

NO. 35386-5

FILED
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHEKYEMA N. CUBEAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-00021-0

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly deny a motion to suppress evidence that was seized after a lawful arrest and was either abandoned by the defendant during the booking process or which was seized during the inventory process? 1

2. Has defendant failed to preserve her claim of instructional error by taking an exception to the failure to give an instruction without any explanation of the grounds for the objection? 1

3. Has defendant failed to show error in the court’s refusal to give an erroneous instruction?..... 1

4. Has defendant failed to show that the prosecutor committed misconduct or that this issue was properly preserved for review? 1

5. Was there sufficient evidence to support the jury’s determination that defendant possessed controlled substances with the intent to deliver them?..... 1

B. STATEMENT OF THE CASE. 1

1. Procedure..... 1

2. Facts 3

C. ARGUMENT..... 7

1. AS DEFENDANT DOES NOT CONTEST THE COURT’S FINDING THAT THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT, THE EVIDENCE DEFENDANT ABANDONED DURING THE BOOKING PROCESS OR WHICH WAS SEIZED DURING THE INVENTORY PROCESS WAS PROPERLY ADMISSIBLE. 7

2. DEFENDANT CANNOT SHOW THAT HER CLAIM OF INSTRUCTIONAL ERROR WAS PROPERLY PRESERVED BELOW OR THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE AN ERRONEOUS INSTRUCTION. 14

3. DEFENDANT HAS FAILED IN MEETING HER BURDEN OF SHOWING THAT THE PROSECUTOR COMMITTED MISCONDUCT OR THAT THE ISSUE WAS PRESERVED FOR REVIEW.....21

4. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY’S FINDING THAT DEFENDANT POSSESSED THE CONTROLLED SUBSTANCES WITH THE INTENT TO DELIVER.24

D. CONCLUSION.30

Table of Authorities

Federal Cases

| | |
|---|-------|
| <u>Beck v. Washington</u> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)..... | 22 |
| <u>Colorado v. Bertine</u> , 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987)..... | 11 |
| <u>G. M. Leasing Corp. v. United States</u> , 429 U.S. 338, 354, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977)..... | 9 |
| <u>Hester v. United States</u> , 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)..... | 9 |
| <u>Payton v. New York</u> , 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)..... | 9 |
| <u>Texas v. Brown</u> , 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502(1983)..... | 9 |
| <u>United States v. Chadwick</u> , 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977)..... | 10-11 |
| <u>United States v. Place</u> , 462 U.S. 696 103 S. Ct. 2637, 77 L. Ed. 2d 110(1983)..... | 9 |

State Cases

| | |
|---|----|
| <u>Boley v. Larson</u> , 69 Wn.2d 621, 625, 419 P.2d 579 (1966)..... | 19 |
| <u>Herring v. Department of Social and Health Servs.</u> , 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996) | 14 |
| <u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989)..... | 24 |
| <u>State v. Alexander</u> , 7 Wn. App. 329, 335, 499 P.2d 263 (1972)..... | 19 |
| <u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988) | 25 |

| | |
|---|------------|
| <u>State v. Binkin</u> , 79 Wn. App. 284, 902 P.2d 673 (1995), <u>review denied</u> , 128 Wn.2d 1015 (1996)..... | 21 |
| <u>State v. Brown</u> , 147 Wn.2d 330, 341, 58 P.3d. 889 (2002)..... | 12 |
| <u>State v. Brown</u> , 35 Wn.2d 379, 386, 213 P.2d 305 (1949)..... | 23 |
| <u>State v. Brown</u> , 68 Wn. App. 480, 485, 843 P.2d 1098 (1993)..... | 18, 19, 27 |
| <u>State v. Bryant</u> , 89 Wn. App. 857, 950 P.2d 1004 (1998)..... | 22, 27 |
| <u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... | 25 |
| <u>State v. Camp</u> , 67 Wn.2d 363, 407 P.2d 824 (1965)..... | 20 |
| <u>State v. Campos</u> , 100 Wn. App. 218, 220, 224, 998 P.2d 893, <u>review denied</u> , 142 Wn.2d 1006 (2000)..... | 28 |
| <u>State v. Carter</u> , 151 Wn.2d 118, 126, 85 P.3d 887 (2004)..... | 9 |
| <u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987)..... | 25 |
| <u>State v. Colwash</u> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977)..... | 15 |
| <u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)..... | 26 |
| <u>State v. Darden</u> , 145 Wn.2d 612, 624-625, 41 P.3d 1189 (2002)..... | 18, 27 |
| <u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)..... | 25, 27 |
| <u>State v. Dent</u> , 123 Wn.2d 467, 478, 869 P.2d 392 (1994)..... | 15 |
| <u>State v. Fernandez-Medina</u> , 94 Wn. App. 263, 266, 971 P.2d 521, <u>review granted</u> , 137 Wn.2d 1032, 980 P.2d 1285 (1999)..... | 14 |
| <u>State v. Gentry</u> , 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)..... | 23 |
| <u>State v. Glossbrener</u> , 146 Wn.2d 670, 680, 49 P.3d 128 (2002)..... | 11 |
| <u>State v. Hagler</u> , 74 Wn. App. 232, 235, 872 P.2d 85 (1994)..... | 19, 27, 28 |
| <u>State v. Harris</u> , 62 Wn.2d 858, 385 P.2d 18 (1963)..... | 15 |

| | |
|---|--------|
| <u>State v. Hill</u> , 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994) | 7 |
| <u>State v. Hinkley</u> , 52 Wn.2d 415, 420, 325 P.2d 889 (1958)..... | 23 |
| <u>State v. Hoffman</u> , 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)..... | 23 |
| <u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965) | 25 |
| <u>State v. Hutchins</u> , 73 Wn. App. 211, 868 P.2d 196 (1994) | 20 |
| <u>State v. Jackson</u> , 70 Wn.2d 498, 424 P.2d 313 (1967)..... | 15 |
| <u>State v. Jackson</u> , 82 Wn. App. 594, 607-608, 918 P.2d 945 (1996)..... | 26 |
| <u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993)..... | 25 |
| <u>State v. Lane</u> , 56 Wn. App. 286, 297, 786 P.2d 277 (1989)..... | 18, 27 |
| <u>State v. Llamas-Villa</u> , 67 Wn. App. 448, 451, 836 P.2d 239 (1992)..... | 18 |
| <u>State v. Lopez</u> , 79 Wn. App. 755, 768, 904 P.2d 1179 (1995)..... | 27 |
| <u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988)..... | 24 |
| <u>State v. Mak</u> , 105 Wn.2d 692, 726, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)..... | 21 |
| <u>State v. Manthie</u> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985) | 21 |
| <u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) | 24 |
| <u>State v. McPherson</u> , 111 Wn. App. 747; 46 P.3d 284 (2002) | 28 |
| <u>State v. McReynolds</u> , 117 Wn. App. 309, 326, 71 P.3d 663 (2003) | 11 |
| <u>State v. Mejia</u> , 111 Wn.2d 892, 896, 766 P.2d 454 (1989) | 18 |
| <u>State v. Mendez</u> , 137 Wn.2d 208, 214, 970 P.2d 722 (1999)..... | 7 |
| <u>State v. Myers</u> , 6 Wn. App. 557, 494 P.2d 1015, <u>cert. denied</u> , 409 U.S. 1061, 93 S. Ct. 562, 34 L. Ed. 2d 513 (1972)..... | 15 |
| <u>State v. Rahier</u> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984)..... | 15 |
| <u>State v. Reed</u> , 102 Wn.2d 140, 145, 684 P.2d 699 (1984) | 23 |

| | |
|---|------------|
| <u>State v. Robinson</u> , 92 Wn.2d 357, 361, 597 P.2d 892 (1979) | 15, 17, 20 |
| <u>State v. Russell</u> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994)..... | 22 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)..... | 25 |
| <u>State v. Simpson</u> , 22 Wn. App. 572, 573, 590 P.2d 1276 (1979)..... | 18, 27 |
| <u>State v. Smith</u> , 76 Wn. App. 9, 13-16, 882 P.2d 190 (1994), <u>review denied</u> , 126 Wn.2d 1003 (1995)..... | 11 |
| <u>State v. Staley</u> , 123 Wn.2d 794, 803, 872 P.2d 502 (1994)..... | 14 |
| <u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)..... | 25 |
| <u>State v. Weekly</u> , 41 Wn.2d 727, 252 P.2d 246 (1952) | 21 |
| <u>State v. Whelchel</u> , 115 Wn.2d 708, 728, 801 P.2d 948 (1990) | 11 |
| <u>Turner v. Tacoma</u> , 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967)..... | 19 |
| <u>Vangemert v. McCalmon</u> , 68 Wn.2d 618, 627, 414 P.2d 617 (1966)..... | 19 |

Constitutional Provisions

| | |
|---|----------|
| Article I, section 7, Washington State Constitution | 9 |
| Fourth Amendment, United States Constitution..... | 8, 9, 11 |

Rules and Regulations

| | |
|---------------|------------|
| CrR 6.15..... | 14, 15, 17 |
|---------------|------------|

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny a motion to suppress evidence that was seized after a lawful arrest and was either abandoned by the defendant during the booking process or which was seized during the inventory process?
2. Has defendant failed to preserve her claim of instructional error by taking an exception to the failure to give an instruction without any explanation of the grounds for the objection?
3. Has defendant failed to show error in the court's refusal to give an erroneous instruction?
4. Has defendant failed to show that the prosecutor committed misconduct or that this issue was properly preserved for review?
5. Was there sufficient evidence to support the jury's determination that defendant possessed controlled substances with the intent to deliver them?

B. STATEMENT OF THE CASE.

1. Procedure

On January 3, 2006, the Pierce County Prosecutor's Office charged appellant, CHEKEYMA CUBEAN ("defendant") with unlawful possession of a controlled substance (cocaine) with intent to deliver and one count of unlawful uses of drug paraphernalia. CP 1-3. The State later

amended the information to include an additional count of unlawful possession of a controlled substance (codeine) with intent to deliver and to add school zone enhancements to both counts of possession with intent. CP 43-45.

Defendant filed a motion to suppress all evidence seized by police. CP 5-24. The motion was heard by the Honorable Lisa Worswick, who denied it. CP 126-133. The court later entered findings of fact and conclusions of law on this ruling. CP 48-52. The court also denied a Knapstad motion. CP 25-42, 134-135.

Trial was held before the Honorable Brian Tollefson. The court denied a motion to dismiss the “intent to deliver” component of the possession with intent to deliver charges. RP 115.

After hearing the evidence, the jury convicted defendant as charged. CP 4, 118, 120; RP 249-263.

The sentencing hearing occurred on October 2, 2006. RP 267. The court sentenced defendant, based upon an offender score of 13, to a standard range sentence of 120 months plus an additional 24 months for the school zone enhancement on each count, and 9-12 months of community custody, to be served concurrently. CP 154-168. The judgment included a proviso that under no circumstances was the sentence actually served to exceed the statutory maximum. Id.

Defendant filed a timely notice of appeal from entry of this judgment. CP 137-150.

2. Facts

Officers Greg Hopkins and Wayne Beals of the Tacoma Police Department were on duty in the area near 13th and Fawcett Avenues around noon on January 2, 2006, because this area had been the epicenter of recent drug activity, particularly street level drug dealing. RP 18-23. This area is widely recognized as being one with a high level of narcotics activity. RP 24. The officers were in uniform but were using an unmarked car, a Ford Explorer, and were surveilling some individuals on the corner of South 13th and Fawcett. RP 23. The parties stipulated that this location was within a thousand feet of the nearest school bus stop. RP 101-102. Officer Hopkins observed a group of people standing near an abandoned building –the Ford building; a car drove up and stopped at a traffic light in front of the building. RP 24-25. A black female who had been with the group in front of the building walked out to the car and leaned inside the car window to talk to the two black males inside. RP 25-26. The officers recognized the black female as being Dorothy Hurd. RP 25.

The car sat at the intersection through several cycles of the stoplight as Ms. Hurd remained at the window talking to the occupants. RP 26-27. Ms. Hurd's activity looked like a drug exchange to the officers. RP 28. When the car drove off the officers followed it to get its license number, then returned their vehicle to the spot where they had been before. RP 27-28.

The officers determined that there were six people in the group standing in the doorway of the Ford Building, including Ms. Hurd and the defendant. RP 28-30. The officers decided to make contact with this group and drove their vehicle over to where they were standing. RP 29-30. Defendant and Ms. Hurd were standing with their backs to the officers. RP 30, 69. The other four were facing toward the officers; they were saying something to Ms. Hurd and defendant as the officers approached. RP 30, 69. Officer Hopkins observed a plastic bag containing a white powder drop between Ms. Hurd and defendant. RP 31. Officer Hopkins could not be certain which one of the two dropped the bag. RP 31. Based upon his experience, Officer Hopkins believed the substance in the bag to be cocaine. RP 31. The officers detained both women; each of them had a pipe used for smoking crack cocaine on their person. RP 31-32. The pipe found on defendant had white residue inside the glass tube and burn marks on each end. RP 32-34.

The defendant was arrested and transported to the Pierce County Jail. RP 34. Officer Hopkins estimated that he had surveilled defendant for about 15 minutes before she was arrested. RP 35. Officer Hopkins and defendant were at the booking desk, a secure area of the jail, when defendant adjusted her bra on one side from the outside of her clothing. RP 43. When she did so a baggy fell from under her shirt to the floor at her feet. RP 43. She made a similar adjustment to the other side of her bra and another baggy fell from under her shirt to the floor. RP 44.

Officer Hopkins recovered \$90.00 from defendant's person. RP 44-45. The two baggies contained narcotics in amounts exceeding what the officer usually finds for personal use. RP 45. One baggy that dropped from defendant's bra contained 14 pieces or rocks of cocaine, totaling 1.5 grams. RP 46, 89-90, 96. The other baggy that dropped from her bra contained eight tablets containing a mixture of codeine and acetaminophen, which is also a controlled substance that is sometimes sold on the street. RP 46-49, 91-94. Officer Hopkins testified that based on his experience most drug users will purchase one or two rocks of cocaine for personal use; fourteen rocks was more consistent with what is found on persons selling narcotics. RP 48.

Officer Hopkins testified that it is not uncommon for persons selling drugs on the street to work with another person – one person may act as a lookout or one person may carry the drugs while the other carries the cash; the person carrying the drugs may not always be the one who will deliver the drugs. RP 49-50. It is not uncommon for a person who sells cocaine at the street level to also be a user. RP 76.

Defendant presented the testimony of an investigator, who has taken some photographs of the corner at 13th and Fawcett as well as some measurements of the distances involved between where defendant was standing and the location where the officers were parked in their vehicle. RP 118-121, 124. An employee of the Department of Social and Health services testified regarding the record of defendant's electronic benefit

transfer card on January 2, 2007. RP 199-208. It showed two withdrawals of \$42.35 and \$52.60 -totaling \$94.95- on that day. RP 208.

Defendant testified that at the time of her arrest she was not employed, but was on government assistance for a mental health disorder and that she received \$339 a month. RP 139. Defendant testified that she went to a pawn shop on December 31, 2005, and pawned her ring for \$70 dollars. RP 141. She was planning on using \$85 to get her ring out of hock at the pawn shop. RP 145-146. After buying some cheap wine she still had \$60 remaining. RP 141. Defendant indicated that she used funds she got by using her Quest card to access funds from her government assistance grant to pay for her crack. RP 143. She stated that she had \$150 in her possession when she got downtown and that she had purchased the cocaine and the codeine pills for a total of \$55. RP 144-145. Defendant testified that she had been smoking crack since she was 14 years old and that she had a crack pipe on her person when arrested. RP 142-143. She indicated that the cocaine and codeine pills she had in her possession on January 2, 2006 was for her own consumption. RP 144. She described herself as “too stingy” with her drugs to sell them and that she did not sell drugs to people. RP 155. Defendant testified that she usually would purchase about a hundred dollars worth of cocaine at the beginning of the month so she could sit at home and smoke it without

having to drive from her home to the Hilltop to buy her drugs. RP 170. She did not contest that she had cocaine, codeine, and a crack pipe in her possession on January 2, 2006. RP 168. She also acknowledged that she had several convictions for shoplifting, theft, and attempted unlawful delivery of a controlled substance. RP 158-164, 167.

C. ARGUMENT.

1. AS DEFENDANT DOES NOT CONTEST THE COURT'S FINDING THAT THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT, THE EVIDENCE DEFENDANT ABANDONED DURING THE BOOKING PROCESS OR WHICH WAS SEIZED DURING THE INVENTORY PROCESS WAS PROPERLY ADMISSIBLE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In the case now before the court, defendant assigned error to several conclusions of law but does not challenge any of the findings of fact. See Brief of Appellant at p.1. Nor does defendant take issue with the

court's conclusion that there was probable cause to arrest the defendant for loitering for the purposes of drug activity. See Brief of Appellant at pp1, 11; see also Conclusion of Law No. 7, CP 48-52. Defendant argues that the pat down search which led to discovery of a crack pipe in defendant's pocket was improper. She argues that it cannot be considered a proper Terry frisk because there was no reason to believe that she was armed or dangerous nor can it be considered a search incident to arrest because the formal arrest did not occur until after the discovery of the crack pipe. See Appellant's brief at pp 12-13. However, neither of these theories affect the legality of the seizure of the evidence which was the basis for her convictions for unlawful possession with intent to deliver. Therefore, these arguments offer defendant no relief from her convictions.

After defendant was arrested, she was taken to the Pierce County Jail. "During the booking process, the defendant shook her bra, causing two baggies to fall out of her bra to the floor. One of the baggies contained 14 pieces of crack cocaine, and the other baggie contained 8 pills of codeine." Finding of Fact 18, CP 48-52. It was these substances that were the basis of defendant's convictions for unlawful possession with intent to deliver. RP 43-49, 89-94, CP 4, 84-117, 118, 120.

The fourth amendment protects people from unreasonable searches and seizures by law enforcement of their persons, houses, papers, and effects. U.S. Const., Amend 4. The constitution protects two types of expectations, one involving "searches," the other "seizures." A "search"

occurs under the fourth amendment when an expectation of privacy that society is prepared to consider reasonable is infringed. Terry v. Ohio, 392 U.S. 1, 9 (1968). A “seizure” of property occurs when there is some meaningful interference with an individual’s possessory interests in that property. United States v. Place, 462 U.S. 696 103 S. Ct. 2637, 77 L. Ed. 2d 110(1983).

Objects such as weapons, evidence, or contraband found in a public place may be seized by the police without a warrant. Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A person does not have a privacy interest in what is voluntarily exposed to the public. State v. Carter, 151 Wn.2d 118, 126, 85 P.3d 887 (2004). “No search occurs, and the protections of article I, section 7 are not implicated, when a law enforcement officer is able to detect something by using one or more of his senses while lawfully present at a vantage point.” Id. As long as there is probable cause to associate the property with criminal activity, the seizure of property in open view in a public place involves no invasion of privacy and is presumptively reasonable. Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924) (illegal liquor seized in open field does not implicate fourth amendment); see also Texas v. Brown, 460 U.S. 730, 103 S. Ct 1535, 75 L. Ed. 2d 502(1983). The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in G. M. Leasing Corp. v. United States, 429 U.S. 338, 354, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977):

It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.

In this case, it was the defendant who dislodged the baggies of controlled substances from her bra, not the police officer. Finding of Fact 18, CP 48-52. When these baggies dropped to the floor of the Pierce County Jail, the officer had every right to seize what he recognized as contraband as it lay on the floor of a public place. Neither the federal nor state constitution is implicated by these actions. The defendant's presence in the Pierce County Jail was the result of her arrest for which she concedes there was probable cause. The recovery of the two baggies of controlled substances was not the fruit of any illegal search or seizure. The court did not err in denying defendant's motion to suppress this evidence.

Defendant argues that the money and the crack pipe were illegally seized. The record does not support defendant's claim with regard to the money. Officer Hopkins testified at the suppression hearing that he could see the wadded U.S. currency in defendant's pocket but the record indicates that the money was left in her pocket until it was inventoried at the Pierce County Jail. CP 128. Searches pursuant to a lawful arrest and routine inventory searches are recognized exceptions to the warrant requirement. United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L.

Ed. 2d 538 (1977); Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); State v. Smith, 76 Wn. App. 9, 13-16, 882 P.2d 190 (1994), review denied, 126 Wn.2d 1003 (1995).

In contrast to the money, it is clear the crack pipe was seized immediately after defendant indicated that one could be found in her left jacket pocket and that this occurred prior to her formal arrest. CP 128. The State further concedes that the record of the suppression hearing is insufficient to support a finding that the police officers had a basis for a Terry frisk¹ for weapons. The officer was never asked about his knowledge of defendant's dangerousness or if he had any reason to believe that she was armed. Thus, there was a basis for suppression of the crack pipe.

Failure to suppress evidence obtained in violation of a defendant's Fourth Amendment rights is constitutional error and is presumed to be 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. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same

¹ A police officer may perform a protective frisk of a person detained in a Terry stop if a reasonable safety concern exists and the officer can point to specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous. State v. Glossbrener, 146 Wn.2d 670, 680, 49 P.3d 128 (2002).

result without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d. 889 (2002).

In assessing whether admission of the crack pipe was harmless error, the court must determine whether the defendant would have wanted this evidence excluded even if there was a legal basis for doing so. The motion to suppress was brought to exclude *all* of the evidence seized by police not just the crack pipe. CP 5-24. As argued above, the drugs defendant abandoned during the booking process and after her lawful arrest were properly admitted at trial. Once the controlled substances were properly before the jury, the defendant would have wanted the jury to hear about the crack pipe in her pocket as well. The defense presented at trial was that the defendant was a drug user, not a drug seller. As such the evidence of a crack pipe on defendant's person, an item needed for the consumption of the cocaine, bolstered her defense rather than caused her prejudice.

Defendant testified that she had been smoking crack since she was 14 years old and that she had a crack pipe on her person when arrested. RP 142-143, 168. She indicated that the cocaine and codeine pills she had in her possession on January 2, 2006, were for her own consumption. RP 144, 168. She described herself as "too stingy" with her drugs to sell them and that she did not sell drugs to people. RP 155. The theme of the defense closing was that defendant had the drugs in her possession for her personal use. RP 232-235, 237-238. Defense counsel argued to the jury

that it should find defendant guilty of possession and possession of paraphernalia. RP 238. Thus, it is clear that if defendant did not want evidence of the crack pipe excluded from evidence as it supported her contention that she possessed the drugs for her personal use. While defendant may have shown a legal basis for excluding the crack pipe, she must concede that this evidence was helpful to her defense.

Ultimately, the jury rejected defendant's proffered explanation that she possessed the drugs for personal use and found that she intended to deliver them. The evidence of a crack pipe in her pocket supported the proffered defense rather than the finding of an intent to deliver. No evidence was presented to the jury that a crack pipe is indicative of drug selling. This evidence did not contribute to the jury's verdict on the possessions with intent to deliver.

The crack pipe could be used as the basis² for the unlawful use of drug paraphernalia conviction. This is the only conviction for which the State cannot show harmless error assuming the court rejects the State's contention that defendant wanted the evidence of the crack pipe before the jury and would have introduced it even if the court had granted the suppression motion.

² The jury could also have found that the baggies containing the controlled substances met the definition of "paraphernalia. See Instruction No. 21, CP 84-117.

This court should find that the trial court properly denied the motion to suppress with regard to the controlled substances and money found in defendant's pocket and the failure to suppress the crack pipe was harmless error in light of the defense presented at trial.

2. DEFENDANT CANNOT SHOW THAT HER CLAIM OF INSTRUCTIONAL ERROR WAS PROPERLY PRESERVED BELOW OR THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE AN ERRONEOUS INSTRUCTION.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is

to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963); State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). A mere exception to the refusal to give requested instructions, without more, does not constitute a sufficient statement of the grounds for objection. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); State v. Myers, 6 Wn. App. 557, 494 P.2d 1015, cert. denied, 409 U.S. 1061, 93 S. Ct. 562, 34 L. Ed. 2d 513 (1972). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

- a. This issue is not properly before the court for review.

This court should refuse to review this assignment of error as defendant failed to comply with CrR 6.15 and does not present an issue of

constitutional magnitude. Defendant proposed a single jury instruction which read:

Washington case law forbids the inference of an intent to deliver controlled substance based upon the bare possession of that controlled substance, absent other facts and circumstances, such as weapons, a substantial sum of money, scales, or other drug paraphernalia indicative of sales or delivery. To convict the defendant of possession with intent to deliver, you must find that there is substantial corroborating evidence in addition to the mere fact of possession. Further, the police officer's opinion as to what a person would carry for the normal use is insufficient to justify a finding beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver.

CP 75-76. The court indicated that it would not give the instruction as written, but that it would give an instruction that contained a shortened version of the first sentence of the proposed instruction. RP 184-185, 191-192. The court refused to give the portion pertaining to the officer's opinion because defendant could argue that the opinion should be disregarded under the general expert witness instruction and that the wording of the proposed instruction constituted a comment on the evidence. RP 192. The court believed that the rest of the instruction was not a proper statement of the law. RP 192. When defense counsel wanted to note his objection, the court indicated that counsel could put his formal exceptions and objections on the record the following day. RP 192. Ultimately the modified version of defendant's proposed instruction became the court's Instruction No 8, which read:

You may not infer an intent to deliver a controlled substance based upon the bare possession of that controlled substance, absent other facts and circumstances.

CP 84-117, 122-123. At the time of taking formal exceptions and objections, defendant interposed this objection to the court's Instruction No. 8:

DEFENSE COUNSEL: Your Honor, I will just simply renew the objection that I had from yesterday to Instruction No 8, that it doesn't comport with the proposed instruction that we had. Making that exception for the record. The rest of the instructions are as we had agreed to yesterday.

RP 215. This exception provides no legal argument as to why the failure to give the proposed instruction, as written, is erroneous. As noted above making a mere exception to the refusal to give requested instructions, without more, is insufficient to constitute a sufficient statement of the grounds for objection under CrR 6.15. State v. Robinson, 92 Wn.2d at 361. As defendant has not complied with CrR 6.15 and has not presented an issue of constitutional magnitude, the court should refuse to consider this claim of error.

- b. The court properly refused to give and instruction that erroneously stated the law.

The court refused to give the proposed instruction because it considered it to be: 1) unnecessary considering the other instructions given; 2) a comment on the evidence; and, 3) an erroneous statement of

the law. Defendant offers no argument as to why the court's rationale for refusing to give the proposed instruction was incorrect.

Defendant contends that Washington law requires "substantial corroborating evidence in addition to possession of a controlled substance in order to establish and intent to deliver." See Appellant's brief at p. 19-20. Despite the fact that this language appears in Division I's decision in State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993), the Washington Supreme Court has not adopted the requirement of "substantial corroborating evidence." The Supreme Court has held that "[n]aked possession of a controlled substance is generally insufficient to establish an inference of an intent to deliver." State v. Darden, 145 Wn.2d 612, 624-625, 41 P.3d 1189 (2002). It went on to note that "reported Washington cases in which intent to deliver was inferred from possession of narcotics all seem to involve *at least one additional factor*." Id., (emphasis added), citing as examples State v. Llamas-Villa, 67 Wn. App. 448, 451, 836 P.2d 239 (1992) (additional factor was officer's observations); State v. Mejia, 111 Wn.2d 892, 896, 766 P.2d 454 (1989) (additional factor was informant's tip); State v. Lane, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (additional factor was drug-processing equipment); State v. Simpson, 22 Wn. App. 572, 573, 590 P.2d 1276 (1979) (same). Thus, an instruction that requires "substantial corroborating evidence" to establish an intent to deliver misstates the law.

Defendant's reliance upon Brown is misplaced. The fact that certain language is used in an appellate court decision does not mean that it can be properly incorporated into a jury instruction. Turner v. Tacoma, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967), Boley v. Larson, 69 Wn.2d 621, 625, 419 P.2d 579 (1966); Vangemert v. McCalmon, 68 Wn.2d 618, 627, 414 P.2d 617 (1966). Instructions should not be so factually detailed as to emphasize certain aspects of a party's case such that they buttress his argument to the jury; rather, instructions should be limited to enunciating basic and essential elements of the legal rules necessary to enable the parties to each present their theories of the case. State v. Alexander, 7 Wn. App. 329, 335, 499 P.2d 263 (1972). The language in Brown was in response to a challenge to the sufficiency of the evidence to support the verdict. Review for sufficiency is an appellate court function and not something that the jury is instructed to assess.

The proposed instruction also inaccurately stated the law with respect to the use that a jury could make of a police officer's opinion. Division I of the Court of Appeals has held that a police officer's opinion that the quantity of drugs possessed was more than typical than that associated with personal use, is insufficient, by itself, to provide corroboration for the inference of intent to deliver. State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994) (cautioning against the use of opinion testimony to inflate a "naked possession" case into one with stiffer penalties); Brown, at 485. Similarly, Division III of the Court of Appeals

has held that expert testimony regarding the profits that could be made from the sale of drugs, without further connection to a defendant's activities, will not provide sufficient corroboration for the inference of intent to deliver. State v. Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994). The State can find no case that holds that the jury may not consider such expert opinion evidence in conjunction with other evidence (or corroborating factors) in reaching its determination regarding the defendant's intent to deliver. Since such evidence may be considered by the jury, it may turn out to be the piece of evidence that, in addition to other corroborating factors, tips the scale and convinces the jury beyond a reasonable doubt with regard to the intent to deliver. Consequently, the proposed instruction which tells a jury that such opinion evidence "is insufficient to justify a finding beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver" is a misstatement of the law.

The trial court has no duty to rewrite incorrect or inaccurate statements of law contained in proposed instructions. It is not error for the trial court to refuse to give instructions that are incorrect in any material aspect. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); State v. Camp, 67 Wn.2d 363, 407 P.2d 824 (1965).

The trial court did not err in refusing to give an instruction that misstated the law.

3. DEFENDANT HAS FAILED IN MEETING HER BURDEN OF SHOWING THAT THE PROSECUTOR COMMITTED MISCONDUCT OR THAT THE ISSUE WAS PRESERVED FOR REVIEW.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing

essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

On appeal defendant contends that the prosecutor committed misconduct by arguing that it was the jury’s job to make credibility determinations and by misstating the burden of proof. Defendant cites to the record at page 224 as to where this misconduct occurred. See Appellant’s brief at pp. 23-24. There were no objections made to any portion of the prosecutor’s argument. RP 218-229, 239-240. Therefore, defendant must not only demonstrate an improper argument, she must show that the conduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Defendant cannot meet her burden.

Even assuming, without deciding, that the challenged remarks were misconduct, defendant fails to prove they were so flagrant and ill intentioned that the court could not have cured any prejudice by instructing the jury. The trial court told the jury to disregard any lawyer’s

remarks not supported by the evidence or the law. CP 84-117, Instruction No. 1. The trial court also instructed the jurors that they (not the lawyers) were the sole judges of credibility and the facts. Id. The trial court told the jury how to apply the concept of reasonable doubt. CP 84-117, Instruction No. 2. Had defendant objected, it would have given the trial court the opportunity to cure any prejudice by referring to or repeating these instructions. Defendant has waived any error.

Nor can defendant show improper argument. In general, a prosecutor may not express a personal opinion about a witness's credibility. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Still a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)); see also State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). A prosecutor may draw inferences as to the credibility of witnesses if done properly and if the record supports the inference. State v. Hinkley, 52 Wn.2d 415, 420, 325 P.2d 889 (1958); see State v. Brown, 35 Wn.2d 379, 386, 213 P.2d 305 (1949).

Here the prosecutor properly argued to the jury, consistent with the court's instructions, that it was the sole judge of credibility. RP 224, CP 84-117, Instruction No. 1. The prosecutor then drew the jury's attention to factors that might be considered in reaching a determination of credibility. While the prosecutor intimated that the jury should not find the defendant

credible but should find the police officer's testimony was credible, he did not argue that the jury's determination as to one witness's credibility controlled the outcome as to the credibility determination on the other. RP 224-225. The argument was not improper, but based on the instructions and evidence. While defendant claims that there was improper argument that misstated the burden of proof, she fails to identify where this argument occurred. The prosecutor argument regarding reasonable doubt was based upon the instruction given by the court and indicated that the State had the burden of proof. RP 227-229. This was not improper.

Defendant has failed to show that her claim of prosecutorial misconduct is meritorious or that it was not waived by the failure to object below.

4. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT DEFENDANT POSSESSED THE CONTROLLED SUBSTANCES WITH THE INTENT TO DELIVER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, and [/or] (e) on appeal. State v. Jackson, 82 Wn. App. 594, 607-608, 918 P.2d 945 (1996). A defendant who presents a defense case in chief may not appeal the denial of a motion to dismiss made at the end of the State's case in chief, but may still challenge the sufficiency of the evidence to support the verdict. Id. at 608. Regardless of when a court is asked to examine the sufficiency of the evidence, it will analyze the claim using the most complete factual basis available at the time the claim is made. Id. at 608-609.

Defendant assigned error to the denial of the motion to dismiss at the close of the State's case as well as to the sufficiency of evidence supporting the element of intent to deliver on both of her convictions for possession with intent to deliver. Defendant presented evidence on her own behalf and therefore waived review of the denial of the motion to dismiss. RP 118. Therefore, the court examines the challenge to the sufficiency based upon the entirety of the evidence adduced at trial.

Criminal intent may be inferred from conduct if it is evident “as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Intent to deliver may not be based solely on possession of a controlled substance; there must be at least *one* additional factor to make an inference of intent to deliver. State v. Darden, 145 Wn.2d 612, 624-625, 41 P.3d 1189 (2002); State v. Brown, 68 Wn. App. 480, 483-84, 843 P.2d 1098 (1993). “The additional factor must be suggestive of sale as opposed to mere possession in order to provide substantial corroborating evidence of intent to deliver.” State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). A police officer’s opinion that a defendant possessed more drugs than normal for personal use is insufficient to act as a corroborating factor to establish intent to deliver. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). As argued in an earlier section of the brief, the language in State v. Brown indicating that “substantial corroborating evidence” is required to support an inference of intent has not been adopted by the Supreme Court. See, supra at pp.16-17.

Case law has provided a variety of factors that may be used as a corroborating factor: State v. Lane, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (\$1000 worth of drugs, large amount of drugs, scales and controlled buy sufficient to support finding of intent to deliver); State v. Simpson, 22 Wn. App. 572, 573, 590 P.2d 1276 (1979) (large quantity of uncut heroin combined with large amount of cutting agent and packaging material sufficient to support intent to deliver); State v. Hagler, 74 Wn.

App. 232, 237, 872 P.2d 85 (1994) (the amount of drugs found on defendant, which officer testified was inconsistent with personal use, coupled with large amount of cash sufficient to prove intent to deliver); State v. McPherson, 111 Wn. App. 747; 46 P.3d 284 (2002) (drugs found in possession of nearby accomplice combined with defendant's possession of scale, cash, and notebooks with records of sales sufficient to uphold finding of intent to deliver); State v. Campos, 100 Wn. App. 218, 220, 224, 998 P.2d 893, (25 grams of rock cocaine, \$1,750 cash, opinion testimony that amount of drugs and cash consistent with drug sales, a pager, a cell phone, and cell phone charger found in defendant's truck, together with a paper list of columns of numbers and a slang word for cocaine sufficient to establish intent to deliver) review denied, 142 Wn.2d 1006 (2000).

In this case the jury heard evidence that defendant was standing on a street corner with several other persons in an area know for high drug activity. A woman from this group, Ms. Hurd, went into the street to contact the occupants of a car stopped at a traffic light in a manner that was consistent with drug sales. When the police contacted the group Ms. Hurd was standing next to defendant; they were both facing in the same direction while the rest of the group was facing the other direction. Either Ms. Hurd or defendant dropped a baggie that had cocaine residue, suggesting that larger amounts of cocaine had been in the bag, but were now gone. The jury heard that drug sellers frequently work in teams, and

that you may not find the money and the drugs on the same person or you may have someone who arranges a street drug sale for another. Defendant had two different types of controlled substances in her possession, both of which are sold on the street. Defendant had 14 rocks of cocaine and 8 codeine pills in two separate bags, which in the opinion of the officer, was more than what you would normally find on a person for personal use. Defendant had \$90 in her possession. The jury did not hear that Ms. Hurd had any money in her possession. Additionally, defendant took the stand and put her credibility at issue by testifying that the drugs she possessed were for her own personal use and by providing an alternative explanation as to why she had \$90 in her possession. The jury's verdict indicates that it did not find defendant to be credible in her explanations.

Looking at this evidence in the light most favorable to the State the jury could consider the activity of Ms. Hurd to indicate drug selling activity and her proximity to defendant to be consistent with them working as a team. The jury could have viewed the \$90 in defendant's possession as proceeds from drug sales. These factors combined with the officer's testimony regarding the amount of drugs found in defendant's possession is sufficient to uphold the jury's determination that defendant possessed the drugs with the intent to deliver them. The jury was no doubt further convinced of the correctness of this conclusion when it determined that defendant was not credible when she denied any intent to deliver. This

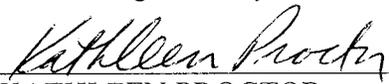
court should uphold the jury's finding of possession with the intent to deliver on both the cocaine and the codeine.

D. CONCLUSION.

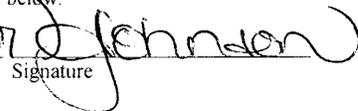
For the foregoing reasons the State asks this court to affirm the judgment and sentence entered below.

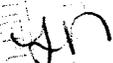
DATED: APRIL 18, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/18/07 
Date Signature

APR 18 2007
BY: 
STAFF OF CLERK OF COURT
COUNTY OF PIERCE
TACOMA, WA 98560