

COURT OF APPEALS NO. 40607-1-II

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BY 

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

Christopher J. Green,

Defendant/Appellant.

Pierce County Superior Court Cause Number No. 08-1-05855-9

**The Honorable Ronald E. Culpepper,
Presiding Judge at the Trial Court**

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	2-6
1) <i>Procedural History</i>	2-3
2) <i>Summary of the Facts</i>	3-6
IV. ARGUMENT.....	6-21
A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. GREEN’S MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE DEFECTIVE SEARCH WARRANT.....	6-13
1. <i>The search warrant was based on stale information contained in the warrant affidavit</i>	8-11
2. <i>An insufficient nexus existed between the alleged criminal act and the places to be searched</i>	12-13
B. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GREEN CONSTRUC- TIVELY POSSESSED ANY OF THE CONTROLLED SUBSTANCES.....	13-17

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
C. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GREEN INTENDED TO DELIVER THE METHYLPHENIDATE OR THE CLONAZEPAM.....	17-18
D. THE ABSENCE OF A UNANIMITY INSTRUCTION DENIED MR. GREEN HIS RIGHT TO A UNANIMOUS JURY UNDER WASHINGTON CONSTITUTION ARTICLE I, § 21.....	18-22
V. CONCLUSION.....	22
Appendix: Complaint for Search Warrant and Search Warrant.	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u><i>In re Det. of Peterson</i></u> 145 Wn.2d 789,799,42 P.3d 952 (2002).....	7
<u><i>State v. Brown</i></u> , 68 Wn.App. 480,843 P.2d 1098 (1993).....	18
<u><i>State v. Callahan</i></u> , 77 Wn. 2d 27, 459 P.2d 400 (1969).....	14
<u><i>State v. Cantabrana</i></u> , 83 Wn.App. 304,921 P.2d 572 (1996)	15
<u><i>State v. Chakos</i></u> , 74 Wn. 2d 154,443 P.2d 815 (1968)), <i>cert. denied</i> <i>sub nom.</i> , <u><i>Christofferson v. Washington</i></u> , 393 U.S. 1090,89 S.Ct. 855, 21 L.Ed.2d 783 (1969).....	14
<u><i>State v. Chamberlin</i></u> , 161 Wn.2d 30, 162 P.3d 389 (2007).....	7
<u><i>State v. Coleman</i></u> , 159 Wash.2d 509, 150 P.3D 1126 (2007).....	19,20
<u><i>State v. Darden</i></u> , 145 Wn.2d 612,41 P.3d 1189 (2002).....	17
<u><i>State v. Dobyys</i></u> , 55 Wn.App.609,621,779 P.2d 746, <i>review denied</i> , 113 Wn.2d 1029(1989)	10,11
<u><i>State v. Elmore</i></u> , 155 Wash.2d 758, N.4,123 P.3d 72 (2005).....	19
<u><i>State v. Greathouse</i></u> , 113 Wash.App. 889,56 P.3d 569 (2002).....	20
<u><i>State v. Hall</i></u> , 53 Wn.App.296,766 P.2d 512, <i>review denied</i> , 112 Wn.2d 1016(1989).....	10,11
<u><i>State v. Hett</i></u> , 31 Wn.App. 849,644 P.2d 1187, <i>review denied</i> , 97 Wn.2d 1027(1982)	10
<u><i>State v. Higby</i></u> , 26 Wn.App.457,613 P.2d 1192(1980).....	9,10,11
<u><i>State v. King</i></u> , 75 Wash.App.899,878 P.2d 466 (1994).....	20
<u><i>State v. Kirwin</i></u> , 165 Wash.2d 818,203 P.3d 1044 (2009).....	21
<u><i>State v. Paine</i></u> , 69 Wn.App.873,850 P.2d 1369, <i>review denied</i> 122 Wn.2d 1024,866 P.2d 39 (1993).....	14

TABLE OF AUTHORITIES(continued)

	<u>Page(s)</u>
<u>Washington Cases</u> (continued)	
<i>State v. Patterson</i> , 83 Wn.2d 49,515 P.2d 496(1973).....	12
<i>State v. Petrich</i> , 101 Wn.2d 566, P.2d 173 (1984).....	20
<i>State v. Paine</i> , 69 Wn.App.873,850 P.2d 1369, review denied 122 Wn.2d 1024,866 P.2d 39 (1993).....	14
<i>State v. Petty</i> , 48 Wn.App.615,740 P.2d 879, review denied 109 Wn.2d 1012(1987).....	9,11
<i>State v. Ponce</i> , 79 Wn.App. 651, 904 P.2d 322 (1995).....	15
<i>State v. Rangitsch</i> , 40 Wn. App . 771,700 P.2d 382(1985).....	12
<i>State v. Rempel</i> , 114 Wn.2d 77,785 P.2d 1134 (1990).....	13
<i>State v. Roberts</i> , 80 Wn.App. 342,908 P.2d 892 (1996).....	14
<i>State v. Seagull</i> , 95 Wn.2d 898, 907,632 P.2d 44(1981).....	12
<i>State v. Spruell</i> , 57 Wn. App. 383,788 P.2d 21 (1990).....	14
<i>State v. Thein</i> , 138 Wash.2d 133,977 P.2d 582(1999).....	12
<i>State v. Thompson</i> , 69 Wn.App. 436,848 P.2d 1317 (1993).....	14
<i>State v. Vander Houwen</i> , 163 Wash.2d 25,177 P.3d 93 (2008).....	20
<i>State v. York</i> , 152 Wash.App. 92,216 P.3d 436 (2009).....	20
<i>State v. Young</i> , 62 Wash.App. 895,802 P.2d 829 (1991).....	9
<i>State v. Zakel</i> , 61 Wn.App. 805,812 P. 2d 512 (1991), affirmed, 119 Wn.2d 563,834 P.2d 1046 (1992).....	13

TABLE OF AUTHORITIES(continued)

Page(s)

Federal Cases

Ornelas v. United States, 517 U.S. 690,697, 116 S. Ct. 1657, 134
L.Ed. 2d 911 (1996).....7

Constitutional Provisions

Washington Constitution. Article I, § 21.....19

Washington Statutes, Court Rules, and WPICs

RCW69.50.401.....2
CrR 3.5.....2
CrR 3.6.....2
RAP 2.5.....21
WPIC 50.03.....15

I. ASSIGNMENTS OF ERROR

1. The facts set forth in the warrant affidavit were insufficient to establish probable cause.
2. The evidence was insufficient to prove that Mr. Green had constructive possession of the controlled substances.
3. The evidence was insufficient to prove that Mr. Green intended to deliver the pills.
4. The trial court erred by failing to give a unanimity instruction for the charge of unlawful possession of a controlled substance with the intent to deliver marijuana.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the search warrant affidavit establish probable cause where it failed to establish that criminal activity was occurring contemporaneous to the issuance of the warrant and failed to demonstrate the requisite nexus between the alleged criminal activity and the places to be searched? (Assignment of Error Number One)
2. Was the evidence sufficient to establish that Mr. Green had dominion and control over the controlled substances that were found inside a box in the closet of the searched residence? (Assignment of Error Number Two)
3. Was the evidence sufficient to establish that Mr. Green intended to deliver the 62 tablets of Methylphenidate and the 33 tablets of Clonazepam that were found in the pill bottle? (Assignment of Error Number Three)
4. Did the trial court err by failing to provide the jury a *Petrich* instruction where the State presented multiple acts of alleged possession of marijuana but failed to elect one?(Assignment of Error Number Four)

III. STATEMENT OF THE CASE

1. *Procedural History*

On December 10, 2008, the defendant/appellant, Christopher Jerome Green, was charged by Information with three counts of Unlawful Possession of a Controlled Substance with the Intent to Deliver (Count I - Methylphenidate, Count II - Clonazepam, Count III - Marijuana) pursuant to RCW 69.50.401 (1) (2) (c) and two counts of a Unlawful Possession of a Controlled substance (Count IV- Cocaine, Count V- Heroin) pursuant to RCW 69.50.4013(1). CP 1-3. A corrected information was filed on January 25, 2010 to address a Skrivner's error.¹

On January 19th and 20th, 2010, pretrial motions were held pursuant to CrR 3.5 and 3.6. RP 1, RP 2 61-103. The trial court ruled that the custodial statements made by Mr. Green to police officers were inadmissible because he was not properly Mirandized. RP 2 91-92. The court also ruled that the challenged search warrant was not defective, and that all evidence seized during the execution of the warrant was admissible. RP 1 50-51. Findings and Conclusions on Admissibility of Evidence CrR 3.6 was filed on February 26, 2010.

¹ The date of the alleged offenses was changed from December 3, 2008 to December 9, 2008. CP 1-3; 126-128.

Mr. Green was convicted by jury of Counts I, II, III, and IV (three counts of unlawful possession with intent to deliver: methylphenidate, clonazepam, and marijuana plus one count of unlawful possession of a controlled substance: heroin). CP 76-83.

On March 26, 2010, the court imposed a low end standard range sentence of 20 months total (concurrent) time in the Department of Corrections. CP 148-161.

A timely Notice of Appeal was filed on April 23, 2010. CP 162-174.

2. *Summary of the Facts*

On December 9, 2008, Tacoma Police Department executed a search warrant at the residence of 901 East 61st Street in Tacoma, Washington. The nine member search team was lead by Officer Aaron Quinn. RP 2 110.

Upon entering the master bedroom, Officer Kenneth Smith noticed an odor of burned marijuana. RP 2 146, 186. The appellant, Mr. Green, and a female were in bed in the master bedroom. The female was identified as Michelle Smith, the possible wife of Mr. Green. RP 2 124. At least one juvenile was located inside the home in the northeast bedroom. RP 2 112.

Mr. Green requested permission to put on his pants. Officer Quinn picket up a pair of pants from the floor, and asked Mr. Green if they were his. RP 2 115, 125. Mr. Green responded affirmatively. Officer Green searched the pockets of the pants and found a “wad of cash,” which totaled \$645.00.

RP 2 115, 244. The cash consisted of five one-dollar bills, 14 five-dollar , 3 ten-dollar bills, 22 twenty-dollar bills, and two fifty-dollar bills. RP 3 245.

Under the supervision of Officer Brand, K-9 Officer “Charlie” initiated the search of the premises. “Charlie” “alerted” the human officers to two locations in the master bedroom: a nightstand and a box situated on a shelf inside the closet. RP 3 220. In the “Princess” shoe box the officers found 27 individually wrapped dime-type baggies bearing specific logos of playboy bunnies and/or aliens, containing suspected marijuana, 119 empty baggies of the same type, and a large pill bottle. A digital scale was found next to the box. The pill bottle contained a small piece of suspected black tar heroin and numerous assorted pills. RP 2 148, 157-160, 175, 186, 192; RP 3 226. More cash, in the sum of \$1,155. was found in the closet. RP 3 253. The denominations included 7 five-dollar bills, 4 ten-dollar bills, 14 twenty-dollar bills, 2 fifty-dollar bills, and 7 one hundred-dollar bills. RP 3 246.

Also located on the bedroom closet shelf were envelopes addressed to Mr. Green at the 901 East 61st Street address. RP 3 248. The document inside the first envelope was correspondence from DSHS regarding custody of Mr. Green and Michelle Smith’s child or children; it lists Mr. Green as the non-custodial parent and Michelle Smith as the custodial parent. RP 3 254. The second envelope addressed to Mr. Green at the 61st Street residence contained an application to join a shopper’s card club from Safeway. RP 2

178-179.

At trial, however, Mr. Green introduced his current Washington Driver's License, issued on 10-25-05, which represents his address as: 6605 Thornberry Drive Southeast in Lacey. RP 2 135. Police officers had no personal knowledge of whether Mr. Green actually lived at the 61st Street house. They had never seen him there before. RP 3 252-253; RP 2 138. Officers found no correspondence in the form of bills related to the residence (i.e. utility, phone, cable, etc.) that were address to Mr. Green. Nor were officers certain that the clothing in the bedroom closet belonged to him. RP 2 121-122.

A search of the remainder of the house revealed no additional evidence. After the home was searched, "Charlie" was taken outside to search a vehicle parked in the driveway. RP 3 216. "Charlie" immediately "alerted" to a pocket on the driver's side door, wherein the officers found cocaine, and [8] more baggies containing marijuana. RP 3 217; RP 2 129-131; CP 4. Police officers discovered no evidence linking Mr. Green to ownership of the vehicle. RP 2 134.

Officer Patrick Stephen testified at trial that drug sales, as opposed to personal drug use, is indicated by packaging techniques, weighing devices, crib notes, and substantial amounts of cash in various denominations. RP 3 225.

Forensic scientist with the Washington State Patrol Crime Laboratory, Jane Boysen, testified that she performed various tests on the substances she received in connection with Mr. Green's case. RP 3 288-320. The leafy green substances (Plaintiff's Exhibits 10B, 10C, and 10G) tested positive for marijuana. RP 3 295. The black tar substance contained the presence of heroin. (Plaintiff's Exhibit 10D). The white substance contained cocaine (Plaintiff's Exhibit 10A). Of the variety of approximately 200 pills she received for testing 62 round yellow tablets and 32 round blue tablets bore the markings of methylphenidate, which is also known as the controlled substance, Ritalin. RP 3 304, 318. The round yellow tablets tested positive for methylphenidate (Plaintiff's Exhibit 10F-1). RP 3 309. The round blue pills were not tested. (Plaintiff's Exhibit 10F-2). RP 3 309. Ms. Boysen also received 33 round yellow tablets which contained the controlled substance of clonazepam. (Plaintiff's Exhibit 10F-5). RP 3 311-312, 318.

When discovered at the residence, the pills were contained in a large pill bottle, but apparently separated by type into small baggies within the bottle. RP 2 148-152.

IV. ARGUMENT

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. GREEN'S MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE DEFECTIVE SEARCH WARRANT.

This Court's review of the trial court's legal determination of probable cause is de novo. A de novo standard of review permits the legal rules of probable cause to "acquire content" through appellate scrutiny. *State v. Chamberlin*, 161 Wn.2d 30, 41 n.5, 162 P.3d 389 (2007) (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L.Ed. 2d 911 (1996)); see also *In re Det. of Peterson* 145 Wn.2d 789, 799, 42 P.3d 952 (2002) (clarifying the de novo standard of review as appropriate for review of the probable cause determinations). Furthermore, de novo review of probable cause determinations "ensures that appellate courts remain the expositors of law and ensures the unity of precedent." *Chamberlin*, 161 Wn.2d at 41 n.5.

In the case at bar, the trial court entered the following findings of fact in their entirety:

1. On December 5, 2008, a Pierce County Superior Court Judge signed a search warrant for defendant's residence, vehicles and outbuildings at 901 East 61st Street, Tacoma, WA.
2. The search warrant was executed on December 9, 2008.
3. The complaint for the search warrant stated that the affiant was in contact with a confidential and reliable informant who said that

within the past 72 hours he/she was inside defendant's residence and observed an amount of crack cocaine.

4. The affiant stated that through a background investigation, he had learned that defendant has been arrested numerous times in the past, including an arrest on 11-03-08, for Unlawful Possession of a Controlled Substance with Intent to Distribute.

5. The CI provided information relating only to probable cause rather than the defendant's guilt or innocence.

Appellant accepts the trial court's factual findings, but challenges the conclusions of law reached by the trial court. Specifically, Mr. Green contests that the search warrant complaint "contained sufficient information for the magistrate to find probable cause," and that "a nexus between the crime and the places to be searched" was established by the warrant affidavit. (Conclusions of Law number 3 and 4.) CP 139-141.

1. The search warrant was based on stale information contained in the warrant affidavit.

The facts and circumstances supporting a search warrant must establish that "the criminal activity was occurring at or about the time the

warrant was issued.” *State v. Higby*, 26 Wn.App.457,460,613 P.2d 1192(1980). It is not enough that the criminal activity occurred some time in the past. *Id.* While the lapse of time between the criminal activity and the issuance and execution of the warrant is not the deciding factor, it is one circumstance among others to be considered, “including the nature and scope of the suspected criminal activity.” *Higby*, 26 Wn.App. at 461. “Staleness thus involves not only duration, but the probability that the [evidence] in question would be retained.” *State v. Young*, 62 Wash.App. 895,802 P.2d 829 (1991)

In *Higby*, the affidavit supporting the warrant detailed a single purchase of a small quantity of marijuana from the defendant’s home two weeks earlier. The court found that while the affidavit constituted “past probable cause,” it did not constitute probable cause for the search two weeks later. *Id.*

By contrast, in *State v. Petty*, 48 Wn.App.615,740 P.2d 879, review denied 109 Wn.2d 1012(1987), the supporting affidavit also established a marijuana sale two weeks earlier. However, the informant had also seen a marijuana grow operation in the basement with grow lights. Given the nature and scope of the operation, the court held that there was a reasonable possibility that the activity was still occurring two weeks after the observation. *Petty*, 48 Wn.App. at 622.

For similar reasons, the court in State v. Hall, 53 Wn.App.296,766 P.2d 512, review denied, 112 Wn.2d 1016(1989), upheld a warrant supported by observations made two months earlier. The Court held that the informant's description of the marijuana grown operation and the size of the plants at the time he observed them established a reasonable probability that the grow operation was still in existence. Hall, 53 Wn.App. at 300. See also, State v. Dobyys, 55 Wn.App.609,621,779 P.2d 746, review denied, 113 Wn.2d 1029(1989)(holding that observation of marijuana grow operation six weeks prior to issuance of warrant was not stale); State v. Hett, 31 Wn.App. 849,644 P.2d 1187, review denied, 97 Wn.2d 1027(1982) (finding probable cause where the informant had seen the defendant sell marijuana three days earlier and had arranged a buy for the day the search warrant was issued).

The foregoing cases illustrate the situations in which otherwise stale information may be used to support probable cause. In each case where a warrant was upheld, the "past probable cause" involved detailed and extensive on-going criminal activity that was still in process.. The magistrate issuing the search warrant thus could reasonably conclude that the activity was still occurring.

In the case at bar, the unidentified and unnumbered confidential informant observed a black male named "Chris" with an unspecified amount of cocaine at the named address three days before the search warrant was

issued on December 5, 2008 (See complaint for Search Warrant and Search Warrant attached as Appendix). CP 17-33, The search warrant was not executed until December 9, 2008. Thus, there was a one week time lapse between the time the CI saw “Chris” with some cocaine and the search. Notably, no alleged sale was involved in the CI’s accusation. A probability that this unspecified amount of cocaine, which may well have been for personal use, would still be present one week later was virtually non-existent. Mr. Green’s facts are most closely analogous to those presented in Higby, except that Higby detailed an actual purchase of marijuana whereas this warrant affidavit did not.

Mr. Green’s facts are unlike those presented in Petty, Hall, and Dobyns, where the warrant affidavits described grow operations. Here, even assuming that “Chris” was in fact the appellant, and furthermore that he was a current resident of the premises to be searched (which was not well established), there was no reasonable probability that this unspecified amount of cocaine would still be present a few days or a week later.

The warrant affidavit contained insufficient information to establish that “the criminal activity was occurring at or about the time there warrant was issued.” Higby at 460. The search warrant was, therefore, defective and all evidence found pursuant to the search warrant should have been excluded.

2. *An insufficient nexus existed between the alleged criminal act and the places to be searched.*

Before a search warrant issues, there must be an adequate showing under oath of “circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched.” State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44(1981) quoting State v. Patterson, 83 Wn.2d 49, 58, 515 P.2d 496(1973); see also State v. Rangitsch, 40 Wn. App . 771, 780, 700 P.2d 382(1985). Accordingly, probable cause requires a nexus between the criminal activity and the item to be searched. State v. Thein, 138 Wash.2d 133, 977 P.2d 582(1999).

In Mr. Green’s case, the observed criminal activity was allegedly the possession of cocaine. From there, the search warrant permitted the search of not only the entire residence where “Chris” was seen, but also of all vehicles located at the property. The search warrant affidavit includes affiant Officer Quinn’s assertion that Mr. Green had “been arrested numerous times in the past, including an arrest on 11-03-08, for Unlawful Possession of a Controlled Substance with Intent to Distribute.” Furthermore, Officer Quinn states that Mr. Green had previously given the Department of Corrections the 901 East 61st Street as his address. CP 17-33. How distant the past when Mr. Green gave the 61st Street address to DOC is unknown.

The affidavit facts therefore, were: (1) that an unnamed, unnumbered, confidential informant had seen a black man named "Chris" at the residence three days earlier, and that "Chris" was holding some cocaine, (2) that "Chris" was probably Christopher Green, who was listed as a previous resident of the premises at some unknown time in the past, and (3) Christopher Green had previously been arrested for intending to distribute an unnamed controlled substance.

The above information is simply too vague and circumspect to establish the requisite nexus between the criminal activity (possession of cocaine) observed and the places (and people) to be searched.

B. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GREEN CONSTRUCTIVELY POSSESSED ANY OF THE CONTROLLED SUBSTANCES.

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zake*, 61 Wn.App. 805,811,812 P. 2d 512 (1991), affirmed, 119 Wn.2d 563,834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77,82,785 P.2d 1134 (1990).

The statutory elements of possession of a controlled substance with intent to deliver are: (1) *unlawful possession* (2) with intent to deliver (3) a

controlled substances. RCW 69.50.401(a); State v. Thompson, 69 Wn.App. 436,439,848 P.2d 1317 (1993). Here, the State failed to prove unlawful possession.

On December 9, 2008, there were two persons present in the residence when the search was conducted: Mr. Green and Ms. Smith. The fact that Mr. Green was located in the bedroom where the drugs were found, as was Ms. Smith, is insufficient to establish actual possession. State v. Spruell, 57 Wn. App. 383,385-386,788 P.2d 21 (1990). Because no substances were found on Mr. Green's person, the State had to prove possession through the doctrine of constructive possession. State v. Paine, 69 Wn.App.873,878,850 P.2d 1369, *review denied* 122 Wn.2d 1024,866 P.2d 39 (1993).

Dominion and control over the premises in which the police discover drugs is a factor in determining whether the defendant had dominion and control, i.e., constructive possession, of the drugs themselves. State v. Roberts, 80 Wn.App. 342,353,908 P.2d 892 (1996), citing State v. Callahan, 77 Wn. 2d 27,30, 459 P.2d 400 (1969) (citing State v. Chakos, 74 Wn. 2d 154,443 P.2d 815 (1968)), *cert. denied sub nom.*, Christofferson v. Washington, 393 U.S. 1090,89 S.Ct. 855, 21 L.Ed.2d 783 (1969),

Here, the jury was instructed that proximity alone is insufficient to establish constructive possession, and that constructive possession requires dominion and control over the substances. Further, the jury was instructed

that whether Mr. Green had dominion and control over the premises where the substances were located was only a circumstance that could be considered in determining whether Mr. Green had dominion and control over the substances. The jury was also instructed that additional factors to consider were whether Mr. Green had the immediate ability to take actual possession of the substances, and whether he had the capacity to exclude others from taking possession of the substances. Jury Instruction No. 9, CP 84-115; WPIC 50.03.

Although it was entirely possible for the jury to view the evidence as showing that Mr. Green did not presently reside at the searched residence, viewing the evidence most favorably to the State (based on the two scant pierces of mail addressed to Mr. Green) the jury could also have inferred that Mr. Green did reside at the house. As a resident of the home, Mr. Green would have dominion and control over the premises in general, but not necessarily over the portion of the premises where the drugs were found.

Dominion and control over the premises, even the precise premises where the substances are located, however, is not sufficient alone to prove constructive possession, i.e., dominion and control over the substances. (See State v. Cantabrana, 83 Wn.App. 304,921 P.2d 572 (1996) in which the

Court rejected the “Ponce”² definition of constructive possession that permitted a finding of constructive possession when the dominion and control of the premises where the substance was found was proved, favoring instead the WPIC 50.03 definition.)

The trial testimony was that the only drugs located inside the house were found inside a “Princess” type shoe box in the closet of the bedroom where Mr. Green and Michelle Smith were in bed. No evidence definitively linked Mr. Green to either the closet or the box. The only evidence that possibly connected Mr. Green to the closet was the mail addressed to him that was found therein. Who placed the envelopes in the closet, however, was not established. No fingerprints were taken of the closet or the box. At best, the State showed that some of the clothing in the closet could possibly have been of a size that would fit him. On the other hand, it might not have been. None of the officers could testify with certainty that anything in the closet, or in the bedroom at all, belonged to Mr. Green.

Considering other factors that can give rise to an inference of constructive possession, Mr. Green did not have the immediate ability to take actual possession of the substances located in the box on the shelf in the closet; nor did the evidence show that he had the capacity to exclude others

² State v. Ponce, 79 Wn.App. 651, 904 P.2d 322 (1995).

from possessing the substances. . Had the jury properly considered the additional factors it would not have found that Mr. Green constructively possessed the substances.

With respect to the vehicle located in the driveway, the State presented no evidence of actual or constructive possession of either the car or the substances found therein. The only possible connection to the car was the tenuous dominion and control Mr. Green may have had over the premises in general. Mr. Green was not, however, convicted of possessing the cocaine located inside the door pocket of the car. Whether the jury found him guilty of possessing the baggies of marijuana, also found in the door pocket of the car, is unknown and is discussed further in Argument D.

C. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GREEN INTENDED TO DELIVER THE METHYLPHENIDATE OR THE CLONAZEPAM.

Even if this Court determined that sufficient evidence existed to establish that Mr. Green had constructive possession of the substances found on December 9, 2008, there was insufficient evidence to prove that he had an intent to deliver the pills. Naked possession of a controlled substance is insufficient to establish an inference of an intent to deliver. *State v. Darden*, 145 Wn.2d 612,625,41 P.3d 1189 (2002).

The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substances into a possession with intent to deliver without substantial evidence as to the possessor's intent above and beyond the possession itself.

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.

State v. Brown, 68 Wn.App. 480,483,843 P.2d 1098 (1993).

In this case, there was no "substantial corroborating evidence" in addition to the 62 pills that tested positive for methyphenidate and the 33 pills that contained clonazepam. RP 3 309-318. The other evidence collected included the scale and the empty baggies that matched the type in which the marijuana was located. There was no evidence presented that these items would be used for selling the pills. Moreover, Officer Smith testified that these pills were not commonly known to be sold on the street. RP 200. The evidence was insufficient to show that Mr. Green intended to sell the pills.

D. THE ABSENCE OF A UNANIMITY INSTRUCTION DENIED MR. GREEN HIS RIGHT TO A UNANIMOUS JURY UNDER WASHINGTON CONSTITUTION ARTICLE I, § 21.

Mr. Green was charged with one count of unlawful possession with the intent to deliver marijuana. The State, however, presented evidence of

and argued to the jury that multiple acts of possession of marijuana were committed: once where he allegedly possessed individually packaged marijuana discovered inside the residence, and again where he allegedly possessed the individually packaged marijuana that was found inside the car.

Constitutional violations are reviewed de novo. The erroneous failure to provide a unanimity instruction requires reversal, unless the error is harmless beyond a reasonable doubt. *State v. Coleman*, 159 Wash.2d 509, 512, 150 P.3D 1126 (2007). The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.* Where the prosecution presents evidence of multiple acts, the court must provide unanimity instructions.

An accused person has a state constitutional right to a unanimous jury verdict. ³ Washington Constitution, Article I, § 21; *State v. Elmore*, 155 Wash.2d 758, 771 N.4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *Coleman*, at 511. If the prosecution presents evidence of multiple acts to support a particular charge, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal

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The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

act to convict the accused person of that particular charge. State v. York, 152 Wash.App. 92,216 P.3d 436 (2009); Coleman, at 511. Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” State v. Vander Houwen, 163 Wash.2d 25,39,177 P.3d 93 (2008).

In the absence of an election by the prosecution, failure to provide a unanimity instruction in a “multiple acts” case is presumed to be prejudicial.⁴ Coleman, at 512; see also Vander Houwen, at 38. Without the election or an appropriate unanimity instruction each juror’s guilty vote might be based on facts that her or his fellow jurors did not believe were established beyond a reasonable doubt. Coleman, at 512.

The obligation to provide a Petrich⁵ instruction applies in cases involving multiple acts of possession. See, e.g. State v. King, 75 Wash.App.899,878 P.2d 466 (1994) (instruction required when evidence shows actual possession of cocaine in a fanny pack and constructive possession of cocaine found in vehicle).

Here, the absence of a unanimity instruction prejudiced Mr. Green and requires reversal. The State introduced evidence that Mr. Green

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Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); State v. Greathouse, 113 Wash.App. 889,916,56 P.3d 569 (2002).

5

State v. Petrich, 101 Wn.2d 566,683 P.2d 173 (1984).

possessed multiple baggies of marijuana which he allegedly intended to deliver. Some of the baggies were discovered inside the residence, while others were found in the vehicle, which the State claimed belonged to Mr. Green. The prosecutor did not make an election as to which of the supplies of marijuana Mr. Green allegedly possessed (and intended to deliver), but rather referenced both during his summation. RP 4 372,375,378,385. Despite this, the trial court failed to provide a unanimity instruction. CP 256-285. This created a manifest error affecting Mr. Green's constitutional right to jury unanimity, and thus can be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818,823,203 P.3d 1044 (2009).

In the absence of a unanimity instruction, there is no guarantee that all twelve jurors agreed on the particular act that rendered Mr. Green guilty of the crime of unlawful possession with the intent to deliver marijuana. The error is presumed prejudicial, and requires reversal unless the State can establish that no rational juror could have a reasonable doubt that Mr. Green was guilty of both acts. The State cannot make this showing: the evidence established that Mr. Green was near both supplies of marijuana, although nothing (beyond mere proximity) actually connected him to either particular supply.

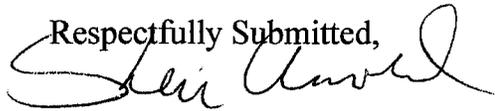
Given the evidence, a rational juror could have had a reasonable doubt that Mr. Green knowingly possessed either of the quantities of marijuana.

Under these circumstances, it is impossible to say that the jury unanimously agreed that Mr. Green was guilty of possessing either the stash discovered in the closet or that found in the car. Accordingly, the convictions must be reversed and the case remanded for a new trial.

V. CONCLUSION

This Court should determine that the search warrant was defective, suppress the evidence found in the search, and dismiss the prosecution against Mr. Green. Alternatively, this Court should find that the evidence was insufficient to show that Mr. Green possessed any of the controlled substances found and dismiss this action. Alternatively, this Court should find that the evidence was insufficient to establish that Mr. Green intended to deliver the pills and dismiss counts I and II. In the alternative, this Court should remand for a retrial on the basis of the failure to give a *Petrich* instruction.

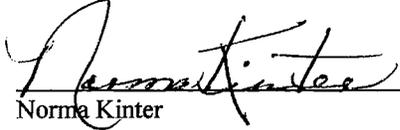
DATED this 24th day of January, 2011.

Respectfully Submitted,


Sheri L. Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on January 24, 2011, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Christopher J. Green, DOC # 975229, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362, true and correct copies of this Opening Brief. 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 January 24, 2011.



Norma Kinter

STATE OF WASHINGTON
COUNTY OF PIERCE
JAN 24 2011
BY  _____
DEPUTY

each occasion, the confidential and reliable informant was supplied with funds from the Tacoma Police Department Special Investigations Narcotics Division, to make purchases of controlled substances. The confidential and reliable informant was then followed to the location of each reliability purchase and observed entering the location. After a few minutes the confidential and reliable informant was observed exiting the location and was followed to a prearranged location. At this time the confidential and reliable informant produced the controlled substances purchased during each reliability buy. The confidential and reliable informant was again searched for controlled substances, with no additional controlled substances found other than those controlled substances that were purchased.

The reliability of the confidential and reliable informant is enhanced by the fact that he/she has been involved in the local drug scene for over 10 years and is familiar with the various controlled substances, to include Cocaine, Crack Cocaine, Methamphetamine, Ecstasy, Prescription pills and Black Tar Heroin. The confidential and reliable informant has also displayed a working knowledge of the street prices of the various controlled substances, as well as normal packaging methods used for illicit street sales. The confidential and reliable informant has also provided information regarding drug trafficking and other criminal activity in the City of Tacoma, which has been proven to be true and correct by independent means.

Your affiant has been employed by the Tacoma Police Department since November 21st 1994, during that time your affiant has been involved in over (200) narcotics related arrests. Your affiant has been assigned to Patrol from 1995 to 2004, during that time your affiant assisted in several "Knock and Talks". Your affiant has also assisted with search warrants, locating evidence, logging evidence, and dismantling of grow operations. Your affiant is currently assigned to the Special Investigations Division of the Tacoma Police Department and has been assigned to investigate the sale and distribution of illegal narcotics. Your affiant has also received extensive in service training in the identification of controlled substance such as Cocaine, Crack cocaine, Marijuana, and Methamphetamine and has attended the Drug Enforcement Administration 80 hour basic drug enforcement school. Your affiant has also received extensive training in the methods for packaging sale, distribution, trafficking, and the use and applications of these substances.

Additionally, your affiant believes that the identity of the informant should remain confidential and that disclosure of his/her identity would expose him/her to retaliation by members of the criminal narcotics community and/or revelation of the informants identity would render him/her inoperative for any future investigation wherein he/she may be able to render assistance to the affiant.

A. Quinn #148
A. Quinn #148

SUBSCRIBED AND SWORN to before me this 5 day of December, 2008. 10:40 AM

Jason Williams
Judge

arrest any person or persons who is a resident of or found to be in possession of controlled substances during such search and bring them into court to be dealt with according to law. Bail is to be set in open court.

GIVEN UNDER MY HAND this 5 day of December, 2008 10:40 AM


SUPERIOR COURT JUDGE