

NO. 34154-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON LINDSAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00874-0

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BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Lindsay can establish manifest constitutional error that would permit him to raise his claim that he was illegally detained for the first time on appeal, where:

(a) the record is inadequate to consider it, and

(b) what record there is does not establish that the evidence was the product of any illegality?

2. Whether Lindsay also fails to show that his trial counsel was ineffective for not moving to suppress the evidence?

3. Whether the trial court properly admitted into evidence the baggie containing what appeared to be methamphetamine that was recovered from Lindsay's sweatshirt pocket?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gordon Lindsay was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1.

Before trial, successfully Lindsay moved to exclude references to Lindsay's invocation of his right to silence, his refusal to consent to a search of his vehicle, and to the field test results the arresting officer obtained from a baggie found in Lindsay's pocket, which showed positive for

methamphetamine. 1RP 7, 11-12. His motions to exclude the baggie itself and a pipe found in a McDonald's bag in his truck on relevance grounds were denied. 1RP 7-10. Lindsay stipulated to the voluntariness of his statements under CrR 3.5. 2RP 21-22.¹ No CrR 3.6 motion was brought.

At the conclusion of the trial, the jury found Lindsay guilty as charged. 3RP 141, CP 39.

B. FACTS

Washington State Patrol Trooper Travis Snider received training and had experience with persons under the influence of various intoxicants. 2RP 27. Snider had seen controlled substances, both in training, 2RP 27, and in the field. 2RP 28. Most of his experience was with marijuana and methamphetamine. 2RP 28. He was also familiar with the devices used to ingest controlled substances. 2RP 28.

Snider was parked on the eastbound side of Highway 16 near Gorst, using his lidar unit. 2RP 30. The lidar recorded a speeding vehicle, which he flagged over. 2RP 31. Lindsay, the driver and only occupant, complied. 2RP 32.

Snider asked for his license, registration, and proof of insurance. 2RP

¹ There are two reports of proceedings labeled "Volume II." Herein, "2RP" refers to the report for the second day of trial, which took place on November 1, 2005. The report for November 2, 2005 will be designated "3RP."

32. Snider noted two odd things about Lindsay: first, he was holding his left hand and arm against his ribs in an odd way, so that he could not effectively use that hand, and second, when he handed his license to Snider, Lindsay's right hand was shaking to an extreme degree. 2RP 33. While it was not unusual for people to be nervous when Snider pulled them over, 2RP 33, Lindsay's nervousness was much more extreme than was common. 2RP 34. Snider also subsequently saw a Red Bull can, which, in his experience, were commonly used in the drug culture to carry stimulants. 2RP 34. Snider also smelled a sweet malty odor that he associated with malt beverages, which he asked Lindsay about. 2RP 35. Lindsay suggested it was the syrup on the McDonald's McGriddle sandwich that he was eating. 2RP 35.

Snider returned to his patrol vehicle and ran Lindsay's information on the in-car computer. 2RP 36. He then returned to Lindsay's car. 2RP 36. Lindsay seemed more relaxed at that point. 2RP 36. He was no longer pressing his left arm against his body. 2RP 37. Snider therefore concluded that it was not any physical disability that had been causing Lindsay to sit like that earlier. 2RP 37.

Snider did notice, however that the corner of a Zip-loc baggie was sticking out of the pocket on Lindsay's sweatshirt. 2RP 37. In Snider's experience such bags were commonly used to hold illegal narcotics. 2RP 37.

Snider asked Lindsay if he could look at it. 2RP 38. Lindsay handed the baggie, which contained an off-white crystalline substance. 2RP 38. Based on his training and experience, Snider believed it was either methamphetamine or crack cocaine. 2RP 38. Lindsay was arrested. 2RP 39.

Snider asked Lindsay to get out of the car and searched it. 2RP 39. On the passenger side of the car, Snider found a McDonald's bag with a pipe and straw container that had more crystalline powder in it. 2RP 39. In Snider's experience, the pipe was of the type used to smoke narcotics. 2RP 47. Snider had never seen a pipe like it used for tobacco. 2RP 47.

There was also a receipt in the McDonald's bag that indicated two McGriddle sandwiches had been purchased at the store on Kitsap Way. 2RP 47. Based on the time on the receipt and the time Snider pulled him over, Lindsay would have had to have come directly from the McDonald's at or above the speed limit. 2RP 48-49.

The substance in the straw was sent to the crime lab, where it was tested and was found to contain 0.12 grams of methamphetamine. 2RP 68. The baggie from Lindsay's sweatshirt was never sent to be tested. 2RP 59.

Lindsay testified and asserted that the drugs must have been left in the car by a hitchhiker he had picked up just before going to McDonald's. Despite having asked for a ride to Port Orchard, Lindsay claimed the

hitchhiker had bolted from his truck just as he was about to get on the freeway in Bremerton. 2RP 87-88. Lindsay also suggested that the baggie in his sweatshirt was a mixture of Epsom salt and other substances, which he would have used in his job at a metals shop. 2RP 100-101.

III. ARGUMENT

- A. **LINDSAY FAILS TO ESTABLISH MANIFEST CONSTITUTIONAL ERROR THAT WOULD PERMIT HIM TO RAISE HIS CLAIM THAT HE WAS ILLEGALLY DETAINED FOR THE FIRST TIME ON APPEAL, WHERE THE RECORD IS INADEQUATE TO CONSIDER IT NOW, WHERE WHAT RECORD THERE IS DOES NOT ESTABLISH THAT THE EVIDENCE WAS THE PRODUCT OF ANY ILLEGALITY, AND WHERE, FOR THE SAME REASONS, LINDSAY ALSO FAILS TO SHOW THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO SUPPRESS THE EVIDENCE.**

Lindsay argues that his continued detention after the trooper issued him a warning for speeding, his subsequent arrest, and the search incident thereto were illegal. Therefore, he asserts, the evidence should have been suppressed. This claim was not raised below, and the record is inadequate to consider it now. Moreover, what record there is does not establish that the evidence was the product of any illegality. For these reasons, Lindsay also fails to show that his trial counsel was ineffective for not moving to suppress the evidence.

1. *Lindsay's claim is not properly before the Court.*

Lindsay did not allege below that his detention, arrest, and search were illegal. Moreover, Lindsay has failed to give any reason why this Court should consider this claim that was not raised below. RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

To establish that the error is "manifest," an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The Supreme Court has addressed the purposes underlying RAP 2.5(a):

[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts." *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the

trial court. Rather, the asserted error must be “manifest” *i.e.*, it must be “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant “must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record.” *McFarland*, 127 Wn.2d at 334. In assessing actual prejudice, the *McFarland* court noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999), *aff’d* 145 Wn.2d 352 (2002).

This case typifies the unfairness to the State of considering issues on appeal that were not broached at trial. Lindsay largely relies on the trooper’s statement of probable cause filed with the information. That document was filed for the sole purpose of determining whether there was probable cause for the charge. It does not purport to be a complete statement regarding the circumstances or legality of the stop. Indeed, it notes on its face that it is an incomplete report. CP 4.

Likewise, although the trooper testified at trial, the State had neither

the motive nor the ability to bring out all relevant information regarding the legality of the stop. First, its purpose in calling the officer was to show the jury the facts surrounding the offense, not the whether the stop was constitutionally proper. More significantly, Lindsay's own motions in limine prevented the State from addressing the circumstances of the request to search, the invocation of *Miranda*, and the results of the NIK test. 1RP 7, 11-12.

Furthermore, the trial court had no opportunity to weigh the credibility of either the trooper or Lindsay to make the necessary factual determinations on which a legal ruling could be based. Our courts consider these determinations, with the inherent benefit to a finder of fact of viewing live testimony, so critical that they are largely unassailable on appeal. *See State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Under these circumstances, the State was not permitted or motivated to explore the officer's impressions, the circumstances surrounding the request to see the baggie, or the timing of the request to search, Lindsay's arrest, and the actual search of the vehicle. It would be grossly unfair to consider whether the search or detention of Lindsay were unlawful based on the undeveloped record in this case.

Moreover, as will be discussed in the following section, what record there is does not support the conclusion that the trial court could properly have suppressed the methamphetamine in this case. Lindsay thus fails to show manifest error. This claim should not be considered.

2. ***The record does not demonstrate that the evidence was the fruit of an unlawful detention.***

The scope of detention for investigation of a routine traffic infraction is limited to that period of time “necessary to identify the person, check the status of the person’s license, insurance identification card, and the vehicle’s registration, and complete and issue a notice of traffic infraction.” RCW 46.61.021(2); *State v. Henry*, 80 Wn. App. 544, 550, 910 P.2d 1290 (1995). Such a detention does not provide grounds for a search of the vehicle or its occupants. *Henry*, 80 Wn. App. at 551. Once the original purpose of a traffic stop has been fulfilled, the police must meet the *Terry* standard² of a reasonable, articulable suspicion of criminal activity in order to continue the detention. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

Lindsay concedes the original traffic stop was lawful. Brief at 4. He argues, however, that the trooper did not have a sufficient basis under *Terry* to ask Lindsay if he could see the Zip-loc baggie protruding from his pocket.³

² *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

³ Although the trooper apparently also asked for consent to search the vehicle, that consent was refused, and obviously no evidence was recovered as a result. CP 5.

Whether there was sufficient basis for a *Terry* detention, however, presupposes that Lindsay was in fact detained at the time. Lindsay fails to address this question.

When examining police-citizen interactions, the Court must first determine whether a seizure has taken place. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). A seizure or detention occurs when, considering all the circumstances, an individual's freedom of movement is restrained and a reasonable person would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. *O'Neill*, 148 Wn.2d at 574. The standard is a purely objective one, looking to the actions of the law enforcement officer. *O'Neill*, 148 Wn.2d at 574 (citing *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)). The defendant has the burden of proving that a seizure occurred in violation of article I, section 7. *O'Neill*, 148 Wn.2d at 574.

Application of *O'Neill* on the present record underscores why this Court should decline to review this issue under RAP 2.5(a). The only evidence comes from Trooper Snider's sparse report: "I advised Lindsay that I was giving him a warning for the speed and that I was finished with the stop." CP 5. The trooper's trial testimony is absolutely silent as to what occurred between his return to Lindsay's truck after running his information,

his giving Lindsay a warning and his subsequent request to examine the baggie. 2RP 36-37. Nor did Lindsay address the transaction in his testimony.

That Snider “advised Lindsay” that he was “finished with the stop” suggests that the trooper indicated to Lindsay that he was free to go or refuse his requests. That Lindsay declined to permit a search of the truck before Snider could even read him the consent warnings certainly suggests that Lindsay believed he was free to leave or refuse the trooper’s requests. Because this evidence is at best equivocal, Lindsay fails to meet his burden under *O’Neill* that he was restrained. His claim should therefore be rejected.

Even assuming, *arguendo*, that Lindsay had been detained, Lindsay fails to establish that Snider lacked a reasonable articulable suspicion to briefly detain him beyond the traffic stop. Under *Terry*, a person may be detained briefly for questioning if the officer reasonably suspects a person of criminal activity. *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995).

Here, Snider had ample basis to believe that illegal drug activity was afoot. Much of this basis is set forth in the probable cause statement:

The defendant appeared very nervous. He held his left arm in an odd manner like he was holding something between his ribs and inner arm. He actually had to set the item he was eating down to hand me the driver’s license because of the odd way in which he held his arm. As he handed me his driver’s license, I noticed his hand shook noticeably. ... I noted a can of Red Bull energy drink on the floorboard.

Due to the nervousness, odd arm position and other indicators, I decided to request consent to search, I observed in my rear view mirror that Lindsay's attention was drawn to something on the center of his bench seat. He was obviously doing something with his hands. ...

During the second contact, I noticed a few things. Lindsay's arm was no longer held in a strange position and I observed him naturally reach across his body with that arm. I also observed the corner of a Zip-loc bag sticking out of the front of his sweatshirt.

CP 5-6. Snider expanded upon these facts in his trial testimony. He noted that he had "extensive" training and experience with narcotics. 2RP 27-28. He again recalled the odd way that Lindsay was pressing his arm to his side, as if he were holding something there. 2RP 33. He also explained more thoroughly why Lindsay's nervousness caught his attention:

A. ... And additionally, when he handed me his driver's license, it was shaking very considerably, much more than normal.

Q. Now, it's not unusual for you to stop people?

A. No, sir.

Q. Would it be fair to say that most of the people that you stop aren't terribly excited about having morning conversations with a Washington State Trooper?

A. That would be correct, sir.

Q. So also be fair to say that people - it's not unusual for people to be nervous?

A. Yes, sir.

Q. Were his mannerisms really any different than what you observe typically?

A. Yes, sir. I've come just -- in my experience, I've stopped lots of vehicles, talked to a lot of individuals. And I've learned just in my experience to gauge the amount of

nervousness. It's true that most persons are somewhat nervous or embarrassed by being stopped by an officer. But in this situation it was much more extreme than that common nervousness that I would observe.

2RP 33-34. He also noted the Red Bull can, "which in and of itself wouldn't seem to be that unusual, except for the fact that on my coaching trip, I was trained to observe these energy drinks, which are commonly used to put stimulants inside them. For some reason just the -- the stimulant drug culture tends to do this." 2RP 34.

Then when the trooper returned to the truck after running Lindsay's data, he noticed that Lindsay appeared to have recovered the full use of his arm, which caused Snider to rule out a medical or physical cause for the odd behavior earlier. 2RP 37. He also noticed the corner of the baggie sticking out of his pocket, which had not been there before. 2RP 37.

The baggie was a red flag for him because in his experience, "Zip-loc bags are commonly used to contain illegal substances, narcotics and whatnot." 2RP 38. He had run across that use "frequently." 2RP 39.

In summary, Snider had the following information:

1. Upon stopping him, Lindsay demonstrated a degree of nervousness far beyond what was normal, even for a traffic stop. This could have been attributable to use of stimulants or to consciousness of guilt.

2. Lindsay initially acted like he was clutching something to his body with his left arm.

3. While Snider was in his car, he observed Lindsay furtively manipulating something in the center seat of the truck.

4. When he returned, Lindsay no longer appeared to be clutching something with his arm, but now had a Zip-loc baggie, which is a commonly-used container for illegal narcotics, incompletely stuffed into his sweatshirt pocket.

5. Snider also observed a Red Bull can, which is another commonly-container for illegal narcotics, on the floor of the truck.

Of course due to the fact that the issue was not litigated below, these facts, and others that may have played in Snider's decision to further detain Lindsay (assuming again he was actually detained) are not particularly well developed. They are, however, sufficient to have provided Snider with a reasonable suspicion that criminal activity might be afoot. *See State v. Glover*, 116 Wn.2d 509, 515, 806 P.2d 760 (1991). He was therefore authorized under *Terry* to briefly detain Lindsay to confirm or dispel those suspicions.

Even when a law enforcement officer unlawfully extends a detention based on a traffic stop beyond the purpose of that stop without a reasonable

suspicion that criminal activity has or is about to occur, the illegal detention *may* vitiate any consent to search given by the illegally detained person. *State v. Tijerina*, 61 Wn. App. 626, 629-30, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991). 629-30; *see also Henry*, 80 Wn. App. at 551-53. The courts weigh several factors in evaluating whether consent given following an illegal detention is tainted by the illegal seizure, including: “(1) the temporal proximity of the detention and subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* warnings.” *Tijerina*, 61 Wn. App. at 630; *see also Armenta*, 134 Wn.2d at 17.

Lindsay’s reliance on *Tijerina* and *State v. Cantrell*, 70 Wn. App. 340, 348, 853 P.2d 479 (1993), *aff’d*, 124 Wn.2d 183 (1994), is thus misplaced. Unlike here, the law enforcement officers in those cases did not terminate the initial detentions and tell the defendants that they were free to go before asking for consent to search their vehicles. Thus, there were no intervening circumstances and the subsequent questioning and consent amounted to a continuation of the initial detention after the purpose of that detention no longer existed. Here, on the other hand, Snider informed Lindsay that he was finished with the stop. Any misconduct cannot be deemed flagrant, because even if the Court finds that Snider lacked sufficient articulable suspicion for a *Terry* stop, there were significant indicia that criminal activity might be afoot.

Finally, although the undeveloped record is less than clear on the chronology, it appears that Snider may have given Lindsay a consent-to-search warning before asking to examine the baggie. Because of these factors, Lindsay's consent to allow Snider to look at the baggie dispelled any alleged illegality of the detention.

Because the brief post-warning detention (again if he was even detained in a constitutional sense) was proper, and/or because the subsequent consent dispelled any taint in the detention, the request to see the baggie was proper. Because upon seeing the contents of the baggie, Snider had probable cause to arrest Lindsay, based on his training, for possession of a controlled substance, Lindsay's arrest was lawful. *State v. Cook*, 104 Wn. App. 186, 190 15 P.3d 677 (2001). It follows that the subsequent search of the truck incident to that arrest was also proper. *State v. Stroud*, 106 Wn.2d 144, 150-52, 720 P.2d 436 (1986). This claim must be rejected.

3. *Counsel was not ineffective*

Lindsay also argues his trial counsel was ineffective for failing to move to suppress the methamphetamine. For the same reasons that he fails to show manifest constitutional error, Lindsay also fails to meet his burden of showing ineffective assistance of counsel.

In order to overcome the strong presumption of effectiveness that

applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

As discussed above, the record is inadequate to show that the methamphetamine should have been suppressed. For the same reason, the record fails to demonstrate either deficient performance or prejudice. This

claim should be rejected.

B. THE TRIAL COURT PROPERLY ADMITTED THE HIGHLY RELEVANT BAGGIE FROM LINDSAY'S POCKET.

Lindsay next claims that the trial court erred in admitting the baggie of probable methamphetamine that was in Lindsay's pocket. This claim is without merit because this evidence met minimal standards of relevancy and was not unfairly prejudicial.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996).

Evidence Rule 402 provides governs the admissibility of evidence:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules or by other rules or regulations applicable in the courts of this state. Evidence, which is not relevant, is not admissible.

"Minimal logical relevancy is all that is required" for a piece of evidence to be admissible. *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512 (1986) (citing 5 K. Teglund, *Wash. Prac., Evid.* § 83 at 170 (2d ed. 1982)), *aff'd*, 108 Wn.2d 515 (1987). The evidence need only have a tendency to prove the crime charged. *State v. Burkins*, 94 Wn. App. 677, 693, 973 P.2d 15 (1999). ER 401 thus defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence.”

The baggie of crystals, found in Lindsay’s pocket, more than meets the minimal logical relevance standard. Indeed, circumstantial evidence and lay testimony may be sufficient to establish that a substance is illegal *beyond a reasonable doubt*. See *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). In *Hernandez*, this Court found sufficient evidence in several delivery or possession with intent to deliver cases in which officers provided detailed testimony about their expertise in identifying drugs and their observations of behavior consistent with drug use. *Hernandez*, 85 Wn. App. at 678-82. The trooper here did both of these things. Likewise in *Hernandez*, the Court found it relevant that some of the material confiscated had been tested and demonstrated to be controlled substances. *Hernandez*, 85 Wn. App. at 679-81. The same thing occurred here. If these circumstances are sufficient to prove the crime, they are certainly sufficient to meet the minimal standards of relevancy. This claim must be rejected.

Nor is Lindsay’s contention that this evidence was unduly prejudicial tenable. Evidence is presumed admissible under ER 403. *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). To exclude evidence pursuant to ER 403 requires more than “mere prejudice.” The courts have recognized

that “nearly all evidence will prejudice one side or the other in a lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial.” *Carson*, 123 Wn.2d at 224. In addition, Teglund has pointed out that “nothing in Rule 403 authorizes the exclusion of evidence merely because it is ‘too probative.’” 5 K. Teglund, *Wash. Prac., Evid.* § 403.3 at 354 (4th ed. 1999).

Rather, ER 403 sets forth the specific grounds upon which relevant evidence may be excluded:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The rule thus requires *unfair* prejudice. The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. *Carson*, 123 Wn.2d at 225 (citing 5 K. Teglund, *Wash. Prac., Evid.* §105 at 346 (3d ed. 1989)).

Rule 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is *substantially* outweighed by the undesirable characteristics. *Carson*, 123 Wn.2d at 225. “If its probative value is not ‘substantially’ outweighed by the danger of unfair prejudice the court has no discretion to exclude the evidence; it must be admitted.” *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 350, 722

P.2d 826 (1986). It is well settled that discrepancies, inconsistencies, uncertainty or other arguments regarding relevant evidence go to the weight and not the admissibility of the evidence. *State v. Baity*, 140 Wn.2d 1, 14, 991 P.2d 1151 (2000).

Here, Lindsay's primary argument on the prejudicial effect of the evidence appears to be that it made his unwitting possession defense less viable. Brief at 14. That contention merely supports the trial court's finding that the evidence was relevant, however. The trooper found a meth pipe and a straw filled with methamphetamine in a McDonald's bag. The McDonald's receipt in that bag showed that the breakfast sandwich Lindsay was eating had been purchased only 15 minutes before Lindsay was stopped. Lindsay gave an improbable story about a hitchhiker to explain the presence of the drugs and paraphernalia in the bag. The baggie containing what appeared to be more methamphetamine, which was found on Lindsay's person, was thus highly relevant to refute the claim of unwitting possession.

Finally, Lindsay's citation to *State v. Draper*, 10 Wn. App. 802, 521 P.2d 53 (1974), does not demonstrate that the trial court abused its discretion. In *Draper*, the Court found that admission of the defendant's *lawful* possession of prescription drugs, to show intent to deliver a controlled substance in his possession, would be unduly prejudicial because any

connection between the two was “tenuous” and “negligible.” *Draper*, 10 Wn. App. at 805-06. Thus, the evidence the Draper court found to be excludable on prejudice grounds was lawfully possessed by the defendant.

Here, on the other hand, the reasonable inference was that the substance in the baggie and the substance in the straw were one and the same. Certainly Lindsay was free, if he really expected that it would support his improbable “patina” story, 2RP 101, to have had the substance in the baggie tested. Of course, since the trooper’s NIK test had already come up positive, it is not unsurprising that Lindsay did not have it tested himself. CP 6. This evidence was highly probative, and Lindsay fails to demonstrate unfair prejudice. This claim is thus without merit.

Even if the trial court erred in admitting this evidence any error must be deemed harmless. Errors in admitting evidence will only be reversed where prejudice to the defendant results. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Where the error is the violation of an evidentiary rule rather than a constitutional mandate, the Court applies “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Thomas*, 150 Wn.2d at 871 (*quoting State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, any error would be harmless because no reasonable jury could have found his unwitting possession claim believable. The flaws in his story abound.

Lindsay claimed he was late to pick up his boss at the airport at the time. 2RP 87. Yet the boss was present and ready to testify at trial, but offered no testimony to verify this story. 2RP 71-75, 85.

Despite being late, and despite it being against company policy to pick up hitchhikers in the company truck he was driving, he pulled over for his phantom hitchhiker. 2RP 93. Lindsay claimed that he initially thought it was someone he knew because the sun was in his eyes. 2RP 87, 94. Yet according to his testimony about his direction of travel on Kitsap Way past the McDonald's toward Highway 3, Lindsay would have to have been traveling westbound.⁴ At 7:30 a.m., the sun would thus have been *behind* him.

Despite being late, he decided to stop at the McDonald's to let the hitchhiker buy him breakfast. 2RP 96. The hitchhiker was supposedly in such a hurry himself to get to Port Orchard from Bremerton that he was willing to be left on the side of Highway 16, but then jumped out of the truck just as Lindsay was about to get on the Highway 3 freeway in Bremerton.

⁴ See 2RP 98 (Lindsay turned left onto southbound Highway 3).

This action was without explanation, and in so doing the hitchhiker supposedly left his drugs and pipe behind. 2RP 88.

Lindsay also totally failed to explain how the hitchhiker would have placed the drugs and the glass pipe into the McDonald's bag and then crunched it between the seats without him having noticed it. No reasonable jury would have believed this story.

Moreover, Lindsay gave an alternate story about what the substance in the baggie was. He also elicited from the trooper that he had never sent the baggie and its contents off to be tested. 2RP 59. Thus, even if the trial court did abuse its discretion, its error would be harmless. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Lindsay's conviction and sentence should be affirmed.

DATED August 21, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Sutton', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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