

No. 39347-6

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

Vs.

STEVEN A. DEMBROWICZ,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

### **I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF GUILT BEYOND A REASONABLE DOUBT.**

Mr. Dembrowicz first attacks the sufficiency of the evidence to prove the elements of Possession of a Controlled Substance. Specifically, he claims that the evidence establishing that the substance taken from his pants was methamphetamine was insufficient to establish guilt. He argues that this evidence was deficient because the state did not rule out that the arresting officer may have field tested the full amount of methamphetamine, thereby contaminating it. Accordingly, he requests that the court dismiss the verdict with prejudice. Such a remedy is not called for here.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Spruell*, 57 Wn.App. 383, 385, 788 P.2d 21 (1990). Courts must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410,

415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). The critical inquiry on review of the sufficiency of the evidence must be to determine whether the record could reasonably support a finding of guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628, 632 (1980). “[T]he relevant question 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.” *Id.* Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745, 747 (2004).<sup>1</sup>

Mr. Dembrowicz's assertion that the officer did not withdraw a testing sample is mere speculation. There is no evidence in the

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<sup>1</sup> Defendant misstates the test created by these holdings. He claims that this court must “find the proof to be *more than* mere substantial evidence...” Appl. Br. at n.1 (emphasis added). However, the case he cites states that “a trial court's findings of fact will not be reversed if supported by substantial evidence.” *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745, 747 (2004). The second cited case, *State v. Carlson*, 130 Wn.App. 589, 123 P.3d 891(2005), concerns review of a motion to suppress, not sufficiency of the evidence. Equally, there is no support for his claim that this court reviews a criminal conviction for whether the state's evidence exceeds the “clear, cogent and convincing” standard. Appl. Br. at n.1. This is a particular standard employed in civil commitment and child termination and dependency cases. It is not a standard by which the evidence supporting a criminal conviction is weighed. *State v. Rinaldo*, 98 Wn.2d 419, 423, 655 P.2d 1141, 1143 (1982) (“We have long reserved the “clear, cogent and convincing” standard for civil matters.”)

record that supports that Officer Butcher tested the full amount of methamphetamines, that the methamphetamine was contaminated, or that the lab report was inaccurate or even suspect. Mr. Dembrowicz had a fair opportunity at trial to present evidence on these points or even to question the state's witnesses about his theory, but he did not. The fact that he now raises such a theory, which if true, would undermine the state's evidence does not render the evidence insufficient. The state, in order to establish guilt, is not required to rule out every possible occurrence or innocent explanation that might diminish the probative value of its evidence. If it were so required, every trial would last for days.

Essentially, the defendant argues that the absence of any testimony confirming that Officer Butcher tested only a sample of the evidence provides an alternative explanation for the lab results and, hypothetically, supports Mr. Dembrowicz's innocence. The Supreme Court rejected this type of contention in State v. Gosby, 85 Wn.2d 758, 760, 539 P.2d 680, 682 (1975), when it held that trial courts should not give "multiple hypothesis" instructions. The Gosby Court determined that the state establishes guilt simply through proving the elements of a crime beyond a reasonable doubt. The state is not required to also establish the other side of

the coin - that its evidence is inconsistent with any reasonable hypothesis or theory tending to establish a defendant's innocence. *Id.* The existence of hypothetical explanations supporting innocence simply does not mean there is insufficient evidence to support a conviction in a case. The test for sufficiency is not whether the evidence could conceivably support an alternative interpretation. The test is whether, viewed most favorably to the State, the evidence is sufficient to persuade the fact finder beyond a reasonable doubt of the defendant's guilt. *Green*, 94 Wn.2d at 221-22. Here, it is clear that the state met that test. Based upon the testimony of the officers and the crime lab results, a rational trier of fact could have found the essential elements of possession of a controlled substance beyond a reasonable doubt.

In fact, even if Mr. Dembrowicz's theory was correct, and the record contained evidence that the officer mistakenly tested the full amount of methamphetamine, the crime lab still found that the substance was methamphetamine. Drug dealers and users frequently contaminate or "cut" drugs. However, that practice does not prevent the state from establishing that the drug is still partially a controlled substance. Thus, proof of contamination would not

alone be sufficient to undercut the sufficiency of the state's evidence.

Since Mr. Dembrowicz does not argue that the state violated some statutory or policy procedure that inherently or per se renders the report unreliable, his argument must be based on the possibility that the testing reagent used by Officer Butcher made a non-methamphetamine substance into methamphetamine. Any lesser result would still support the state's allegation that Mr. Dembrowicz was in possession of an illegal substance (although later contaminated). But considering the complexity of the methamphetamine manufacturing process, it is very unlikely that a law enforcement field test would create methamphetamines where it didn't exist before. This remote possibility, even if presented at trial, certainly would not have prevented a jury from finding guilt beyond a reasonable doubt. For this reason too, Mr. Dembrowicz's argument fails.

Finally, his argument is defective because it was waived at trial. Although Mr. Dembrowicz presents his argument on appeal as a sufficiency of the evidence claim, the argument actually attacks the admissibility of the crime lab report. The fact that Officer Butcher may have tested the full amount of

methamphetamines addresses the foundation for admitting the lab report. As Mr. Dembrowicz notes in his brief, due to the possibility of Officer Butcher's mistake "the lab test results are suspect..." Appl Br. at X. Viewing the defendant's argument any other would allow him to circumvent the reasoning behind RAP 2.5(a). By couching all newly raised evidentiary arguments as "sufficiency of evidence" claims, he is able to waste judicial resources by appealing errors which a trial court, "if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This court should not allow Mr. Dembrowicz to sidestep this rule so easily.

Viewed as an evidentiary claim, Mr. Dembrowicz's argument quickly collapses. At trial, Mr. Dembrowicz did object to the foundation for admitting the crime lab report, but the objection addressed an inconsistency between the report number and the technician's testimony. RP 59. He did not object on the basis of possible contamination of the lab sample. As a result, the argument was not preserved for appeal. RAP 2.5(a); State v. Newbern, 95 Wn.App. 277, 289, 975 P.2d 1041, 1047 (1999); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may

only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.") Regardless, "uncertainty or inconsistencies in the testimony affects only the weight of the testimony and not its admissibility." Gosby, 85 Wn.2d at 760.

Hence, the trial court did not err by admitting the lab report, and the jury had sufficient grounds, based on the results of this report, to determine guilt. The conviction should be affirmed.

## **II. THE TRIAL COURT EXERCISED SOUND DISCRETION IN REFUSING TO GIVE THE DEFENDANT'S PROPOSED "MISSING WITNESS" INSTRUCTION BECAUSE THE FOUNDATIONAL REQUIREMENTS WERE NOT MET.**

Mr. Dembrowicz next argues that the court erred when it rejected his request for a "missing witness instruction." He claims that the instruction was necessary after the state failed to call some of the individuals who were in the chain of custody for the methamphetamine. This claim is not based upon the law.

A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. State v. Picard, 90 Wn.App. 890, 902, 954 P.2d 336, *rev. denied*. 136 Wn.2d 1021 (1998).

There is no right to an instruction unsupported by the evidence.

State v. Staley, 123 Wn.2d 794, 803 872 P.2d 502 (1994). A

missing witness instruction allows the jury to infer that an uncalled

witness would have given unfavorable testimony to the party to whom the witness is peculiarly available. WPIC 5.20. In order to invoke the missing witness rule, a defendant must show that, as a matter of reasonable probability, the prosecution would not have failed to produce the witness unless his or her testimony would have been unfavorable to the State. State v. McGhee, 57 Wn. App. 457, 463, 788 P.2d 603, *rev. denied*, 115 Wn.2d 1013 (1990). "The inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable." State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185(1968) (*quoting* Wigmore, Evidence sec. 286 (3d ed. 1940)). The inference does not arise when the witness is unimportant or the testimony would be cumulative. State v. Blair, 117 Wn.2d 479, 488-490, 816 P.2d 718 (1991). Furthermore, this doctrine applies only when the witness is "[p]eculiarly available' to the party against whom the instruction is offered. Davis, 73 Wn.2d at 276-77. For a witness to be "peculiarly available" there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably

probable that the witness would have been called to testify for such party *except for the fact that his testimony would have been damaging. Id.*

WPIC 5.20 states:

If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case. In the present case, after hearing argument from both sides, the trial court decided not to give the missing witness instruction.

The court did not err in this case because the above standards were not met. Specifically, the record does not support that the state failed to call the crime lab and Centralia Police Department evidence custodians because their testimony would have been damaging. As the trial court found, there was no indication that the testimony of the evidence custodians would have been unfavorable to the State's case. RP 65. On the contrary, the evidence established that these individuals did not ever access the methamphetamine and, thus, would not be able to testify to its condition. Both Officer Butcher and the crime lab technician

testified that the seals on the evidence package were unbroken when they received the package. RP 41-43, 45, 51, 57.

Thus, there was no reason for the state to produce the evidence custodians. The state is not required to produce every person who touched a piece of evidence. Rather, the state is required

to establish a chain of custody “*with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.*” United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir.1989). Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. Campbell, 103 Wn.2d at 21, 691 P.2d 929. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. Campbell, 103 Wn.2d at 21, 691 P.2d 929. “[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility.” *Id.* State v. Roche, 114 Wn.App. 424, 436, 59 P.3d 682, 690 (2002)

Based on this, it was natural for the state not to produce the custodians as witnesses. There was just no need to do so. The state had provided sufficient testimony to establish a foundation for admitting the evidence. And the defendant did not object to this foundation at trial.

As with his prior argument, Mr. Dembrowicz now asks this court to find error based simply upon his speculation and

conjecture. He makes no showing that comports with the requirements of *Davis*. Based on the record, there is no reasonable probability that the state failed to call the witnesses because the witnesses' testimony would be damaging. The record supports that it was just as likely that the state didn't call the custodians because their interaction with the evidence package was trivial as it was that they weren't called because they tampered with the evidence.

Finally, the trial court's refusal to provide the missing witness instruction did not prevent Mr. Dembrowicz from noting their absence at trial. He did, in fact, argue that the lack of their testimony created reasonable doubt. RP 85. This argument is as much as the evidence supported. Consequently, the trial judge did not abuse his discretion by not allowing the missing witness instruction to be submitted to the jury. This court should disregard this issue and affirm the conviction.

### **III. THE TRIAL COURT CORRECTLY IMPOSED AN EXCEPTIONAL SENTENCE UPON ITS FINDING THAT THE DEFENDANT WAS ON COMMUNITY CUSTODY AT THE TIME OF HIS OFFENSE**

In his final argument, Mr. Dembrowicz invites this court to rule inconsistent with the Supreme Court's ruling in *State v. Jones*,

159 Wn.2d 231, 149 P.3d 636 (2006) and find that the trial court improperly imposed an exceptional sentence. This court should refuse the invitation. The Supreme Court's *Jones* ruling was well reasoned and is now precedent in this state. The Court's holding is consistent with the holding of other state and federal holdings. See *Jones*, 159 Wn.2d at 242-43. And the Supreme Court denied certiorari of the opinion in *Thomas v. Washington*, 549 U.S. 1354, 127 S.Ct. 2066 (2007). Accordingly, the state requests that this court apply stare decisis and affirm the exceptional sentence based upon the holding of *Jones*.

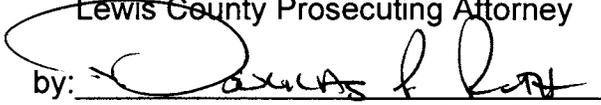
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Dembrowicz's conviction.

RESPECTFULLY submitted this 4 day of December, 2009.

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by:

  
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) NO. 39347-6 II  
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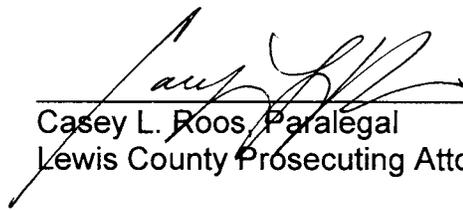
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Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 4, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 4<sup>th</sup> day of December 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
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