

FILED  
Court of Appeals  
Division II  
State of Washington  
5/22/2019 3:08 PM  
NO. 52401-5

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

STATE OF WASHINGTON, RESPONDENT

v.

RICKY RAY SEXTON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jack Nevin

No. 17-1-00988-3

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**Brief of Respondent**

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

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B. STATEMENT OF THE CASE.

1. PROCEDURE

On March 10, 2017, Ricky Ray Sexton, hereinafter "defendant" was charged and arraigned in Pierce County Superior Court with two counts of unlawful possession of a controlled substance with the intent to deliver, one count of unlawful possession of a controlled substance and one count of unlawful possession of a firearm in the first degree. CP 3 – 4. Counts I and II included a firearm sentencing enhancement. CP 3 – 4.

Trial commenced before the Honorable Jack Nevin on February 13, 2018. RP Vol. I February 13, 14, 2018 p. 3. A CrR 3.6 hearing to suppress evidence was held. The court denied the defense motion to suppress the search warrant finding that it was properly issued and served and contained sufficient facts and circumstances to establish probable cause. RP Vol. I February 13, 14, 2018 p 176 – 185. The court entered findings of facts and conclusions of law. CP 120 – 127. Defendant made an oral motion to reconsider the decision in the CrR 3.6 hearing. The court reopened the CrR 3.6 hearing on March 5, 2017. RP Vol. VI March 5, 2018, p. 6.

The court held a CrR 3.5 hearing regarding the admissibility of defendant's statements made to law enforcement on February 14, 2018. RP Vol. I February 13, 14, 2018 p 143 – 168. The trial court found that

defendant was properly advised of his constitutional rights and defendant's statements were knowingly, intelligently, and voluntarily made. *Id.* p 173. The trial court ruled that defendant's statements were admissible pursuant to *Miranda v. Arizona*. *Id.* P. 173. The court entered findings of fact and conclusions of law. CP 128 – 131.

The parties appeared for trial on February 15, 2018. RP Vol. II February 15, 22, 2018, p.3. Defense counsel informed the court that the defendant had fired him and he requested to withdraw from the case. *Id.* 3 – 5. The defendant requested to represent himself. *Id.* 7. After hearing from the State, defense counsel and the defendant, the court denied defense counsel's motion to withdraw and denied defendant's motion for self representation. *Id.* P. 34. The court entered findings of fact and conclusions of law. CP 132 – 135.

The defendant was found guilty of all four charged counts but did not reach a decision on the firearm sentencing enhancements charged in counts I and II. RP Vol. V February 28, 2018, p. 44 – 49. The court denied defendant's request for a DOSA sentence and sentenced the defendant to a standard range sentence of 85 months on counts I, II, and IV and 24 months on count III to run concurrent to each count and to the sentence imposed on defendant's other cause number 17-1-02934-5. RP Vol. VI May 4, 16, 2018, p. 34 – 36. This appeal follows.

2. FACTS

a. Facts at CrR 3.6 Hearing.

Pierce County Sheriff's Department Deputy Philip Wylie testified he has been employed by the Department since 1994 and is a member of the Special Weapons and Tactics Team (SWAT). RP Vol. I February 13, 14, 2018, p. 8 - 9. Deputy Wylie is also a former member of the Special Investigations Unit which investigates drug crimes. *Id.* p. 12. Each individual on the team has special training with weapons and tactics for high risk warrant service. *Id.* p. 8. Deputy Derek Nielson is a member of the SWAT team. *Id.* 42. Deputy Roland Bautista has been assigned to the SWAT team for the last 21 years as a crisis negotiator and supervises the investigators of the Domestic Violence Unit. *Id.* 78 - 79. A threat assessment is done prior to the service and includes information about the subject, their criminal history, prior incidents, known associates and whether there is electronic surveillance present. *Id.* p. 9 – 10, 52.

It is common that drug suspects may try to destroy evidence upon learning that their home is about to be searched. *Id.* p. 13. Drugs can easily be destroyed by being eaten, being put into toilets or sinks, or hidden under carpets. *Id.* p. 13 -14. Officers try to go unnoticed until the last moment to combat evidence destruction. *Id.* p. 14. Officers serving warrants are concerned about firearms being present and it is common in

Deputy Wylie's experience for individuals involved in drug trafficking to arm themselves. *Id.* p. 15.

One of the duties on the SWAT team is as the "breacher." *Id.* p. 43. A breacher usually the one that covers the requirements of the "knock and announce." *Id.* p. 43. The breacher is the one gains entry into the structure. *Id.* p. 43. Other situations can dictate how a knock and announce is completed. One situation is a no-knock warrant and another is when the service is compromised. *Id.* p. 43 – 44. During a compromise, the officer will knock and announce as they are breaching the door. *Id.* p. 44.

In this incident, SWAT officers were briefed on the threat assessment and tactical information at approximately 4:30 a.m. *Id.* p. 16, 18, 49 - 51. The two significant factors that the officers were told about was that the suspect was know to carry a handgun and there was a dog on the property. *Id.* p. 18, 50, 52. The address of the service was 20114 69<sup>th</sup> Avenue East in Spanaway and the suspect's name was Ricky Sexton. *Id.* p. 21, 24, 50, 53. The residence was set up above so it had a good vantage point to look out at the area where the officers were approaching. *Id.* p. 21 – 22. The officers were in uniform and the vehicle was clearly marked as a law enforcement vehicle. *Id.* p. 17 - 18.

Deputy Wylie and Deputy Neilsen were outside of the armored vehicle and observed someone standing on the front porch of the residence. *Id.* p. 14 -15, 24, 54, 69. The person was a white male with dark hair wearing a gray shirt with “Army” in black lettering on the front. *Id.* p. 25, 70. Deputy Wylie and Deputy Nielsen saw the male look in their direction and then turn and bolt into the house in a hurry. *Id.* p. 24, 26, 54, 67 - 68. The officers were about 15 yards from the front door when they saw the male on the male on the porch. *Id.* p. 55, 74. Deputy Wylie was holding the ballistic shield so he couldn’t call out “compromise” over the radio. *Id.* p. 17, 24 – 25. Other officers began to call out “compromise” over the radio and well as verbally around him. *Id.* p. 24 – 25, 54. Deputy Nielsen was near the fence when he heard “compromise.” *Id.* p. 76.

When the word “compromise” is called out, it heightens the SWAT team members awareness because they assume that the people inside the residence are now aware of their presence. *Id.* p. 26, 36, 45 – 46, 82 - 83. It’s standard operating procedure for the emergency lights on the vehicle to be activated and announcements made over the PA system. *Id.* p. 46 -48. The officers now try to secure the house as soon as possible. *Id.* p. 26, 36. When a house is compromised the knock and announce is quicker. *Id.* p. 26, 36, 83. When a compromise is called, it means the

tactical edge of getting there quietly is lost. *Id.* p. 83. The door is breached as the officers are yelling “police, search warrant” throughout the entire service. *Id.* p. 27, 30, 56. Because the officers had been briefed about the presence of a firearm, Deputy Wylie was concerned that someone could access the weapon and also about evidence destruction. *Id.* p. 27 - 28.

Deputy Bautista was part of the service warrant conducted on defendant’s residence on March 9, 2017. *Id.* p. 81. Deputy Bautista was in the passenger seat of the SWAT team vehicle and heard the word “compromise” over the radio. *Id.* p. 82, 88, 90. Once the compromise was transmitted, Deputy Bautista turned on the vehicle lights and announced over the PA system, “this is the police, we have a search warrant, get on the ground.” *Id.* p. 83 – 84, 90, 91. He typically adds the residence address during his third announcement. *Id.* p. 86. This announcement continued until the team has completed their first primary search of the location. *Id.* p. 84. The PA system is very loud and was checked that morning before approaching the residence. *Id.* p. 85. Deputy Bautista estimated that the vehicle was roughly 30 to 40 feet from the residence when the compromise was called. *Id.* p. 84, 90. Deputy Bautista estimated the elapsed time between the announcement over the

PA system to when the team made entry into the residence as 15 seconds.

*Id.* p. 86.

Deputy Wylie estimated that the elapsed time between when he heard “compromise” and entry into the residence was approximately 10 to 12 seconds. *Id.* p. 28. Deputy Nielsen estimated the elapsed time to be 3 to 5 seconds. *Id.* p. 57. Deputy Wylie and the other officers announced their identity as law enforcement officers with a search warrant prior to the door being breached. *Id.* p. 39, 64. The announcements continue throughout the warrant service. *Id.* p. 57.

Deputy Nielsen breached the door using a battering ram. *Id.* p. 57. The defendant was present inside the residence at the time of the warrant service as was the male seen on the front porch. *Id.* p. 29, 50, 58. Deputy Wylie located the defendant about 15 feet inside the residence near the hallway into the bedroom and detained him. *Id.* p. 30. Deputy Nielsen detained three men that were inside the residence. *Id.* p. 74 -75. The execution of the warrant occurred at approximately 5:15 a.m. *Id.* p. 31, 53. The warrant was served early in the morning to enhance officer safety as it’s possible that no one would be up. *Id.* p. 32. Neither Deputy Wylie or Deputy Nielsen heard a dog barking, footsteps running, or toilets flushing. *Id.* p. 33, 62. A dog was later located in the house. *Id.* p. 38.

Douglas Thompson, Dana Rolfe, and Sokvireap Khoi were in the residence at the time of the warrant service. RP Vol. I February 13, 2018, p. 5. Mr. Thompson was homeless at the time of the warrant service and was staying at the residence with the defendant and Dana. *Id.* p. 5. Mr. Thompson had just arrived at the residence to drop off keys and was inside talking with Dana when “everything” happened. *Id.* p. 8, 10, 16. Grenades went off in the defendant’s bedroom and people came through the doors with their guns out. *Id.* p. 8 – 9. Mr. Thompson and Ms. Rolfe did not hear anything like “police,” “search warrant” or “get on the ground.” *Id.* p. 10, 19, 34.

Mr. Thompson, Dana, Brandon, and Gina were in the living room at the time but the defendant was not. *Id.* p. 11 – 12, 29 - 30. Mr. Thompson did not hear anything over a PA system. *Id.* p. 12, 18. Everyone was awake in the house. *Id.* p. 19. Mr. Thompson was not aware of any drug in the house because he is gone all day working on the car. *Id.* p. 21 -22. Mr. Thompson has been previously convicted of three crimes of dishonesty. *Id.* p. 25 -26.

Dana Rolfe is the defendant’s girlfriend and has a bad memory. *Id.* p. 27 -28. She was living with the defendant at the time of the warrant service in Fir Meadows. *Id.* p. 28 – 29. The defendant was in his bedroom when the police came into the house. *Id.* p. 30, 37. Ms. Rolfe

heard banging and glass breaking. *Id.* p. 31 – 32. She thought it was 2 or 3 in the morning when the police came in and that it happened three months previous. *Id.* p. 36, 38.

Sokvireap Khoi was at the residence with her friend, Brandon, visiting the defendant when she heard two percussion grenades go off. *Id.* p. 42 – 43. Ms. Khoi testified that she, Brandon, and the defendant were in the defendant’s bedroom when the grenades went off. *Id.* p. 43. Ms. Khoi did not hear any announcement from the police. *Id.* p. 44 – 45. Ms. Khoi took care of the defendant’s big dog. *Id.* p. 46 -47, 54. Ms. Khoi had looked at the documents regarding the case that the defendant had. *Id.* p. 48. She saw a piece of paper with her name on it and it was printed off the internet at the defendant’s house. *Id.* p. 48 – 52. There was a “community pipe” with “meth” that was going around and Ms. Khoi took two hits from it. *Id.* p. 57, 59.

The defendant testified that he was living at the incident address with Dana Rolfe at the time of the warrant service. *Id.* p. 72. Keith Adams was in the process of renting the place and Doug Thompson and his girlfriend were staying there. *Id.* p. 72 -73. The defendant was in his bedroom with Brandon and Gina. Dana, Matt, and Doug were in the residence before the police came in. *Id.* p. 73, 82. The windows in the bedroom were broken in and what sounded like cherry bombs went off.

*Id.* p. 74, 82. The defendant went into the living room and the door had been ripped off. *Id.* p. 75 – 76, 78 - 79. The defendant did not hear anything like “police,” “search warrant,” or “open the door.” *Id.* p. 76.

The defendant testified that probably “15 of them” came through the door with rifles. The defendant asked “what in the hell is going on?” and the men said “Pierce County Sheriff.” The defendant asked if they had a search warrant and “they” responded “We don’t need a F’ing search warrant.” *Id.* p. 77, 78 – 79, 90 - 91. The defendant was cuffed and taken to a patrol car. *Id.* p. 77. The defendant did not hear any announcement from a PA. *Id.* p. 79, 91. The defendant testified that no one at this house was wearing an “army” shirt but it was possible. *Id.* p. 80. The defendant was not given a search warrant or an inventory. *Id.* p. 81. He found the inventory at the bottom of a pile about a week later. *Id.* p. 81.

On March 5, 2018, Pierce County Sheriff’s Detective Brent VanDyke testified that he is a forensics computer investigator. RP Vol. VI March 5, 2018, p. 8 – 9. Deputy VanDyke examined the DVR that was seized from the defendant’s residence and located video of a man exit a vehicle in front of the defendant’s residence and run to the front door. The man pauses and appears to be looking back in the direction where the SWAT team will come from. As the SWAT vehicle lights come into

view, the man moves inside the house and off camera. *Id.* p. 11 – 17, 23, exhibit 1.

b. Facts at Trial.

On March 9, 2017, the Pierce County Sheriff's Department's Special Investigations Unit was involved in a narcotics investigation at a mobile home in Spanaway Washington. RP Vol II February 15, 22, 2018, p. 68 – 70, 101. The subject of the investigation was the defendant. *Id.* p. 71, 104. The Unit was serving a search warrant on the defendant's residence. *Id.* p. 72 – 73, 102.

Detective Darrin Rayner searched the southeast bedroom of the mobile home along with Deputy Madrigal Mendoza. *Id.* p. 73, 103 - 104. Every item of evidence found is photographed, photographed with a placard number placed to identify it, and is then turned over for packaging and to be logged into evidence. *Id.* p. 74, 105 - 106. Detective Rayner found two pill bottles containing pills on a table or nightstand in the bedroom. *Id.* p. 74, 81. One bottle contained 67 pills. *Id.* p. 85, RP Vol. III February 26, 2018, p. 52, exhibit 19.

Deputy Madrigal Mendoza located a gallon sized baggie containing a foggy clear crystal like substance. *Id.* p. 107, exhibit 4. Deputy Madrigal Mendoza located the baggie on or near the desk in the southeast bedroom. RP Vol. III February 26, 2018, p. 9, 12 – 13. Three

digital scales, one with white residue, and documents in the defendant's name were found on the desk in the southeast bedroom next to the gallon bag of methamphetamine. *Id.* p. 14, exhibit 6, *Id.* p. 23, 31, exhibit 8, *Id.* p. 32 – 38, exhibit 10, *Id.* p. 90 -XX exhibit 33. Deputy Madrigal Mendoza found a sandwich baggie containing a crystalline substance on the desk in the southeast bedroom and a spiral notebook with names and numbers under the same desk. *Id.* p. 39, exhibit 15, *Id.* p. 43, exhibit 17. Another baggie containing a foggy crystal substance was found in the drawer of the desk in the southeast bedroom. *Id.* p. 57 – 61, exhibit 20. A handgun with two magazines was found in a drawer in the same desk of the southeast bedroom. *Id.* p. 67 – 68, exhibit 32. The defendant's wallet with his identification was found next to the firearm. *Id.* p. 99 – 101, exhibit 35.

A surveillance system consisting of a television screen or monitor and a digital recording device was found in the master bedroom. *Id.* p. 115 – 116, exhibit 37. Detective Shaun Darby found a safe in the bedroom. Inside the safe, Detective Darby located a gallon sized baggie containing a crystalline substance inside of a black nylon bag, a black zippered bag with various ammunition and bullets and a red zipper case containing bundles of cash. *Id.* p. 117 - 128 exhibit, 36, exhibit 38.

Deputy Kris Nordstrom is a member of the Special Investigations Unit and was assigned to be the packaging officer in this incident. *Id.* p. 7 – 8. The duties include packaging, sealing and field testing any of the recovered evidence. *Id.* p. 8. Deputy Nordstrom also took photographs of the residence before it was searched. *Id.* p. 11, exhibits 5, 7, 9, 13, 16, 18, 22, 24, 28, 29, 30, 31, 34, 37.

Deputy Robert Vance Tjossem has been with the Pierce County Sheriff's Department for 15 years and is assigned to the Special Investigations Unit. *Id.* p. 70 – 71. He has participated in conducting the controlled buys of narcotics and is familiar with their street value. *Id.* p. 79. Methamphetamine sells for approximately \$20 to \$40 per gram. Methyphenidate typically comes in pill form and sells for \$1 per milligram. A 10 milligram pill cost about \$10. *Id.* p. 80 – 81. Digital scales are used by drug sellers to weigh out an amount of drugs to be sold. *Id.* p. 81. Drug sellers commonly use various sized plastic ziplock baggies to package drugs for sale. *Id.* 82. Drug sellers also keep ledgers to record sales and drug debts. *Id.* p. 83. Common terms used by drug sellers include “zip” meaning an ounce or an “eight ball” meaning an eighth of an ounce. *Id.* p. 79, 83. Drug dealers will arm themselves to protect themselves because the drug trade can be dangerous. *Id.* 84 - 85. Drug sellers will commonly use a surveillance system. *Id.* p. 85.

Deputy Tjossem was the case officer assigned to the defendant's investigation. *Id.* p. 85 – 86. Deputy Tjossem spoke with the defendant when the warrant was being on his residence. The defendant stated that the offices would find “a little” methamphetamine in the residence. The defendant asked what “a little” meant to Deputy Tjossem and he answered that a little would be an “eight-ball.” The defendant chuckled and said there would be more than that. *Id.* p. 88 – 89, 105 - 106. The defendant also admitted that officers would find a safe, packaging materials, and a scale. *Id.* p. 88. The defendant denied having a gun in the residence. *Id.* p. 110.

Approximately one and a quarter pounds, or 566 grams, of methamphetamine was ultimately recovered from the defendant's residence. *Id.* 90 -91. The street value would be about \$5,000 to \$6,000. 87 pills of methylphenidate would be worth about \$870. Deputy Tjossem examined the spiral notebook found in the defendant's bedroom and recognized monetary figures, weights and measurements, and common drug terms. *Id.* 93 – 94, exhibit 17. The listed dollar amount and weights were consistent with street value. *Id.* p. 94.

Over \$5,000 in cash was recovered from the defendant's residence. *Id.* p. 94 – 95. Illegal drug sales usually involve cash transactions. *Id.* 95, exhibit 1, 3, 38. The defendant identified specific items that would be

found in his bedroom, including the safe, packaging materials, and the scale. *Id.* p. 101 – 102. The defendant stated that the money in his wallet was from SSI and was for rent. *Id.* p. 108

Maureena Dudschus is a forensic scientist with the Washington State Patrol Crime Lab. She has analyzed controlled substances over 10,000 times. Ms. Dudschus determined that the substances recovered from the defendant's residence were methamphetamine, a total of 87 pills of methyphenidate and oxycodone. *Id.* p. 36 – 69, exhibits 4, 11, 15, 20, 21, 23, 25, 27, 36.

Adam Anderson is a forensic investigator with the Pierce County Sheriff's Department. *Id.* p. 28. One of his responsibilities is to test fire guns. *Id.* p. 29. Mr. Anderson test fired a Sig Sauer semi-automatic pistol that was retrieved in this case. *Id.* p. 32, exhibit 32. He loaded the gun with two 9mm rounds and pulled the trigger twice. *Id.* p. 33. The gun fired both rounds into the metal tank filled with Kevlar. *Id.* p. 31, 33. The firearm successfully fired the two rounds. *Id.* p. 35.

C. ARGUMENT.

1. THE SEARCH WARRANT WAS PROPERLY  
ISSUED ON PROBABLE CAUSE, THE  
INFORMATION WAS NOT STALE, AND THE  
WARRANT WAS PROPERLY SERVED

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also, State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."); *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988) ("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.").

Probable cause for a search warrant is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that defendant is involved in criminal activity and the evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Probable cause to search requires (1) a nexus between the criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to

be searched. *State v. McGovern*, 111 Wn. App. 495, 499, 45 P.3d 624 (2002).

A magistrate makes a practical, commonsense determination, based upon all the circumstances set forth in the affidavit and by drawing commonsense inferences. *State v. Maddox*, 152 Wn.2d at 509 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

Common experience suggests that drug dealers must mix and measure the merchandise, protect it from competitors, and conceal evidence of their trade—such as drugs, drug paraphernalia, weapons, written records, and cash—in secure locations. For the vast majority of drug dealers, the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings. And no training is required to reach this commonsense conclusion. *United States v. Spencer*, 530 F.3d 1003, 1007 (D.C. Cir. 2008). The review of a judge's decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, an appellate court reviews de novo conclusions of law on whether probable cause was established. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

There are multiple factors a magistrate can consider when determining whether probable cause has been established. The experience and expertise of an officer can be taken into account. *State v. Maddox*, 152 Wn.2d at 511. Generalizations regarding the common habits of drug dealers can be used with other evidence where a factual nexus supported by specific facts is provided and are based on the affiant's experience. *State v. Thein*, 138 Wn.2d 133, 148, 977 P.2d 582 (1999). Prior convictions may be used when the prior conviction is for a crime of the same general nature. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001). Facts that individually would not support probable cause can do so when viewed together with other facts. *State v. Dunn*, 186 Wn. App. 889, 897, 348 P.3d 791 (2015).

Following a suppression hearing, the court reviews challenged findings of fact to determine whether they are supported by substantial evidence. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Unchallenged findings are verities on appeal, and challenged findings supported by substantial evidence are binding. *O'Neill*, 148 Wn.2d at 571. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We defer to the fact finder on issues conflicting testimony, witness credibility,

and persuasiveness of the evidence. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

- a. The officers announcements and breach of the door was reasonable under the totality of the circumstances.

“The knock and announce rule has both constitutional and statutory components. *State v. Ortiz*, 196 Wn. App. 301, 307, 383 P.3d 586 (2016). Both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that “a nonconsensual entry by the police ‘be preceded by an announcement of identity and purpose on the part of the officers.’” *State v. Coyle*, 95 Wn.2d 1, 6, 621 P.2d 1256 (1980) (quoting *State v. Young*, 76 Wn.2d 212, 214, 455 P.2d 595 (1969)); *Ortiz*, 196 Wn. App. at 307.

RCW 10.31.040 codifies these requirements. It allows officers making an arrest to “break open any outer or inner door, or windows of a dwelling house or other building” if “after notice of [their] office and purpose, [they] be refused admittance.” RCW 10.31.040. In order to comply with this “knock and announce” rule, police officers “prior to a nonconsensual entry must (1) announce their identity, (2) announce their purpose, (3) demand admittance, (4) announce the purpose of their demand, and (5) be explicitly or implicitly denied admittance.” *State v. Richards*, 136 Wn.2d 361, 369, 962 P.2d 118 (1998). “The remedy for an

unexcused failure to comply with the ‘knock and wait’ rule is suppression of the evidence obtained after the entry.” *Richards*, 136 Wn.2d at 371.

“Whether an officer waited a reasonable time before entering a residence is a factual determination to be made by the trial court and depends upon the circumstances of the case.” *Richards*, 136 Wn.2d at 374. We evaluate the reasonableness of the waiting period by looking to the underlying purposes of the knock and announce rule, including “(1) reduction of potential violence to both occupants and police arising from an unannounced entry, (2) prevention of unnecessary property damage, and (3) protection of an occupant’s right to privacy.” *Ortiz*, 196 Wn. App. at 308 (quoting *Coyle*, 95 Wn.2d at 5). The “waiting period ends once the rule’s purposes have been fulfilled and waiting would serve no purpose.” *Ortiz*, 196 Wn. App. at 308. The police are not required to wait for an actual refusal because “denial of admittance may be implied from the occupant’s lack of response.” *Ortiz*, 196 Wn. App. at 308 (quoting *State v. Garcia-Hernandez*, 67 Wn. App. 492, 495, 837 P.2d 624 (1992)).

In cases where the officers heard movement inside the residence, courts have upheld waiting periods between announcing and forcing entry of between five to ten seconds. See *State v. Johnson*, 94 Wn. App. 882, 890-91, 974 P.2d 855 (1999); *State v. Jones*, 15 Wn. App. 165, 166, 168, 547 P.2d 906 (1976). A period of several seconds can constitute a

reasonable waiting period in certain circumstances. *Id.* at 891, 974 P.2d 855 (finding a five-to-ten-second delay between knock and forced entry reasonable where police sought easily destroyed drug evidence and heard the suspects moving around inside); ***State v. Schmidt***, 48 Wn. App. 639, 740 P.2d 351 (1987) (finding a three-second delay reasonable where police had identified the small shed as a methamphetamine lab by its distinctive odor, barking dogs may have alerted the occupants of the officers' presence, the occupants of the shed had become quiet, and the officers had reason to believe the occupants were armed and/or destroying evidence).

But a failure to comply with the rule may be justified where exigent circumstances exist, as determined on a case-by-case basis. ***State v. Young***, 76 Wn.2d 212, 217, 455 P.2d 595 (1969); ***State v. Dugger***, 12 Wn.App.74, 80-81, 528 P.2d 274 (1974). To demonstrate exigent circumstances, the officers must be able to point to specific, articulable facts and reasonable inferences drawn from those facts justifying the unannounced intrusion. ***State v. Sanders***, 8 Wn. App. 306, 310, 506 P.2d 892 (1973). The particularity requirement may be satisfied either where the officers have specific prior information that a suspect has resolved to or made specific preparations to act in a manner creating an exigency, or where confronted with contemporaneous activity alerting them to the

possible presence of exigent circumstances. *State v. Coyle*, 95 Wn.2d 1, 10, 621 P.2d 1256 (1980).

Here, the officers reasonably believed the defendant had access to a firearm and that they had been compromised by the man seen hurrying into the residence from the front porch. The affidavit for the search warrant stated that the C.I. had seen a black handgun next to the defendant as he sold methamphetamine. Once the male on the porch had been seen, officers began to call out “compromise” over their radios. Upon hearing “compromise” Deputy Bautista began to announce over the PA system “police,” “search warrant,” and “get on the ground.” February 13, 14, 2018, p. 83 – 84, 90, 91. Deputy Bautista estimated the elapsed time between the announcement over the PA system to when the team made entry into the residence as 15 seconds. *Id.* p. 86. Deputy Wylie estimated that the elapsed time between when he heard “compromise” and entry into the residence was approximately 10 to 12 seconds. *Id.* p. 28. Deputy Nielsen estimated the elapsed time to be 3 to 5 seconds. *Id.* p. 57.

There is ample support for the trial court’s conclusion that the elapsed time between the announcements and the breach of the door was reasonable. CP 120 – 127.

- b. The affidavit sets forth specific facts to establish a nexus between the items to be seized and the defendant's residence.

A magistrate can draw a reasonable inference that evidence of drug deals, drugs themselves, and drug paraphernalia is likely to be found where the drug dealer lives. *United States v. Angulo-Lopez*, 791 F.2d 1934 (9th Cir. 1986). Probable cause can be met by showing not only that a drug dealer lives at a particular residence and drug dealers commonly keep drugs where they live, but also additional facts from which to reasonably infer that this drug dealer keeps drugs at his or her residence. *State v. McGovern*, 111 Wn. App. 495, 499-500, 45 P.3d 624 (2002) (emphasis in original). It is reasonable to suspect a drug dealer stores drugs in a home for which s/he owns a key. *United States v. Grossman*, 400 F.3d 212, 218 (4th Cir. 2005).

Here, police had ample evidence providing probable cause to believe that the defendant possessed a controlled substance and that evidence of that crime would be found at his residence. The following facts come from the complaint for search warrant probable cause to search. *See* CP 25 – 34.

According to the probable cause declaration to the search warrant, Deputy Tjossem used a confidential informant (C.I.) to conduct his investigation into the defendant's illegal activities. The C.I. has been

working with the Pierce County Sheriff's Department since 2016 and made two reliability buys under the supervision of the officers. Since becoming a C.I., the person had provided information that resulted in probable cause for search warrants, arrests, and recovery of methamphetamine, heroin, and prescription narcotics. CP 18.

Within the previous 3 weeks the C.I. provided information that the defendant was a source of methamphetamine in the Spanaway/Pierce County area. The C.I. reported that the defendant would sell methamphetamine from his mobile home at the Fir Meadows neighborhood. CP 18. The C.I. confirmed the defendant's identity and residence location. The C.I. has been immersed in the drug culture for numerous years and is able to identify narcotics based on their unique characteristics of color, shape, smell, and texture. CP 18 – 19.

Deputy Tjossem found that the defendant had seven felony convictions of which six were narcotics related including theft of ammonia. CP 18. Within the last 72 hours, the C.I. reported that he/she had been inside the mobile home and observed the defendant holding a large amount of methamphetamine packaged in a large Ziplock baggie. The C.I. observed a drug scale, smaller amounts of methamphetamine packaged in 1 inch by 1 inch baggies, unused baggies of various sizes, and a black handgun. The C.I. reported that he/she had witnessed the

defendant sell methamphetamine to another subject. CP 19. The warrant is dated March 3, 2017 and was signed by a judge. CP 20.

All of the factors a magistrate can consider when making a determination of probable cause are met in this case. Deputy Tjossem made it clear in the affidavit that he has extensive experience with drug cases and the techniques of drug dealers. CP 17 – 18. He was currently assigned to the Special Investigations Unit and had 5 years of previous experience in that unit. He is a certified member of the Department's clandestine lab team from 2007 to 2016 including being team leader for 4 years. He received training for undercover and drug investigations. CP 17 - 18. Tjossem has the requisite experience and expertise a magistrate can use and consider when determining there was sufficient probable cause to issue a search warrant.

In addition, a reliable C.I. provided information that the defendant was selling drugs while next to a handgun and had personally observed a large quantity of methamphetamine and the sale of such to another person. The C.I. observed scales and packaging materials. The defendant also has 6 prior convictions for drug related felonies. CP 18 – 19.

The affidavit of the search warrant clearly establishes that evidence of the defendant's drug trafficking could be located at his residence. The issuance of the warrant was not an abuse of the judge's discretion. The

trial court was correct in concluding the search warrant was issued on probable cause and that there was a nexus between the criminal activity, the defendant and his residence.

- c. The information within the affidavit was not stale and supports a finding of probable cause.

The defendant also challenges that the information provided in the complaint for the search warrant was stale by the time the police executed the search warrant on March 9, 2017. This claim also fails.

A delay in executing a search warrant may render the magistrate's probable cause determination stale. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). "Common sense is the test for staleness of information in a search warrant affidavit." *Maddox*, 152 Wn.2d at 505. To evaluate whether the facts underlying a search warrant are stale, we look at the totality of the circumstances, including the length of time between issuance and execution of the warrant and the nature and scope of the criminal activity. *Maddox*, 152 Wn.2d at 506. Probable cause may also grow stale based on the time between a CI's observations of criminal activity and the presentation of the affidavit to the magistrate. *State v. Lyons*, 174 Wn.2d 354, 360-61, 275 P.3d 314 (2012). CrR 2.3(c) requires that search warrants require officers to search the specific place "within a specified period of time not to exceed 10 days."

Here, the C.I. observed a large quantity of methamphetamine in a large baggie and observed its sale to another. Deputy Tjossem applied for the search warrant on March 3, 2017, within 72 hours of receipt of the information and served the warrant three days later. Less than 10 days had elapsed from the C.I.'s observations about the substance and the sale and the service of the warrant. The defendant fails to show the warrant was stale when it was served.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO PROCEED *PRO SE* WHEN THE REQUEST WAS EQUIVOCAL AND UNTIMELY.

The Sixth Amendment of the United States Constitution guarantees that a defendant in a criminal trial has the right to waive the assistance of counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Improper denial of the right of self-representation requires reversal regardless of whether prejudice results. *State v. Englund*, 186 Wn. App. 444, 455, 345 P.3d 859 (2015).

A defendant's request to proceed pro se must be timely made and stated unequivocally. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). When a request to proceed pro se is made during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002)

(citing *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)). When a request to proceed pro se is an alternative to substitution for new counsel, the request is not necessarily equivocal, but may be an indication to the trial court in light of the whole record that the request is equivocal. *Stenson*, 123 Wn.2d at 740-741. Even when a request is unequivocal, a defendant still may waive their right to self-representation through subsequent words or actions. *Vermillion*, 112 Wn. App. at 851.

Our Supreme Court has found multiple times that when there is equivocation, a court acts well within its discretion in denying defendant's motion to proceed pro se. For instance, in *Stenson*, virtually all of the conversation between the court and defendant was how he wanted a new lawyer and discussed specifically whom should be assigned. *Stenson*, 132 Wn.2d at 742. He noted that he only wanted to proceed pro se because he felt as though he was forced to do so by the court and counsel. *Id.* Finally, when the court stated how it did not believe defendant truly wanted to represent himself, defendant did not argue or object. *Id.* Similarly, in *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), in the context of a sexually violent predator commitment proceeding, defendant numerous times tried to represent himself. *Turay*, 139 Wn.2d at 395-400.

In the first attempt, defendant wanted to either represent himself or have a specific attorney. *Turay*, 139 Wn.2d at 396. When that lawyer was not available, defendant did not answer the court's questions related to what he wanted to do and asked for more time to consider the matter. *Turay*, 139 Wn.2d at 396-397. All of this showed that he wanted only a specific attorney, not that he truly wanted to proceed pro se. *Id.* Another time, defendant listed three alternatives he would be satisfied with, including the final option being pro se representation. *Turay*, 139 Wn.2d at 398. The court found that this was again equivocal. On a third and final occasion, defendant stated he wanted to preserve his objection for the record on being denied the right to represent himself. *Turay*, 139 Wn.2d at 399. This was again an equivocal request.

The right to self-representation, however, is neither absolute nor self-executing. *State v. Madsen*, 168 Wn.2d 496, 504 229 P.3d 714 (2010); *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). In order to guarantee a defendant a fair trial, “courts indulge in every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). Before a request for pro se status may be granted, the defendant’s request to proceed pro se must be both timely and

unequivocal. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis in original). A trial court's denial of a request to proceed pro se is reviewed for an abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011); *Madsen*, 168 Wn.2d at 504.

A trial court's decision on a defendant's request for self-representation will only be reversed if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (quoting *State v. Madsen*, 168 Wn.2d 496, 504 229 P.3d 714 (2010) (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003))). Courts should indulge every reasonable presumption against finding that defendant has waived their right to counsel. *Vermillion*, 112 Wn. App. at 851.

First, the defendant did not make an unequivocal request to proceed pro se. The defendant was unhappy with his retained attorney and wanted to fire him. RP Vol. II February 15, 22, 2018, p. 3. When asked if his intention was to represent himself, the defendant answered "At this time, yes." *Id.* 7. The defendant then engaged in a rambling explanation of his feelings about his situation before being cut off by court trying to pin him down on his request to represent himself. *Id.* 7 – 8.

The emphasis of defendant's statements were on his displeasure with the court's ruling against defense motion to suppress. *Id.* 7 – 8. The defendant first stated that he was willing to pick a jury but also that he was trying to contact an attorney in Seattle. *Id.* 7 – 8. The defendant stated that his attorney is a “very, very, good attorney” and that he was reluctant. *Id.* 8. He then expressed his disappointment in the outcome of the motion and stated that what happened was “evil” and he wanted the opportunity to put that before a jury of his peers. *Id.* 8.

“The general loss of confidence or trust alone is not sufficient to substitute new counsel.” *State v. Stenson*, 132 Wn.2d 668, 733-34, 940 P.2d 1239, 1272 (1997), citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir.1991). “A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *Id.*

When looked at in the context of the whole record, defendant's request was equivocal. At no time did defendant make a formal motion or explicitly move to proceed pro se. Throughout the course of the proceedings his argument consistently was that he simply did not want his current counsel to continue to represent him. He made the request after the trial court ruled against his motion. The defendant stated on the record

“At this point, Your Honor, after the last three days and the motion that was put before you and the decision you made, I feel that there’s no way possibly I could get a fair verdict from you. I feel that as I was instructed initially that it would be fruitless to even think that I could get a fair shake. I would like to ultimately get a change of venue.” *Id.* 14.

“The reason I’m firing Mr. Short is because I can’t afford him. I’ve exhausted the money I gave him... Like I said, because of the financial aspect of it and also Mr. Short doesn’t let me say anything.” *Id.* 16 – 17.

This is radically different from defendant making it unequivocally clear that he wanted to represent himself. The record supports the trial court’s finding that the defendant’s request for self representation was equivocal. CP 132 -135.

Second, the defendant’s request to discharge his attorney and to represent himself was untimely. Where a defendant’s request for self-representation is untimely, “the right is relinquished and the matter of the defendant’s representation is left to the discretion of the trial judge.”

*DeWeese*, 117 Wn.2d at 377. The trial court’s discretion to grant or deny a motion to proceed pro se “lies along a continuum that corresponds with the timeliness of the request.” *State v. Breedlove*, 79 Wn. App. 101, 107, 900 P.2d 586 (1995); *Fritz*, 21 Wn. App. at 361.

If the request is made well before the trial or hearing, the right to self-representation exists as a matter of law. *Fritz*, 21 Wn. App. at 361. If the request is made as the trial or hearing is about to commence, or shortly

before, the existence of the right depends upon the facts of the case with a measure of discretion reposing in the trial court. *Id.* at 361. Finally, if the request is made during the trial or hearing, “the right to proceed pro se rests largely in the informed discretion of the trial court.” *Id.* A court may deny a request for self-representation made as the trial or hearing is about to begin if granting the request would obstruct the orderly administration of justice. *Breedlove*, 79 Wn. App. 108; *Fritz*, 21 Wn. App. at 361.

The defendant made the request after the case had been called for trial and the trial court had ruled on the suppression motion. RP Vol II February 15, 22, 2018, 3 - 4. Substantial evidence supports the trial court’s finding that the defendant’s request was untimely. CP 132 - 135.

Finally, the court engaged the defendant in a colloquy to determine whether the defendant’s request for self-representation was knowing, voluntary, and intelligent.

Where a request is unequivocal and timely, a trial court must then determine if the request is knowing, voluntary, and intelligent. *State v. Madsen*, 168 Wn.2d at 504, 229 P.3d 714 (2010) (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The method for determining whether a defendant understands the risks of self-representation is a colloquy on the record. The colloquy should generally include a discussion of the nature of the charges against the

defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). The trial court may also look to the defendant's behavior, intonation, and willingness to cooperate with the court. See *State v. Curry*, 191 Wn.2d 475, 423 P.3d 179 (2018).

Here, the trial court evaluated all of the information in front of it and used its discretion to determine that the defendant's waiver was not knowing, voluntary, and intelligent. The trial court found that the defendant has not studied law, did not have an accurate understanding of the charges against him, and no knowledge of the rules of evidence or applicable criminal procedure. RP Vol. II February 15, 22, 2018 p. 28 - 34, CP 132 -135.

A trial court may properly deny a motion for self-representation "made without a general understanding of the consequences." *Madsen*, 168 Wn.2d at 504–05. Given the defendant's demonstrated inability to understand that he was facing significant consequences and inability to focus his answers to the court's colloquy, the trial court's denial of the defendant's pro se request was not an abuse of discretion.

3. THE TRIAL COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE WHEN IT GAVE INSTRUCTIONS THAT ARE PROPER INSTRUCTIONS ON THE LAW OF POSSESSION.

Article 4, section 16 of the Washington Constitution states “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose behind this provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the submitted evidence. *State v. Miller*, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014) (citing *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 57 (2000)). “To constitute a comment on the evidence, it must appear that the trial court’s attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court’s statements.” *Id.* (citing *Elmore*, 139 Wn.2d at 376).

A jury instruction can be an improper comment on the evidence. *Miller*, 179 Wn. App. at 107. However, “[a] jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.” *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). However, a definitional jury instruction that “essentially resolve[s] a contested factual issue” is an improper comment on the evidence because

it “effectively relieve[s] the prosecution of its burden of establishing an element of the [crime].” *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1081 (2006). In such a case where a jury instruction is found to be a comment on the evidence, it is presumed to be prejudicial and the burden rests on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Jury instructions are sufficient if they allow the parties to argue their theories of the case, properly inform the jury of the applicable law, and are supported by the evidence. *State v. Green*, 182 Wn. App. 133, 152, 328 P.3d 988, *review denied*, 337 P.3d 325 (2014).

Dominion and control is a single concept, which the jury must determine after considering all of the evidence in the case. Whether a person has dominion and control, and thus constructive possession, is determined by the “various indicia” of dominion and control, their cumulative effect, and the totality of the situation. *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977) (overruled on other grounds, *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012)). The court should include

all relevant portions of the definitional instruction, based upon an assessment of the evidence in the case. *State v. Shumaker*, 142 Wn. App. 330, 174 P.3d 1214 (2007); *State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996); *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989).

The ability to take actual possession of the substance is but one of several factors for determining dominion and control. In *State v. Hagen*, 55 Wn. App. 494, 781 P.2d 892 (1989), it was held error to instruct that “dominion and control is the ability to reduce an object to actual possession.” The court noted that “[w]hile it is true that the ability to reduce an object to actual possession may be one aspect of dominion and control, there are other aspects such as physical proximity which must be included in a definitional instruction.” *State v. Hagen*, 55 Wn. App. at 499. Constructive possession is a fact-sensitive determination. The jury should consider all relevant factors. *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253 (2011); *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008). It is not error to instruct the jury that control need not be exclusive. *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989).

In this case, the trial court did not impermissibly comment on the evidence in instructing the jury. The court instructed the jury using pattern jury instructions WPIC 50.03 and WPIC 133.52. CP 49 – 83. WPIC 133.52 parallels the instruction used for drug offenses, WPIC

50.03. Instruction 10 included the sentence; “Dominion and control over the premises where drugs are found is insufficient as the sole factor to establish dominion and control over the drugs” which is based on the holding in *State v. Shumaker*, 142 Wn. App. 330, 174 P.3d 1214 (2007).

Instruction 10 reads:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with the possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item you are to consider all the relevant circumstances in the case. Factors that you may consider among others include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. Dominion and control over the premises where drugs are found is insufficient as the sole factor to establish dominion and control over the drugs. CP 49 – 83, Instruction 10.

Instruction 25 used the term “item” instead of drugs and did not include the last sentence above. The last sentence in Instruction 25 stated “No single one of these factors necessarily controls your decision.” CP

49 – 83, Instruction 25. Defendant requested that the court include the second bracketed paragraph. RP Vol. IV February 27, 2018 p. 148. The court ultimately included all bracketed paragraphs in WPIC 50.03 and added the sentence; “Dominion and control over the premises where drugs are found is insufficient as the sole factor to establish dominion and control over the drugs” based on *Shumaker*. RP Vol. V, February 28, 2018, p. 3. The defendant requested that the bracketed option regarding proximity be added to Instruction 25. RP Vol. IV February 27, 2018, p. 148.

These instructions allowed both parties to argue their case to the jury, properly informed the jury of the law and was based on the evidence presented at trial. The inclusion of the *Shumaker* language did not construe the facts in the State’s favor. Rather, it made clear that this one factor standing alone was not enough to base their answer on. The defendant relies on this court’s decision in *State v. Sinrud*, interpreting *State v. Brush* in his argument. *State v. Sinsrud*, 200 Wn. App. 643, 650, 403 P.3d 96 (2017), *State v. Brush*, 183 Wn.2d 350, 353 P.3d 213 (2015). This case is distinguishable.

In *Sinsrud*, the instruction was not a pattern instruction and was found to be a comment on the evidence because of the inclusion of the sentence “The law requires at least one additional corroborating factor.”

*Sinsrud* at 650. This court found that its inclusion coupled with the preceding sentence resolved for the jury that one corroborating factor was necessarily “substantial corroborating evidence.” The question the jury was charged to answer on its own. *Sinsrud* at 651. The trial court’s instructions on possession did not quantify the amount of evidence the jury needed to find to answer whether or not the defendant was in construction possession of the gun and the drugs found in his house.

This court’s opinion in the *Sandoval* case is instructive. This court cautioned that “The language in *Brush* should not be read in isolation.” This court examined the reasoning in *Brush* and noted, “after discussing why the instruction inaccurately interpreted Barnett, the court stated:

Furthermore, the question faced by the court in Barnett was whether the specific facts in that case were legally sufficient for the court to uphold an exceptional sentence based on abuse occurring over a “prolonged period of time.” This is not an appropriate basis on which to create a jury instruction defining “prolonged period of time.” Thus, we clarify that legal definitions should not be fashioned out of courts’ findings regarding legal sufficiency.”

*State v. Sandoval*, \_\_ Wn. App. \_\_, 438 P.3d 165 (2019) citing *Brush*, 183 Wn.2d at 558, 353 P.3d 213. “Read in its entirety, it is clear that the court had concerns about defining highly fact-specific terms, such as “prolonged,” based on previous sufficiency of the evidence rulings. *Sandoval* at 172.”

The jury was properly instructed using pattern jury instructions on the law of possession of substances and firearms and the court did not constrain the jury by including the language based on *Shumaker*. The instructions as given did not include an impermissible comment on the evidence.

4. THE STATE CONCEDES THAT THE  
DEFENDANT WAS SENTENCED BASED  
UPON AN INCORRECT FELONY CLASS

This appeal pertains to the defendant's sentence as to Count II only. The Judgment and Sentence lists the unlawful possession of a controlled substance with intent to deliver – methylphenidate as a class “B” felony with a statutory maximum sentence of 120 months. This is incorrect. Possession with intent to deliver a schedule II substance is a class “C” felony when the substance is not designated as a narcotic. Methylphenidate is not a narcotic. The information correctly charged defendant in count II under RCW 69.50.401(1)(2)(c) – I as a class “C” felony. CP 3 – 4. As a level II drug offense, the defendant's offender score at sentencing of 7 does make the correct standard range 60 to 120 months, but because this is a class “C” felony, the maximum sentence that can be imposed on this count is 60 months. RCW 9.94A.510.

However, a review of the defendant's criminal history reveals three prior convictions for unlawful possession of a controlled substance two

convictions for unlawful possession of a controlled substance with intent to deliver, all convictions for a violation under RCW 69.50.

RCW 69.50.408(1) states, “Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” An offense is a second or subsequent offense if, “prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.” RCW 69.50.408(2).

This court recently held in *State v. Cyr*, \_\_\_ P.3d \_\_\_ 2019 WL 2096674, under RCW 69.50.408(1), the doubling of the statutory maximum sentence is automatic. *See also, In re Personal Restraint of Hopkins*, 89 Wn. App. 198, 201, 201-03, 948 P.2d 394 (1997), *rev'd on other grounds*, 137 Wn.2d 897, 976 P.2d 616 (1999) (Division One of this court expressly held that RCW 69.50.408(1) is not discretionary and instead automatically doubles the maximum sentence.).

The defendant’s statutory maximum for Count II in this case should have been doubled to a statutory maximum of 10 years. The State, therefore, concedes that count II was listed incorrectly on the judgment

and sentence as a class “B” felony. The State asks the court to reverse and remand the case as to Count II only so that the court can enter the correct felony class and affirm the standard range sentence of 85 months.

5. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO MODIFY THE CONDITION PROHIBITING CONTACT WITH DRUG USERS AND SELLERS.

Due process precludes the enforcement of vague laws, including sentencing conditions. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). To avoid a vagueness challenge, the law “must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to ‘protect against arbitrary enforcement.’” *Id.* at 652-53 (quoting *State v. Bahl*, 164 Wn.2d 739, 752–53, 193 P.3d 678 (2008)). Failure to satisfy either prong renders the condition unconstitutional. *Id.* at 653. But a condition imposed upon community custody is not vague “‘merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.’” *Id.* (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)). This court does not presume sentencing conditions to be constitutionally sound. *Id.* at 652.

The State concedes that the condition regarding association with drug users and sellers is unconstitutionally vague. This court should

remand for the trial court to amend the condition to read “known users and sellers of illegal drugs.”

6. THIS COURT SHOULD ORDER THAT THE IMPOSITION OF THE CRIMINAL FILING FEE AND THE INTEREST ACCRUAL PROVISION BE STRICKEN

In this case, the trial court found the defendant to be indigent. CP 152 - 153. House Bill 1783, effective June 7, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on nonrestitution legal financial obligations.

The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the \$200.00 criminal filing fee and the interest accrual provision on nonrestitution legal financial obligations should be stricken.

The appellant in this case also appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541,

which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714, (2018).

The State’s records show that this appellant’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100 DNA collection fee.

7. THE DEFENDANT FAILS TO ESTABLISH  
THAT SUPERVISION COSTS ARE  
DISCRETIONARY COSTS SUBJECT TO  
***RAMIREZ.***

RCW 9.94A.703 describes the conditions a court can impose when sentencing a person to a term of community custody. It identifies four categories of conditions: mandatory, waivable, discretionary, and special. RCW 9.94A.703(1)-(4). The statute defines “waivable conditions” as those that “the court shall order” unless “waived by the court.” RCW 94A.703(2). The statute defines “discretionary conditions” as those that the court may order and lists six conditions. RCW 94A.703(3). A sentencing court can also require that an offender perform “affirmative

acts necessary to monitor compliance” with the community custody conditions. RCW 94A.030(10).

The condition that a defendant pay supervision costs as determined by DOC is listed as a waivable, not discretionary, condition. Because it is the Legislature's province to establish punishment, a sentence condition must be authorized by law. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050, 208 P.3d 555 (2009). Review of an authorized community custody condition is under the abuse of discretion standard. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court did not abuse its discretion by imposing the condition. Since the condition was required by statute, there was a tenable basis for imposing it. Second, there was no request to waive the condition. A trial court cannot abuse discretion it was never asked to exercise. In addition, the normal rule is that an issue that was not presented to the trial court will not be considered by an appellate court. RAP 2.5(a). The appellate court has discretionary authority to consider an issue of “manifest error affecting a constitutional right.” RAP 2.5(a)(3). However,

defendant has not attempted to argue that a constitutional right was violated by imposing this required condition.

The defendant relies on dicta from the recently decided *Lundstrom* to support his contention that the fees are discretionary and the trial court must waive if the defendant indigent. *State v. Lundstrom*, \_\_\_ Wn. App.2d \_\_\_, 429 P.3d 1116 (No. 49709-3-II, Nov. 15, 2018). Brief of Appellant p. 50. The State does not dispute the basic contention that *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018), prohibits the imposition of discretionary costs against an indigent defendant. However, it is not clear that waivable costs are to be treated the same as discretionary costs. The State agrees that the trial court did not conduct an inquiry into the defendant's present or future ability to pay discretionary costs in this case.

RCW 9.94A.704(3)(d) requires that "If the offender is supervised by the department, the department shall at a minimum instruct the offender to ... pay the supervision fee assessment." RCW 9.94A.703(9) allows the Department of Corrections to require offenders to pay for special services such as electronic home monitoring, day reporting, and telephone reporting dependent on the offender's ability to pay. It appears that the statutory authority given to the Department of Corrections allows for the department to make determinations regarding an offender's financial

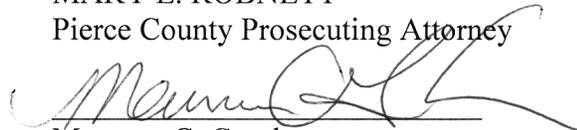
status. The defendant has failed to show that the supervision costs are discretionary and that the trial court abused its discretion in ordering the condition.

D. CONCLUSION.

This court should remand for the trial court to strike the imposition of the \$200.00 filing fee, the imposition of the \$100 DNA collection fee and the nonrestitution interest accrual provision. Further, this court should remand for the trial court to amend the language contained in the community custody condition regarding association with drug users and sellers and affirm defendant's convictions.

DATED: May 22, 2019

MARY E. ROBNETT  
Pierce County Prosecuting Attorney



Maureen C. Goodman  
Deputy Prosecuting Attorney  
WSB # 34012

Certificate of Service:

The undersigned certifies that on this day she delivered by *efile* 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.

*5/23/19*  
Date      *[Signature]*  
Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 22, 2019 - 3:08 PM**

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