permissible only to the extent "necessitated by the legitimate demands of the operation of the parole process." State v. Simms, 10 Wash. App. 75, 86, 516 P.2d 1088 (1973), *quoting*. In re Martinez, 1 Cal. 3rd 641, 83 Cap.Rptr.382, 463 P.2d 734 (1970) *cert. denied*, 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88 (1970), *review denied*, 83 Wn.2d 1007 (1974). See also, RCW 9.94A.631, State v. Massey, 81 Wash. App. 198, 200, 913 P.2d 424 (1996). (Washington courts have recognized an exception to the search warrant requirement to search parolees or probationers and their homes or affects if the CCO has reasonable cause to believe that the offender violated a condition or requirement of community supervision.) See also, State v. Lucas, 56 Wash. App. 236, 239-240, 783 P.2d 121 (1989). (Parolees and probationers have a diminished privacy right because they are serving time in the community outside of prison and therefore may need to be supervised closely.) Reasonable cause exists when the CCO has a well-founded suspicion that an offender has violated a condition or requirement

of community supervision. State v. Winterstein, 140 Wash. App. 676, 166 P.3d 1242 (2007) rev'd, 167 Wash. 2d 620, 220 P.3d 1226 (2009).

As noted above, Washington law, as to community custody searches, is consistent with the holding of Riley in so far as any search must be predicated on a legal basis that there be reasonable suspicion and a nexus between the item searched and the community custody violation. See, State v. Parris, 163 Wash. App. 110, 259 P.3d 331 (2011). (Memory cards and their contents fall within the warrantless search of a probationer's "person, residence, automobile, or other personal property" that is authorized by RCW 9.94A.631.) A parolee's privacy expectation is not equated with that of an arrestee. The doctrine that permits search incident to arrest is generally predicated on officer safety concerns, whereas a parolee's expectation of privacy is reduced substantially as a condition of being released into the community where ensuring public safety is but one of many factors to be considered. Given these distinctions Ritchie fails to demonstrate that Riley is material or controlling. Moreover, the record in this case is wholly insufficiently complete to review this new issue where, appropriately so, Ritchie's CCO did not testify as to why Ritchie was in prison, what the terms of his release were or what concerns arising from the previous evening prompted CCO Sholtz's request to bring Ritchie in.

Review of Ritchie's suppression issue for the first time on appeal should be declined.

3. The prosecutor's reference during opening statements, that Ritchie had been in jail since his arrest, does not warrant reversal where the isolated statement was cumulative to the otherwise admissible evidence before the jury that detailed Ritchie was on community supervision and was in jail during a period between the date of offense and trial.

Relying on State v. Gonzales, 129 Wn.App. 895, 120 p.3d 645 (2005), Ritchie complains the prosecutor's comment during opening remarks that Ritchie had been in custody since his arrest denied him a fair trial. Br. of App. at 30. While the record reflects Ritchie objected to the prosecutor's passing comment and requested a mistrial, the trial court nonetheless appropriately denied the motion noting that because much of the significant admissible evidence would reflect Ritchie was in jail, had been in prison and was on community custody, the passing remark was not so prejudicial as to warrant a mistrial. RP 8 (opening statements 10/15/2013). The trial court determined, within its discretion, that the prosecutor's isolated remark was not so prejudicial as to warrant a mistrial.

A mistrial should only be granted when "nothing the trial court could have said or done would have remedied the harm" alleged to have

been done to the defendant. State v. Gilcrist, 91 Wash. 2d 603, 612, 590 P.2d 809 (1979). Here, as pointed out by the trial court, much of the evidence was predicated on statements Ritchie made while in jail and Ritchie's actions while on community custody under the supervision of the department of corrections following his release from prison. Under these circumstances, the trial court did not err denying Ritchie's request for a mistrial.

Ritchie's reliance on Gonzales to suggest that the fact that the jury knew of his custodial status is sufficient to warrant a mistrial or reversal on appeal, is misguided. In Gonzales, the trial court *instructed* the jury that Gonzales was in custody because he could not post bail, was being transported in restraints and would have a guard while in the courtroom. These facts would not otherwise have been before the jury but for the court's instructions and undermined Gonzales' presumption of innocence, thus reversal was warranted. These egregious facts are not present in Ritchie's case. The prosecutor made a passing remark in opening; a remark that was cumulative to the evidence to be presented at trial that would be considered and appropriately before the jury. Additionally, the jury was instructed to make their decision based on the law and the facts and that they should only consider witness testimony and admissible evidence in determining Ritchie's guilt. CP 47-73. Therefore, the trial

court's determination that the prosecutor's statement was not so prejudicial as to deprive Richie of a fair trial, did not undermine his presumption of innocence or warrant a mistrial was reasonable. Reversal is not warranted.

4. The trial court acted well within its discretion admitting relevant text messages to and from Ritchie under ER 401, 402, 403, 404(b) as res gestae evidence of the charged crime.

Prior to trial, Ritchie moved in limine to prohibit the state from introducing evidence of text messages Ritchie sent and received on his cell phone. RP 20. Br. of App. at 33. Ritchie contends the texts messages were improperly admitted at trial because they are unduly prejudicial, irrelevant and could only have been used improperly as propensity evidence. Br. of App. at 31, 33.

A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion. State v. Yarbrough, 151 Wash. App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wash. 2d 276, 283-4, 165 P.3d 1251 (2007). This Court can affirm the trial court's ruling on any grounds

supported by the record and the law. State v. Costich, 152 Wash. 2d 463, 477, 98 P.3d 795 (2004).

The texts at issue are as follows:

May 3rd, 2013 (reference to text 5(a) RP 55.)

I texted you at round 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 your friends and roommates. Lol.

May 12 2013 (reference text 5 (b) RP 55):

Hey so my roomies are really interested in doing something harder than pot like e and [I]heard you mention it once plus [I] don't know anyone else so..if that's a possibility will you let me kno? Hehe is that wrird. I feel like [I] shouldn't fee awk about that but idk?:)

May 15th 2013 (reference text 5(c) RP 55):

Well, you should have 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.

May 15th 2013 (reference text 5 (f), RP 56):

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 no#1 go to girl on all my product. You and Brian. Hit me up.

May 17th 2013 (reference text 5(j) RP 74.)¹

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.

RP 55-559, 74

Pursuant to ER 401, 402, 403, the trial court did not abuse its considerable discretion admitting these text messages because this evidence is admissible as 'res gestae' evidence to complete the story of the crime or in this case, to provide context for events close in time and place to the charged crime. State v. Grier, 168 Wash. App. 635, 644, 278 P.3d 225 (2012). Each of these texts from Ritchie's cell phone connects Ritchie to the pills found or the hash and marijuana that were found with the pills and his relevant activities in the two weeks prior to his arrest. Pills that Ritchie was observed crouched and reaching around, that he admitted trying to cover with debris, in an isolated back corner off of a trail where he stopped prior to going to meet his community corrections officer.

These texts confirm that Ritchie possessed these drugs, intended to sell or provide drugs to third parties and essentially completed the picture

¹ Ritchie asserts the trial court excluded text message 5(j). The record reflects however, the trial court reconsidered its ruling and after determining a jail recording of Ritchie sufficiently provided context for this text, ruled text message 5(j) was admissible.

Ritchie created by stopping and by his own admission, hiding these containers that held pills and 'his hashish and marijuana' with debris under a bush prior to him going to meet his corrections officer. The trial court appropriately weighed this evidence and determined the relevance of these text messages outweighed the potential prejudice because the text messages and jail call speak directly to the issue of whether Ritchie exerted dominion and control over these items or intended to deliver the pills unlawfully to third parties. RP 26-59, 74, 243.

Ritchie asserts the prosecutor introduced these text messages only to prove Ritchie's propensity to engage in drug dealing. The record reflects however, these relevant text messages were introduced to demonstrate first, that the pills found belonged to Ritchie and secondly, that he intended to sell them. However unartfully the prosecutor initially argued for admissibility during the hearing on Ritchie's motion in limine, the record reflects this evidence was not introduced or argued to the jury improperly as propensity evidence.

In State v. Wade, 98 Wash. App. 328, 989 P.2d 576 (1999), prior instances of drug offenses were improperly admitted pursuant to ER 404(b) to show Wade intended to deliver drugs. In contrast to the facts in this case, the trial court in Wade permitted the prosecutor to admit two prior drug dealing acts; one event that occurred 14 months earlier and

resulted in a guilty plea to possession with intent to deliver cocaine and another drug dealing arrest 10 months earlier. The prosecutor used these instances to argue that they showed Wade knew and intended to sell drugs in the current case.

The appellate court reiterated that to determine admissibility under ER 404 (b) the trial court must identify the purpose for admitting the evidence, determine that the evidence is material to the case and that the probative value of the evidence is not outweighed by prejudice to the defendant by the fact finder. State v. Saltarelli, 98 Wash. 2d 358, 362, 655 P.2d 697 (1982). Regardless of the relevance or probative value, evidence that relies on propensity of a person to commit a crime cannot be admitted to show a defendant acted in conformity therewith. Id. at 362. The Court held that when the state offers prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged crime. Id. The use of prior acts to prove intent is generally based on propensity when the only commonality between the acts and the charged act is the defendant.

Here, in contrast to Wade, the prosecutor did not seek to admit prior convictions or incidents of drug dealing to prove conformity therewith. The text messages were near in time to the date of the offense and reflected an ongoing course of conduct by the defendant. Each text

message connected Ritchie to the drugs found or to his willingness and ability to sell the pills or provide drugs, such as hashish, to his contacts. These text messages gave context to the officer's observations, demonstrate Ritchie had dominion and control over the controlled substances found and what Ritchie's intended use of the drugs was. Where there is a connection between text messages, the evidence and the charged crime, it is permissible for the jury to make reasonable inferences regarding Ritchie's intent. Making this evidence all the more relevant was Ritchie's defense that he only went to look at the items hidden in the brush and upon finding them, only sought to cover them up with debris and otherwise knew nothing about any of the items or drugs found hidden in the brush.

Ritchie's text messages, made over the course of the previous two weeks, and phone call admissions, contradicted Ritchie's assertions and were therefore highly probative to the state's ability to prove possession and intent to deliver. Unlike in Wade, the text messages admitted in this case were not of separate unconnected prior drug deals, they were close in time, gave context to Ritchie's actions confirming he was in possession of the controlled substances found and intended to sell them.

Moreover, any concern that the jury would improperly consider the admitted text messages as propensity evidence was negated when the trial

court gave a limiting instruction during closing arguments following an objection when the prosecutor began to argue the text messages demonstrated Ritchie was trying to set up a drug delivery. The Court appropriately reminded the jury it was only to consider and deliberate on the charges before them. RP 425. Under these circumstances the trial court did not abuse its discretion in admitting these text messages as evidence where the elements of ‘possession’ and ‘intent to deliver’ were issues before the jury and Ritchie was claiming he knew nothing of the controlled substances he claimed he only looked at and covered up but otherwise knew nothing about.

Next, Ritchie complains the trial court abused its discretion admitting Ritchie’s statements made during a recorded jail phone call and, in admitting the suspected marijuana and hashish at trial. Br. of App. at 45.

In a jail phone call, Ritchie discussed his incriminating text messages to an unknown friend and during the conversation asserted the hashish and marijuana found with the pills were in fact his. As noted by the trial court, the content of this jail phone call was highly relevant to proving the drugs found belonged and were in Ritchie’s constructive possession. Contrary to Ritchie’s complaint, it is not the fact the marijuana and hashish were found with the pills that rendered this

evidence admissible, it was that Ritchie held out on his phone call that the marijuana and hashish found with the pills *were his*. This evidence allows the jury to infer, since the hashish and marijuana were hidden together with the pills, in a location known to Ritchie that ALL of these items belonged and were legally in Ritchie's constructive possession. Under these circumstances the trial court acted well within its discretion to admit Ritchie's jail phone calls and the hashish and marijuana itself. Moreover, when CCO Bajema testified regarding the suspected marijuana found in a small box amongst containers containing the pills, the court cautioned the jury and gave a limiting instruction to ensure the jury did not improperly consider this evidence. RP 130. Specifically, the trial court cautioned:

...I will note for the jury's sake that when we look at the evidence we do it in a very literal way. So the testimony indicates, and I'm sure visual examination would confirm, there's a green leafy substance in the box. No one here is qualified to tell you based on the fact that it's a green leafy substance what that substance is, that would take a forensic report from a chemical lab that's authorized to do that. So I'm asking the jury not to draw any conclusions about what the green leafy substance is, but the fact that the green leafy substance was in the box is part of the testimony that you may consider. All right.

RP 130-31. Thus, even if the trial court erred in actually admitting the alleged marijuana and hashish itself into evidence, any error was harmless given that Ritchie wasn't charged with possessing these items and this

physical evidence was cumulative to Ritchie's otherwise admissible incriminating texts and statements.

5. The state concedes this matter should be remanded to the trial court to vacate one count of possession of oxycodone and to vacate the no contact order prohibiting contact with Esther Bower.

Next, Ritchie asserts his convictions for two counts of possession of oxycodone with intent to deliver as charged in counts four and six violate double jeopardy. Ritchie also contends the trial court's judgment prohibiting contact with Esther Bower is not statutorily authorized. Ritchie requests this Court remand this matter this matter back to the trial court to vacate one count of the possession of oxycodone with intent to deliver and to strike the no contact order provision. The state concedes, predicated on the record in this case, remand to the sentencing court to vacate one count of Ritchie's convictions for possession of oxycodone with intent to deliver and to strike/vacate the no contact order provision protecting Esther Bower is appropriate.

E. CONCLUSION

The State respectfully requests this Court to deny Appellant's appeal and affirm his conviction for four counts of unlawful possession of

a controlled substance with intent to deliver. The state also respectfully requests this matter be remanded to sentencing court to vacate one of the unlawful possession of a controlled substance, oxycodone, with intent to deliver and to strike the no contact order provision prohibiting contact with Esther Bower.

Respectfully submitted this 15th day of November, 2014.


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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Whitney Rivera
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Legal Assistant



Date