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40181-9-II

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

State of Washington
Respondent

v.

JENNIFER JOY HATHAWAY
Appellant

40181-9

On Appeal from the Superior Court of Jefferson County

Cause No. 08-1-00162-3

The Honorable
Craddock D. Verser

APPELLANT'S REPLY BRIEF

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CONTENTS

I.	Authorities cited	ii
II.	Arguments in Reply	1
	1. The fact that a random search is “routine” does not create an exception to the warrant requirement	2
	2. The fact that a random search is for outstanding warrants does not create an exception to the warrant requirement	3
	3. Consent to a random search does not create an exception to the warrant requirement absent probable cause	6
	4. The driver’s license status of non-drivers is a constitutionally protected “private affair”	8
	5. The jury was not properly instructed on mere proximity	9
	6. The evidence of possession was insufficient	11
	7. The to-convict instruction was fatally flawed	12
	8. The jury fee is excessive	14
III.	Conclusion	15

I. **AUTHORITIES CITED**

Washington Cases

City of Seattle v. Mesiani, 110 Wn.2d 454
755 P.2d 775 (1988) 1, 2, 3

Kadoranian v. Bellingham Police Dept., 119 Wn.2d 178
829 P.2d 1061 (1992) 5

Maybury v. City of Seattle, 53 Wn.2d 716
336 P.2d 878 (1959) 13

State v. Chenoweth, 160 Wn.2d 454
158 P.3d 595 (2007) 4, 5

State v. Coates, 107 Wn.2d 882
735 P.2d 64 (1987) 5

State v. Haapala, 139 Wn. App. 424
161 P.3d 436 (2007) 5

State v. Hendrickson, 129 Wn.2d 61
917 P.2d 563 (1996) 3

State v. Hickman, 135 Wn.2d 97
954 P.2d 900 (1998) 12

State v. Hobart, 94 Wn.2d 437
617 P.2d 429 (1980) 3

State v. Jorden, 160 Wn.2d 121
156 P.3d 893 (2007) 7

State v. Keend, 140 Wn. App. 858
166 P.3d 1268 (2007) 11

State v. Ladson, 138 Wn.2d 343
979 P.2d 833 (1999) 1, 3, 5

State v. Lee, 128 Wn.2d 151 904 P.2d 1143 (1995)	13
State v. Maxwell, 114 Wn.2d 761 791 P.2d 223 (1990)	5
State v. McAlpin, 36 Wn. App. 707 677 P.2d 185 (1984)	3
State v. Myrick, 102 Wn.2d 506 688 P.2d 151 (1984)	1
State v. Olivas, 122 Wn.2d 73 856 P.2d 1076 (1993)	1, 3, 5, 6
State v. Powell, 150 Wn. App. 139 206 P.3d 703 (2009)	8
State v. Rankin, 151 Wn.2d 689 92 P.3d 202 (2004)	1
State v. Simpson, 95 Wn.2d 170 622 P.2d 1199 (1980)	1
State v. Smith, 155 Wn.2d 496 120 P.3d 559 (2005)	11
State v. Stanton, 68 Wn. App. 855 845 P.2d 1365 (1993)	10
State v. Stroud, 106 Wn.2d 144 720 P.2d 436 (1986)	2
State v. Thomas, 150 Wn.2d 821 83 P.3d 970 (2004)	10
State v. Utter, 4 Wn. App. 137 479 P.2d 946 (1971)	11, 12

State v. White, 97 Wn.2d 92 640 P.2d 1061 (1982)	4
State v. Williams, 93 Wn. App. 340 969 P.2d 106 (1998)	8

Federal Cases

Carroll v. U.S., 267 U.S. 132 45 S. Ct. 280, 69 L. Ed. 543 (1925)	3, 6
Coolidge v. New Hampshire, 403 U.S. 443 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)	3
Schmerber v. California, 384 U.S. 757 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)	6
Schneckloth v. Bustamonte, 412 U.S. 218 93 S. Ct. 2041, 36 L. Ed. 2d 854 1973)	6
Terry v. Ohio, 392 U.S. 1 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	3
Wong Sun v. U.S., 371 U.S. 471 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)	4

Washington Statutes

RCW 10.01.160	13
RCW 36.18.016	13

Constitutions

Wash. Const. art. 1, § 7	1
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Treatises

13B WAPRAC § 3612	13
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I. **ARGUMENTS IN REPLY**

Warrantless searches are per se unconstitutional under article I, section 7 of the state constitution¹ unless a recognized exception applies. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004), citing *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Const. art.1, § 7 is more protective of individual privacy interests than is the Fourth Amendment. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Washington's constitution protects citizens from all warrantless searches without probable cause, with certain strictly-construed exceptions. *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988).

Warrantless searches are valid only if there is "authority of law." *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986). The courts must consider the privacy rights of citizens and seek a reasonable balance. *Mesiani*, 110 Wn.2d at 459. Exceptional circumstances may justify warrantless searches, but only where probable cause is shown. *State v. Olivas*, 122 Wn.2d 73, 88, 856 P.2d 1076 (1993); *Carroll v. United States*, 267 U.S. 132, 155-56, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

Exceptions to the warrant requirement include consent, exigent circumstances, a search incident to a valid arrest, an inventory search,

¹ "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

items in plain view, and the *Terry*² investigative stop. *Ladson*, 138 Wn.2d at 359. These exceptions are carefully drawn and jealously guarded. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996); *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

1. STANDARD ROUTINE PRACTICE IS NOT A
RECOGNIZED EXCEPTION TO THE
WARRANT REQUIREMENT.

The State first defends its warrantless investigations of visitors' driver's licenses on the grounds it is "standard practice." Respondent's Brief (RB) at 1. But standard practice is not a recognized exception to the warrant requirement. The courts have consistently struck down random intrusions into citizen privacy in various contexts. Random highway checkpoints are illegal, for instance, despite the legitimate government function of ensuring the safe and legal operation of automobiles. *Mesiani*, 110 Wn.2d at 456. Individuals operating automobiles do not "lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Mesiani*, 110 Wn.2d at 457. If drivers retain a right to privacy in their department of licensing records, surely pedestrians have at least an equally reasonable expectation of freedom from gratuitous government searches into their license status.

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

2. RANDOM CHECKS FOR OUTSTANDING WARRANTS ARE NOT A RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT.

The State next rationalizes these random searches on the grounds the police need to prevent criminals from walking out of the jail. The government claims it needs be able to apprehend potential violators of no-contact orders and people with outstanding warrants. RB 8. But that is true in all places at all times. There is no more justification for suspending the constitutional rights of jail visitors than of wedding guests. In any group of 50 people, one or two will have a suspended driver's license, a no-contact order, or a warrant. But the privacy rights of Washington citizens' trump police efficiency. *Mesiani*, 110 Wn.2d at 459. At the jail, moreover, the people for whom probable cause exists are not going anywhere; they are locked up. The State does not explain why individuals visiting loved ones in jail should be subject to gratuitous invasions of their privacy.

To survive constitutional scrutiny, a warrantless intrusion must be reasonable. *State v. McAlpin*, 36 Wn. App. 707, 716, 677 P.2d 185 (1984). The absence of any basis for suspecting criminal activity tips the balance between the public interest in law enforcement and the right to privacy in favor of the latter. *State v. Hobart*, 94 Wn.2d 437, 444, 617

P.2d 429 (1980). There is no exception for “standard practice.” And no legitimate government purpose is served by checking the status of pedestrians’ license to drive.

Assuming that effective jail administration requires visitors to identify themselves (to give inmates the opportunity to decline a visit, for example), their driver’s license status is simply not relevant. The State assumes guilt by association, which this Court should not condone.

Arguably, a jail visitor’s reasonable expectations of privacy are limited, but that does not mean no restriction on government intrusion is preserved. Ask visitors for identification, search them for weapons and contraband, and videotape and record their interactions with their loved ones. But no conceivable reason suggests itself for inquiring into restrictions on their license to drive.

Because subjecting Washington pedestrians to gratuitous investigation of their driving status violates art. 1, § 7 and the Fourth Amendment, no evidence obtained by means of such a search can be introduced in any Washington court for any purpose. *State v. Chenoweth*, 160 Wn.2d 454, 483, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Reversal is required.

3. CONSENT WITHOUT PROBABLE CAUSE
DOES NOT JUSTIFY A WARRANTLESS
SEARCH.

The State next claims jail visitors “freely” consent to the warrantless intrusion into their licensing records. RB 6. The State says Ms. Hathaway had the option of leaving. RB 8. But this can be said of every victim of unlawful government intrusion — they could just have stayed home. This intrusion was not optional. It was a mandatory requirement for all jail visitors without regard to grounds to suspect driving violations.

Our constitution measures exceptions to the requirement against a “standard of reasonableness” that includes a requirement for probable cause. *Ladson*, 138 Wn.2d at 351. Probable cause to search means facts sufficient for a reasonable person to conclude the subject “probably is involved in criminal activity.” *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). The consent exception relieves the government of the need for a warrant, not the need for probable cause. Even a search pursuant to a warrant is invalid unless the warrant is based on probable cause. *State v. Haapala*, 139 Wn. App. 424, 432, 161 P.3d 436 (2007), citing *Maxwell*, 114 Wn.2d at 769, citing *State v. Coates*, 107 Wn.2d 882,

888, 735 P.2d 64 (1987). Thus, every government search conducted without probable cause is unlawful, even if the victim consents.³

“Authority of law” in the search and seizure context has two components: a warrant and probable cause. *Chenoweth*, 160 Wn.2d at 466. The warrant requirement and the probable cause requirement are not to be confused. *Olivas*, 122 Wn.2d at 88. Circumstances may justify relaxing the warrant requirement, but only where probable cause is shown. *Olivas*, 122 Wn.2d at 88; *Carroll*, 267 U.S. at 155-56 (where it is impractical to obtain a warrant, the government may invoke an exception to the warrant requirement, provided the officer has “reasonable or probable cause” for the search); *Schmerber v. California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (blood alcohol); *Wyo. v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999) (warrantless automobile search).

Moreover, when the State justifies a search on the basis of consent, the Fourth and Fourteenth Amendments require “consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). That was not the case here. Jail visitors

³ An analogous situation is a warrantless wiretap based on one-party consent, which is lawful provided the police initially determine probable cause. *Kadoranian by Peach v. Bellingham Police Dept.*, 119 Wn.2d 178, 184, 829 P.2d 1061 (1992).

may have acquiesced to have their driver's licenses seized, but coercion is at least implied. And searching department of licensing records for driving status exceeds any consent that was given.

The Court should reverse the conviction on this ground.

4. RANDOM, SUSPICIONLESS SEARCHES FOR WARRANTS AND DRIVER'S LICENSE STATUS VIOLATE WASHINGTON'S PROHIBITION AGAINST WARRANTLESS INTRUSIONS INTO PRIVATE AFFAIRS.

The State contends the status of a person's license to drive is not a private affair. RB 6. This may be true of a driver's driver's license, but here we are talking about pedestrians.

The purpose and circumstances of a search are crucial factors in determining what constitutes private affairs in the context of art. 1. § 7. *State v. Jorden*, 160 Wn.2d 121, 126-27, 156 P.3d 893 (2007). In *Jorden*, the Court struck down the practice of checking names in motel registries for outstanding warrants without individualized or particularized suspicion.

Granted, the driver's license status of people driving is a legitimate area of scrutiny by the police. But the police may not engage in fishing expeditions. They need particularized suspicion.

4. FAILURE TO GIVE A PROXIMITY
INSTRUCTION WAS REVERSIBLE ERROR.

Criminal defendants are entitled to jury instructions that accommodate the defense theory of the case. The court must interpret the evidence strongly in the defendant's favor and give a requested instruction so long as some evidence supports the theory. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009); *State v. Williams*, 93 Wn. App. 340, 348, 969 P.2d 106 (1998), *review denied*, 138 Wn.2d 1002 (1999).

The State claims there was no evidence that mere proximity connected Hathaway to the vial on the ground. RB 9. This is wrong. The record speaks for itself.

Deputy Anderson noticed a tiny vial on the ground in proximity to Hathaway while searching her. RP 43. He did not see the vial drop and did not see Hathaway try to get rid of it. RP 55. Contrary to the State's claim, Anderson did not hear the vial hit the ground. He heard a tiny "tink", then noticed the tiny vial. He simply inferred a cause-and-effect relationship between the "tink" and the vial. The jury need not have made the same inference. Moreover, a juror with any knowledge of physics would entertain at least a reasonable doubt whether running over a tiny cylindrical vial would necessarily have crushed it, even if it was glass, and the State presented no evidence as to the composition of this vial.

Interpreted most strongly in favor of the defense, this evidence entitled Hathaway to a proximity instruction.

For the first time on appeal, the State alleges Hathaway was in actual possession of the vial. RB 10. But the State did not allege actual possession. Instead, the court instructed the jury solely on constructive possession. Instr. 7, CP 47. The defense argued that the constructive possession instruction needed to be supplemented with the corollary instruction that “mere proximity” to a controlled substance is not sufficient to prove constructive possession was required. RP 81-82. Based on the State’s own evidence, it was error not to give complete instructions. Reversal is required.

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE SIMPLE POSSESSION.

Evidence is sufficient to support a conviction if any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff’d*, 166 Wn.2d 380, 208 P.3d 1107 (2009). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences to be drawn from it. *Thomas*, 150 Wn.2d at 874.

Here, accepting the State's evidence as true, it shows merely that Anderson heard a "tink" sound while searching Hathaway and found a small plastic vial on the ground. The State did not prove beyond a reasonable doubt that Hathaway — rather than Anderson or some anonymous pedestrian — dropped the vial, especially since Anderson had just handcuffed Hathaway and surely would have checked for concealed objects in her hands.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse Hathaway's conviction and dismiss with prejudice.

6. THE INFORMATION AND THE TO-CONVICT INSTRUCTION INCLUDE THE EXTRANEOUS ELEMENT THAT POSSESSION OF THE VIAL WAS "UNLAWFUL".

The State next defends the defective to-convict instruction. RB 11.

Fundamental due process requires the State to prove every element of the charged crime beyond a reasonable doubt." *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); *State v. Keend*, 140 Wn. App. 858, 870, 166 P.3d 1268 (2007).

Defense counsel at first suggested that the elements should include that the possession was “unlawful.” RP 73. Upon further reflection and after consulting the case law, counsel retracted his objection and agreed that “unlawful” should not be included. RP 80. This placed the decision squarely with the court and the prosecutor and obviated any claim of invited error. The prosecutor then affirmatively acquiesced in leaving “unlawfully” in the instruction. Therefore, the State was required to prove that Hathaway’s alleged possession was “unlawful”, which means, at minimum, knowing and intentional. Essential to the proof of any unlawful act are the implied elements of knowledge and intent. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). A culpable state of mind is an essential component of any unlawful act. *Utter*, 4 Wn. App. at 139. Even if the evidence supported a jury finding that Hathaway was in possession of the vial, the State failed to prove the possession was unlawful.

The charging document and the to-convict instruction both alleged that Hathaway’s possession of the methamphetamine vial was “unlawful.” The prosecutor stated unequivocally that including “unlawfully” in the instruction was fine. RP 80-81. It was defense counsel who argued that “unlawfully” was extraneous. RP 80.

Here, the State failed to prove the possession was knowing and intentional. Therefore, it did not prove the possession was “unlawful,” and reversal is required.

The State cannot rely on the general rule that possession is a strict liability crime. RB 12. The State had to prove the additional element that Hathaway possessed the vial of methamphetamine unlawfully. Conduct is unlawful only if it an act is performed with a culpable state of mind.

Utter, 4 Wn. App. at 139.

The State claims that changing the elements of a crime to match the to-convict instruction somehow invades the province of the legislature. RB 13. To borrow a term liberally employed by the State, this argument is “specious.” The courts’ proper function is to interpret the law. A jury instruction not objected to becomes the law of the case and the State must prove all extraneous elements. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).

The absence of any evidence proving the state of mind element defeats the conviction. The remedy is to reverse and dismiss.

6. THE JURY FEE EXCEEDED THE COURT'S STATUTORY AUTHORITY.

The court imposed a jury fee of \$1,604.53. CP 56; RP 133. The maximum allowed by statute is \$250.00.

Costs are limited to “expenses specifically incurred” by the state in prosecuting the defendant or in administering special programs. RCW 10.01.160(2) (emphasis added). By the plain language of the statute, costs cannot include expenses inherent in providing a constitutionally guaranteed jury trial. RCW 10.01.160(2). The legislature does allow a limited statutory jury fee. RCW 36.18.016(b); 13B WAPRAC § 3612. That fee is currently two hundred fifty dollars for a jury of twelve. RCW 36.18.016(b).

The State is mistaken in arguing that including an excessive jury fee in Hathaway's sentence is not appealable under RAP 2.2. Piecemeal appeals are to be avoided in the interests of judicial economy. *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). Hathaway's direct appeal as of right of her judgment and sentence is the proper forum in which to address all assignments of error.

The State asks the Court to require Hathaway to institute extraneous proceedings in the future to seek reconsideration. RB 16. But her challenge to the jury costs goes to the trial court's erroneous

interpretation of the law, not its discretionary application to the particular facts of this case. The Court should remand to reduce the court costs to conform to statute.

V. CONCLUSION

For the forgoing reasons, the Court should reverse Ms. Hathaway's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this June 25, 2010.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", written over a horizontal line.

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