

**FILED**

JUL 05, 2012  
Court of Appeals  
Division III  
State of Washington

**NO. 29832-9-III**

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**DARRELL SMITH,**

**APPELLANT.**

---

**BRIEF OF RESPONDENT**

---

**D. ANGUS LEE  
PROSECUTING ATTORNEY**

**Ryan J. Ellersick, WSBA #43346  
Deputy Prosecuting Attorney  
Attorney for Respondent**

**PO BOX 37  
EPHRATA WA 98823  
(509)754-2011**

**TABLE OF CONTENTS**

**I. INTRODUCTION .....1**

**II. ISSUES.....1**

**III. STATEMENT OF THE CASE .....2**

    A. Background Facts ..... 2

    B. Trial Court Proceedings ..... 13

**IV. ARGUMENT .....21**

    A. The Trial Court Properly Exercised its Discretion in Denying the Motion for a New Trial Because the Admission of Extrinsic Evidence was Harmless ..... 21

    B. This Court Should Not Consider the Defendant’s Newly Raised Privacy Act Argument Because a Violation of the Privacy Act Cannot be a Manifest Constitutional Error ..... 27

    C. The Defendant Was Not Denied the Effective Assistance of Counsel By Counsel’s Failure to Request a Curative Instruction on a Harmless Error ..... 29

    D. This Court Should Not Consider the Defendant’s Newly Raised Challenge to the Jury Instructions Because the Trial Court’s Variations From the Pattern Instructions Are Not Manifest Constitutional Errors ..... 30

        1. The Defendant has not Shown that Use of the Trial Court’s “To Convict” Instructions was a Manifest Constitutional Error ..... 30

        2. The Defendant has not Shown that Use of the Trial Court’s Introductory Instructions was a Manifest Constitutional Error .... 33

E. A Rational Trier of Fact Could Have Found the Defendant Guilty of Possession of a Controlled Substance Based on His Possession of Methamphetamine Residue .....	34
F. The Record Does Not Reflect a Basis for Imposing Legal Financial Obligations (LFOs) Other than \$100 in Restitution.....	38
G. The Defendant Has Not Established Error Based on His Statement of Additional Grounds .....	39
<b>V. CONCLUSION.....</b>	<b>41</b>

## TABLE OF AUTHORITIES

### **Cases**

<i>In re Pers. Restraint of Domingo</i> , 155 Wn.2d 356, 369, 119 P.3d 816 (2005).....	34
<i>State v. Koontz</i> , 145 Wn.2d at 651.....	41
<i>State v. Baldwin</i> , 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).....	38
<i>State v. Bertrand</i> , 165 Wn. App. 393, 404, 267 P.3d 511 (2011) .....	38
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).....	21
<i>State v. Briggs</i> , 55 Wn. App. 44, 56, 776 P.2d 1347 (1989).....	21, 25
<i>State v. Brown</i> , 130 Wn. App. 767, 770, 124 P.3d 663 (2005).....	32
<i>State v. Carpenter</i> , 52 Wn. App. 680, 685-86, 763 P.2d 455 (1988). ....	25
<i>State v. Courtney</i> , 137 Wn. App. 376, 383, 153 P.3d 238 (2007) .....	28, 29
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) .....	28
<i>State v. Fanger</i> , 34 Wn. App. 635, 637, 663 P.2d 120 (1983) .....	39
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011).....	27, 31
<i>State v. Koontz</i> , 145 Wn.2d 650, 658, 41 P.3d 475 (2002).....	40
<i>State v. Lynn</i> , 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992)....	31, 33, 34
<i>State v. McKague</i> , 172 Wn.2d 802, 805, 262 P.3d 1225 (2011).....	35
<i>State v. Malone</i> , 72 Wn. App. 429, 439, 864 P.2d 990 (1994) .....	37
<i>State v. Mines</i> , 163 Wn.2d 387, 391, 179 P.3d 835 (2008)). .....	35
<i>State v. Myers</i> , 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976).....	39
<i>State v. O’Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2009) .....	27, 31
<i>State v. Pete</i> , 152 Wn.2d 546, 552, 98 P.3d 803 (2004).....	21, 29
<i>State v. Rinkes</i> , 70 Wn.2d 854, 862, 425 P.2d 658 (1967) .....	21
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) .....	29
<i>State v. Williams</i> , 62 Wn. App. 748, 751, 815 P.2d 825 (1991).....	37
<i>United States v. Bagley</i> , 641 F.2d 1235, 1242 (9th Cir. 1981) .....	22

### **Statutes**

Former RCW 69.50.101(d) (2010). .....	35
RCW 69.50.206(d)(2) .....	35
RCW 69.50.4013 .....	35, 36, 37

### **Other Authorities**

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.02 (3d Ed). .....	35
14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE	
§ 31.2, 261 (2003)).....	34
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY .....	31

**Rules**

CrR 7.5(a)(1)..... 21  
RAP 2.5(a). .... 27, 28

## **I. INTRODUCTION**

Following a long evening of criminal activity, the Defendant was apprehended by police and interviewed. The video of the interview was played for the jury once during the trial and again during its deliberations. The second time, the jury saw about two minutes more of the interview than it saw during the trial. The trial court found this error harmless given the overwhelming evidence of the Defendant's guilt. The Defendant now challenges that finding. He also raises several additional issues, some for the first time on appeal that should not be considered. This Court should affirm the Defendant's convictions.

## **II. ISSUES**

1. Did the trial court abuse its discretion in concluding that the jury's exposure to extrinsic evidence was harmless?
2. Should this Court review the Defendant's claim, raised for the first time on appeal, that the State violated the Privacy Act at trial?
3. Was the Defendant denied the effective assistance of counsel based on his attorney's failure to raise the alleged Privacy Act violation at trial?
4. Should this Court review the Defendant's challenges to the jury instructions, which are raised for the first time on appeal?
5. Is there sufficient evidence for a rational trier of fact to find the Defendant guilty of possession of a controlled substance based on his possession of methamphetamine residue?

6. Did the trial court clearly err in finding the Defendant capable of paying legal financial obligations?
7. Has the Defendant established error in his statement of additional grounds?

### **III. STATEMENT OF THE CASE**

#### A. Background Facts

Eric Chadwick left his home and family in Boise, ID in January 2010 to begin a six-month job as a mechanical insulator. Verbatim Report of Proceedings (VRP) (Jan. 24, 2011) at 445-47. He took up residence at the Sage and Sand Motel in Moses Lake, WA. *Id.* at 446. There he became acquainted with Desert Donini, a homeless woman who was moving from room to room at the Sage and Sand. *Id.* at 450. Chadwick learned that Donini was waiting on some funding from the State to pay for her housing, and he decided to let her stay in his room for a few days until she could get back on her feet. *Id.* Donini came and went as she pleased. *Id.* at 451-52. Chadwick and Donini slept in the same bed and on at least one occasion had sexual relations. *Id.* at 450.

On February 26, 2010, while Chadwick was working, Donini was in Chadwick's motel room drinking alcohol. *Id.* at 317-19. Donini called the Defendant, also a tenant of the Sage and Sand Motel, and asked if he

had any dope. *Id.* at 317-18. The Defendant came over to Chadwick's room to meet up with Donini, and the two shared a few drinks. *Id.* at 321-22. Donini mentioned something to the Defendant about Chadwick's employment. *Id.* at 322. The Defendant responded that he would like to get Chadwick's money. *Id.* at 323. At some point in their conversation, the Defendant and Donini came up with a ruse: they would wait for Chadwick to come back from work, and then the Defendant, posing as Donini's husband, would enter Chadwick's room pretending to be angry over Donini's infidelity and would demand money. *See id.* at 334-35, 343, 456-57. Donini hoped to get some methamphetamine out of the deal, so she told the Defendant when Chadwick normally returned home from work. *Id.* at 325, 343.

Chadwick arrived back to the Sage and Sand shortly after 4:30 pm. *Id.* at 452. Nobody was in the room. *Id.* Eventually, Donini returned and took a call on the motel phone. *Id.* at 453-54. On the other line, the Defendant asked if Chadwick had arrived from work. *Id.* at 326-27. Donini said yes and hung up. *Id.* at 327. She then left the room. *Id.* at 453-54. Chadwick, oblivious to the looming plot against him, lounged on the motel-room bed. *Id.* at 455.

A short time later, the door to the room swung open. *Id.* Donini was thrown into the room, and a man—later identified as the Defendant—

followed right behind her. *Id.* The Defendant was wearing a black mask with two holes cut out for his eyes. *Id.* His hands were in his pockets, but Chadwick could see that he appeared to be clutching something. *Id.* at 455-56. The Defendant demanded Chadwick's cell phone. *Id.* at 456. Chadwick flipped it to him in compliance. *Id.* In an angry tone, the Defendant yelled at Chadwick for sleeping with his wife, and he threatened to kill both Chadwick and Donini. *Id.* at 456-57. Chadwick was terrified. *Id.* at 456.

While continuing to spew threats, the Defendant secured Chadwick to a motel-room chair using zip ties. *Id.* at 457-58. The Defendant brandished a knife and stuck it against Chadwick's side, saying he should gut him like a pig. *Id.* at 459. Meanwhile, Donini was bound with red duct tape in the bathroom. *Id.* at 338-39, 460.

The Defendant demanded money from Chadwick. *Id.* at 463-64. Finding Chadwick's debit card in his wallet, the Defendant forced Chadwick to call both his bank and his wife to get an account balance. *Id.* at 464-67. After learning that Chadwick had approximately \$2,500 in his account, the Defendant said they were going to take a drive. *Id.* at 465-67. The restraints were removed from Donini and Chadwick. *Id.* at 468-69. Donini exited the motel room first, opened all the doors to Chadwick's car, and sat in the front passenger seat. *Id.* at 468, 471. Chadwick

climbed into the driver's seat, and the Defendant sat directly behind him.

*Id.* at 471

The Defendant directed Chadwick to drive to the Moses Lake Walmart. *Id.* at 473. From the back seat, the Defendant told Chadwick not to make any rash moves because he had something a lot more powerful than a knife. *Id.* at 472. At the same time, the Defendant held the knife to Chadwick's left side, telling Chadwick to do exactly as instructed and that he had better not mess things up. *Id.*

On arriving at Walmart, the Defendant gave Donini Chadwick's debit card and directed her to go inside and purchase two I-Pods, a prepaid calling card, and an HP touch-screen computer. *Id.* at 474, 76. Donini returned a short time later with only one I-Pod and the phone card. *Id.* at 477. The Defendant was angry. *Id.* Donini was sent back into the Walmart to purchase the computer, but by that time Chadwick's account had been frozen and the transaction was blocked. *Id.* at 478. Infuriated, the Defendant instructed Chadwick to drive to the Ephrata Walmart. *Id.* at 479. During the approximately twenty-minute drive, the Defendant told Chadwick not to drive erratically or attract attention—otherwise he would be killed. *Id.* at 480-81.

Chadwick pulled into the nearly empty Ephrata Walmart parking lot. VRP (Jan. 25, 2011) at 490. The Defendant instructed Donini to go

inside and purchase the computer using Chadwick's debit card. *Id.* at 491. Again, the transaction was blocked. VRP (Jan. 24, 2011) at 431. The Defendant then sent Chadwick inside along with Donini to make the purchase. VRP (Jan. 25, 2011) at 492. The Defendant held onto Chadwick's car keys, wallet, and cell phone. *Id.* at 493. Chadwick did as instructed, fearing for his own safety and the safety of his family. *Id.* at 492-93. The account remained frozen, and Chadwick reported back to the Defendant that he was unable to purchase the computer. *See id.* at 493-94.

The Defendant ordered Chadwick and Donini to remain in the car while he went inside. *Id.* at 494-95. The Defendant eventually returned and directed Chadwick and Donini to enter the Walmart with him. *Id.* at 496. As they entered the store, the Defendant threatened Chadwick not to make any noise or he would put him down. *Id.* He told Chadwick he had nothing to lose. *Id.* The Defendant instructed Chadwick and Donini where to go and where to stand in the store. *Id.* Out of the corner of his eye, Chadwick could see that the Defendant had taken a large dog-house box, removed the dog house, and replaced it with an HP touch screen computer. *Id.* at 497-98. The three then proceeded to the check-out stand, purchasing the "dog house" with its hidden contents for approximately \$50. *Id.* at 497.

The Defendant had Chadwick drive to a residence to attempt to sell the merchandise. *Id.* at 499-500. Following a failed attempt to reach a buyer, the Defendant directed Chadwick to drive back to Moses Lake. *Id.* at 500.

They arrived back at Chadwick's room at the Sage and Sand, where the Defendant continued making phone calls trying to arrange a buyer. *Id.* At approximately 5:20 am, the Defendant instructed Chadwick that they were going to take another drive. *Id.* at 501. Chadwick complied, while Donini remained asleep on the motel-room bed. VRP (Jan. 24, 2011) at 364; VRP (Jan. 25, 2011) at 501-02. The Defendant grabbed the dog-house box with the computer inside, and loaded it into Chadwick's car. VRP (Jan. 25, 2011) at 501. The Defendant told Chadwick to disable his GPS and they drove to an unknown location near some mobile homes. *Id.* at 502.

When the Defendant stepped from the vehicle and began unloading the dog-house box, Chadwick noticed that his wallet and cell phone—which the Defendant had been keeping under his control—were sitting on the front seat. *Id.* at 502-03. As soon as the Defendant unloaded the dog-house box, Chadwick made a break for it: he threw the car into reverse and sped away. *Id.* Not knowing where he was, Chadwick enabled his

GPS and went to the first familiar location. *Id.* at 503. He arrived at a Denny's Restaurant and called 911 from his cell phone. *Id.*

Within a few minutes, Officer Loyd from the Moses Lake Police Department arrived and contacted Chadwick. VRP (Jan. 20, 2011) at 55. Chadwick was shaking and crying uncontrollably. *Id.* at 56. Through the tears, Chadwick told Officer Loyd that he had been tied up and kidnapped. *Id.* at 57. Officer Loyd could see marks on Chadwick's wrists consistent with being restrained by zip ties. *Id.* at 58. He transported Chadwick to the police station and conducted an interview to gather information about the night's events. *Id.* at 60.

Following the interview, Officer Loyd went with Chadwick to the Sage and Sand to conduct a search of Chadwick's room. *Id.* at 70-72. Chadwick waited in the motel office while officers entered the room. *Id.* at 72. Donini was found inside. *Id.* at 73. After identifying her, officers transported her back to the police station for an interview. *Id.* at 79-80.

A short time later, the Defendant was seen loading the dog-house box into a truck driven by one of his associates, Gabe Medina, and the two drove away from the Sage and Sand. VRP (Jan. 21, 2011) at 146; VRP (Jan. 24, 2011) at 293-94. The Defendant told Medina that he was going to try and meet somebody at the local McDonalds, but the person never showed up. VRP (Jan. 24, 2011) at 296. They returned to the Sage and

Sand and Medina dropped the Defendant off. *Id.* at 296-97. Before Medina could leave, officers arrived at the Sage and Sand and made contact with him. VRP (Jan. 20, 2011) at 85-87. They secured the dog-house box with the computer inside and let Medina go. *Id.*; VRP (Jan. 24, 2011) at 301. The Defendant was then apprehended in his motel room and placed under arrest. VRP (Jan. 20, 2011) at 93-94.

In searching the Defendant's pockets, officers found a Walmart receipt for an I-Pod and an AT&T calling card. *Id.* at 94. The last four digits of Chadwick's debit card matched the numbers listed on the receipt. *Id.* at 96. The Defendant told Officer Loyd that the I-Pod was still in Medina's truck. *Id.* at 97-98. Medina was later stopped and the I-Pod was retrieved. *Id.* at 101-02. The serial number for the retrieved I-Pod matched the serial number for the I-Pod on the Walmart receipt. *Id.* at 108-09.

The Defendant was transported to the police station and was placed in an interview room with Officer Loyd. *Id.* at 109. The room was equipped with a camera that made both a video and audio recording of the interview from the moment the Defendant and Officer Loyd walked into the room. Ex. 94. Officer Loyd also had a portable audio recording device that he used to record the interview separately. VRP (Jan. 21, 2011) at 158-59. After obtaining consent from the Defendant to record the

conversation, Officer Loyd activated the portable recording device. *Id.* at 159.<sup>1</sup> According to the camera recording, this occurred eight minutes and 45 seconds into the interview. Ex. 94 at 8:45.

The Defendant was highly emotional throughout the interview. VRP (Jan. 20, 2011) at 111. The Defendant said he “fucked up” at least three times. Ex. 93 at 7, 35.<sup>2</sup> He asked Officer Loyd if he was “going to prison,” to which Officer Loyd responded he did not know. *Id.* at 11. Officer Loyd informed the Defendant that they were going to search his motel room, and the Defendant pled with Officer Loyd to call off the search. *Id.* at 12-14. In an apparent attempt to get the search called off, the Defendant admitted to Officer Loyd that they would find red tape and zip ties in a black backpack in his room. *Id.* at 14. The Defendant also admitted to having methamphetamine in his room. *Id.* at 24.

In one emotional exchange, the Defendant exclaimed:

This guy ain’t did nothing fucking wrong to me (crying) or her, or nobody, and I can explain to that gentleman how bad I feel Loyd. (Crying). I tell him how bad I feel, (inaudible), right now, (inaudible), right now. And, I’ll

---

<sup>1</sup> Officer Loyd did not expressly ask permission for the recording—both video and audio—that was occurring from the interview-room camera. VRP (Jan. 21, 2011) at 159-60. But the room itself had a sign indicating that the room was being recorded. *Id.* at 160.

<sup>2</sup> Exhibit 93 is a transcript of an audio portion of the interview. The transcript is from the audio recording made by Officer Loyd’s portable recording device, not the interview-room camera that picked up both video and audio of the interview. VRP (March 22, 2011) at 61. The transcript reflects the conversation that occurred between Officer Loyd and the Defendant from minute 8:45 to minute 49:45 on the video. *Compare* Ex. 93 (transcript), *with* Ex. 94 (video).

walk, and I'll leave this I-Pod here (crying) . . . . And, I, (crying), (inaudible), tell him I didn't mean to scare him . . . . I (inaudible) didn't mean to scare anyone.

*Id.* at 19.

As the interview progressed, the Defendant tried to minimize his role, saying he was only interested in obtaining the merchandise, and that he received the items from an individual named "Rick." *Id.* at 30-31. The Defendant tried to explain how he just met "Rick," a transplant from New York, a few days earlier. *Id.* at 31-33. According to the Defendant, "Rick" gave him a ride to get some cigarettes and the Defendant ended up walking away from the encounter with the backpack and all its contents.

*Id.* at 33.

Officer Loyd confronted the Defendant, telling him he did not believe the story about "Rick." *Id.* at 33-34. The Defendant admitted he was lying and confessed that, in fact, he was "Rick":

Loyd: So, Rick is just made up, is that why . . .

Smith: (Whispering), that's me.

Loyd: . . . that's you? Is that what you go by, is Rick?

Smith: I just made it up.

Loyd: Just made it up, same with New York? You don't have any ties to New York do you?

Smith: No, sir.

*Id.* at 36.

Shortly after the Defendant admitted that he was “Rick,” Officer Loyd ended the interview and turned off the portable recording device. *Compare* Ex. 93 at 37, *with* Ex. 94 at 49:46. The interview-room camera, however, continued to record the conversation. Ex. 94 at 49:46.

During the approximately four minutes they lingered in the interview room, the Defendant continued to talk. He said that he had been an “outlaw” and that he was “sick . . . before this shit.” *Compare* CP at 119,<sup>3</sup> *with* Ex. 94 at 50:05. He asked Officer Loyd three times if he was going to prison, to which Officer Loyd said he did not know. *Compare* CP at 119-20, *with* Ex. 94 at 50:50. In response to a question from Officer Loyd about the location of the “ski mask,” the Defendant said “It’s not a ski mask . . . . [It’s a] beanie with holes cut in the eyes.” *Compare* CP at 120, *with* Ex. 94 at 52:28. The Defendant mentioned the possibility that officers would find meth during the search of his room. *Compare* CP at 121, *with* Ex. 94 at 52:50. He also made a statement indicating his remorse for “that guy”:

I apologized to that guy, from my heart man, I apologized to him and I told him, he don’t need to do any of this, he can have (inaudible). Like, I swear to God I did. And I

---

<sup>3</sup> Clerk’s papers 119-21 consist of a transcript of the audio that picks up where Exhibit 93 leaves off. It reflects the conversation between Officer Loyd and the Defendant from minute 49:45 to the end of the video at minute 53:22.

told him I am sorry. I cried. I cried in the backseat and I told him, I'm sorry man, and I swear to God I cried.

*Compare* CP 120, with Ex. 94 at 52:10.

After the interview, officers executed a search warrant at the Defendant's motel room. VRP (Jan. 21, 2011) at 162. They found several items consistent with the information they had gathered about the previous night's events: a Walmart receipt for a dog house, *id.* at 167; an AT&T phone card, *id.* at 168; a backpack containing a knife, zip ties, and a roll of red duct tape, *id.* at 176-78, 184, 187-88; and a black mask or ski cap sitting next to the backpack, *id.* at 180. Officers also located a cd with white residue on its surface. *Id.* at 189-90.

B. Trial Court Proceedings

The Defendant was charged with (1) robbery in the first degree, (2) kidnapping in the first degree, (3) burglary in the first degree, (4) assault in the second degree, (5) possession of a controlled substance (methamphetamine), (6) felony harassment (threat to kill), and (7) theft in the second degree. CP at 1-5. The case proceeded to a jury trial on January 20, 2011. VRP (Jan. 20, 2011) at 7.

Officer Loyd testified as the lead officer on the case. He recounted the interview with the Defendant, describing in detail the Defendant's high emotions and incriminating statements. *Id.* at 109-24. The jury heard that

the Defendant admitted to Officer Loyd that he had messed up; that the Defendant knew there was red tape in a black backpack inside his motel room; that the Defendant wanted to apologize to “that man” and that he did not intend to scare him; that the Defendant did “it” to get money in order to get his girlfriend’s car out of impound; and that the Defendant admitted to having methamphetamine in his room. *Id.* The jury also heard through Officer Loyd how the Defendant made up a story about “Rick” being the primary assailant. *Id.* at 121-24. And they heard that the Defendant ultimately confessed to being “Rick.” *Id.*<sup>4</sup>

On the second day of trial, January 21, 2011, the State admitted into evidence the camera recording of Officer Loyd’s interview with the Defendant. VRP (Jan. 21, 2011) at 203. The parties agreed that certain portions of the recording were not admissible. *Id.* at 203-06. But because of technical difficulties that prevented the video from skipping ahead adequately, the State had to resort to using a human operator to manually press “mute” when the video reached portions that were inadmissible. *Id.* at 204-06.

The State put on the record what part of the video would be played for the jury: the video would begin at minute 8:45 and it would be muted

---

<sup>4</sup> A forensic scientist from the Washington State Patrol Crime Laboratory also testified at trial, stating that the white substance found on the cd in the Defendant’s motel room contained methamphetamine. VRP (Jan. 24, 2011) at 273-74.

from 13:09 to 13:29; from 16:28 to 17:40; from 20:23 to 20:34; from 23:28 to 23:59; and from 29:51 to 30:05. *Id.* at 247. The State also marked a transcript, offered as Exhibit 93,<sup>5</sup> indicating for defense counsel the segments that would not be played to the jury. *Id.* at 131-35. Because several portions of the video consisted of natural silence between Officer Loyd and the Defendant—portions that still had evidentiary value—it was agreed that the State would announce the truly inadmissible segments by saying “muted.” *Id.* at 238-40.

The video was then played for the jury. *Id.* at 249-51. The State’s representative announced “muted” five times, apparently consistent with the five segments of the video that were agreed as inadmissible. *Id.* The video was stopped where the written transcript concluded—i.e. where Officer Loyd turned off the portable, audio recording device. *See* VRP (March 22, 2011) at 61. The jury did not see any of the approximately four minutes of video recorded by the interview-room camera at the conclusion of the interview. *See id.*

When trial picked up the following Monday, the jury heard from several additional witnesses, including Desert Donini. VRP (Jan. 24, 2011) at 307. Donini gave the jury its first view of the entire night’s events, recounting how she told the Defendant when Chadwick would be

---

<sup>5</sup> Exhibit 93 was offered into evidence, but it was not admitted. VRP (Jan. 20, 2011) at 115.

home, how she was restrained with red duct tape, and how she followed the Defendant's instructions in making purchases at Walmart. *Id.* at 325, 338-39, 352-55. Chadwick was the State's final witness. *Id.* at 445. He recounted chronologically and in even greater detail the circumstances of the night's events. *Id.* at 445-81; VRP (Jan. 25, 2011) at 486-534.<sup>6</sup>

The jury began its deliberations late Tuesday afternoon. VRP (Jan. 25, 2011) at 667. At 10:20 am the following morning, the jury sent a note to the court that stated, "Can we watch the video again of Officer Loyd's interview of Darrell Smith?" CP at 79. At 11:49 am the court responded "No." *Id.* Then, at 2:10 pm that same day, the jury sent another note to the court stating, "We have come to a stand-still and don't believe we can get any closer to a unanimous decision without seeing the parts of the interview video between Officer Loyd and Darrell Smith that we viewed during the trial." CP at 80. This time the court exercised its discretion to allow the jury to watch the video contained in Exhibit 94 one time in open court. VRP (Jan. 26, 2011) at 683-84. It was to be played in the same manner as during trial, with the State announcing "mute" at the segments that were inadmissible. *Id.* at 684-85.

As it had during trial, the State began playing the video at minute 8:45. *Id.* at 688. And consistent with its presentation during trial, the

---

<sup>6</sup> The Defendant did not take the stand at trial. VRP (Sept. 23, 2011) at 89.

State announced “muted” five times. *Id.* at 689-90. Unlike the presentation during trial, however, the State inadvertently allowed the video to play beyond the point where Officer Loyd’s portable audio recorder was turned off. *Id.* at 690-92. Defense counsel caught the error and asked to approach the bench. *Id.* at 690. At that point, the video was paused. *See id.* at 690-91. After a discussion with counsel, the court instructed the jury to retire to the jury room to continue deliberations. *Id.* at 692.

The record indicates that the jury saw no more than two minutes of the video beyond the point where Officer Loyd’s portable audio recorder was turned off. *See id.* at 689-90. The video that was played during trial began at minute 8:45 and ended at approximately minute 49:45—the point at which the portable audio device was turned off and the transcript ended. *Compare* Ex. 93, *with* Ex. 94. This means the video, if played uninterrupted for the duration that the portable audio device was activated, was approximately 41 minutes long. *Id.*; *see also* VRP (Jan. 26, 2011) at 685 (noting that portion of video played during trial was approximately 40 minutes long).

Fortunately, the trial transcript tracked the time of the proceedings in hours, minutes, and seconds, so it is possible to determine how much of the video was played for the jury the second time around. VRP (Jan. 26,

2011) at 689-90. According to the transcript, the video was played beginning at 4:36:16. *Id.* at 689. The State announced “muted” five times, with no other interruptions. *Id.* at 689-90. Defense counsel asked to approach the bench at 5:19:08. *Id.* at 690. At that point, the video was paused. *See id.* at 690-91. It had played for approximately 43 minutes—meaning the video was paused somewhere near the end of minute 51, but not beyond the 52 minute mark. *See id.* at 689-90.

This is consistent with statements of the court and counsel on the record. During the sidebar, defense counsel indicated he believed the video was turned off the first time at about minute 50, but that it was now showing minute 51: “I thought it was 50 minutes and then now it’s showing 51. It’s showing 51 now.” *Id.* at 690. The sidebar discussion also indicated that there was a balance remaining on the video that the jury had still not seen—suggesting that Officer Loyd and the Defendant were still in the interview room talking when the video was paused. *Id.* at 690-91.

Further, the court’s recitation of events suggests the portion of the video that was played to the jury was significantly less than the entire four minutes of extra footage:

[M]y best recollection is that when it was shown first during the trial, it was terminated when the recorder was turned off by the – the audio recorder was turned off by the

officer, and that on this occasion the exhibit played *slightly beyond that*. I did not see anything of any evidentiary value or concern one way or the other in the *brief portion* of the exhibit that the two people in the room following the recorder being turned off.

*Id.* at 693 (emphasis added).

The same means was used to display this exhibit that was used during the trial. Prosecutor staff turned off the audio at the appointed times and turned it back on. However, during that process when we reached the end of the transcript that everyone had, except the Court, had been operating from before, the staff member for inadvertence or error didn't stop the video but allowed it [sic] continue to play. Several people in the courtroom were in a position to know that that was occurring. [The prosecutor], who apparently didn't catch it. [Defense counsel], who apparently didn't catch it until, at some point, *about apparently something like thirty seconds into this extra portion*, [defense counsel] stood up and announced an objection and announced that it had been allowed to play beyond where it had played previously . . . .

VRP (March 22, 2011) at 63 (emphasis added).<sup>7</sup>

The jury found the Defendant guilty of (1) robbery in the first degree, (2) unlawful imprisonment (lesser included offense of kidnapping), (3) burglary in the first degree, (4) assault in the second degree, (5) possession of a controlled substance, (6) gross misdemeanor harassment, and (7) theft in the second degree. CP at 81-87.

---

<sup>7</sup> It is also noteworthy that the Defendant's motion for new trial did not allege that the jury had been exposed to the entire four minutes of extra video footage. CP at 112 (stating that the jury heard only "some" of the extra footage).

The Defendant moved for a new trial based on an error in the jury instructions on the burglary charge and the jury's viewing of the extra portions of the video. CP at 99-103, 111-14. The court granted the Defendant's motion on the instruction issue and vacated the Defendant's burglary conviction. VRP (March 22, 2011) at 56. But the court rejected the Defendant's argument that the jury's viewing of the extra portions of the video was prejudicial:

[Defense counsel] has moved to – for a new trial based on the jury being permitted, during that process, to see material that was not admitted in evidence. I have reviewed the exhibit itself so that I could see the conversation in context. I have reviewed the transcript prepared by Ms. Berg of what was said during that time. And, have come to the conclusion that it was error to display to the jury material that was not submitted during the trial but, in the context of this case and the other evidence presented, it was harmless error.

The evidence of Mr. Smith's guilt was overwhelming. It was not in the Court's view – it would not, in the Court's view, even be reasonable to presume that the jury was affected in its deliberations in the face of that evidence by the material that was presented beyond the exhibit itself. I recognize what was said during that time and find that it is so unlikely that it contributed to the mental processes of the jury or to their findings as to not support the motion for a new trial.

*Id.* at 64.<sup>8</sup>

The Defendant now appeals. CP at 163.

---

<sup>8</sup> The Defendant moved for reconsideration, but the court denied the motion. VRP (March 28, 2011) at 69.

#### IV. ARGUMENT

A. The Trial Court Properly Exercised its Discretion in Denying the Motion for a New Trial Because the Admission of Extrinsic Evidence was Harmless

A trial court has the discretion to grant a new trial when it “affirmatively appears that a substantial right of the defendant was materially affected” by the jury’s receipt of “any evidence, paper, document or book not allowed by the court.” CrR 7.5(a)(1). The “denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion.” *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (citing *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)). “An abuse of discretion occurs only ‘when no reasonable judge would have reached the same conclusion.’” *Id.* (quoting *Bourgeois*, 133 Wn.2d at 406).

The jury’s consideration of the extrinsic video footage in this case was harmless because the video was cumulative of the overwhelming evidence of guilt presented during trial. “[C]onsideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” *Id.* at 555 n.4 (quoting *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967); see also *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (“[A] new trial must be granted unless ‘it can be

concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.”) (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981))).<sup>9</sup>

The trial court denied the Defendant’s motion for a new trial because it found no reasonable ground to believe that the defendant was prejudiced by the extrinsic video evidence played for the jury during its deliberations. The question is whether the trial court, in considering all the evidence presented during the trial, abused its discretion in reaching this conclusion. It did not.

The record supports the trial court’s conclusion that the jury’s brief exposure to the extra video footage was harmless. First, as the trial court noted, “the evidence of [the Defendant’s] guilt was overwhelming.” VRP (March 22, 2011) at 64. The jury heard the vivid and detailed testimony of two witnesses who accompanied the Defendant throughout the night’s events. Chadwick related how the Defendant barged into his motel room wearing a ski mask, tied him up with zip ties, held him at knife point, stole his money, and forced him to drive around town to find a seller of the stolen merchandise. Chadwick also testified about his dramatic escape in

---

<sup>9</sup> These two formulations of the standard for prejudice when dealing with extrinsic evidence are essentially coterminous. If a court concludes that there is no “reasonable ground to believe that the defendant may have been prejudiced” by the extrinsic evidence, then, by definition, the extrinsic evidence would likewise seem to be harmless “beyond a reasonable doubt.”

the early morning hours when he realized the Defendant had inadvertently left the wallet and cell phone in the car. Donini corroborated much of Chadwick's testimony, telling the jury about the original plot against Chadwick, how she was restrained with red duct tape, and that the Defendant acted as the principal in committing the crimes.

The physical evidence supported this testimony. Officers found a Walmart receipt in the Defendant's pocket for purchases of an I-Pod and an AT&T phone card. The numbers on the receipt matched the last four digits on Chadwick's debit card. The Defendant admitted to the police that the I-Pod was left in Medina's truck, and when the officers checked, the serial number on the I-Pod matched the serial number on the receipt found in Defendant's pocket. Officers also recovered the dog-house box containing the HP touch screen computer that Chadwick testified the Defendant had stolen the night before. A Walmart receipt for the dog house was found in the Defendant's motel room. Also in the Defendant's motel room, officers found an AT&T phone card; a backpack containing a knife, zip ties, and a roll of red duct tape; and a black mask or ski cap sitting next to the backpack.

The Defendant's statements, introduced both through Officer Loyd and the video recording, were even more damning. The Defendant admitted multiple times that he had "fucked up." Ex. 93 at 7, 35. He

asked Officer Loyd if he was going to prison. He tried to get the search of his room called off by admitting to Officer Loyd that they would find zip ties and red duct tape in a backpack in his room. He expressed remorse for scaring “that gentleman.” *Id.* at 19. And he concocted a story about “Rick,” a person who he suggested may have committed the crimes, only to confess later that, in fact, he was “Rick.” *Id.* at 30-33.

Against this backdrop of overwhelming evidence, the approximately two minutes of video footage the jury saw on the second viewing could not have prejudiced the Defendant. In the two minutes of extra video, the Defendant made only two statements that could reasonably be viewed as incriminating: (1) that he had been an outlaw and that he was “sick . . . before this shit,” and (2) that he wanted to know if he was going to prison. *Compare* CP at 119-20, *with* Ex. 94 at 50:05-51-05. Neither of these statements had particularly compelling evidentiary value. Nor is it reasonable to believe that the jury would have given these statements any weight in light of the otherwise overwhelming evidence.

Moreover, the Defendant’s statements during the two minutes of extra video footage were cumulative of statements he made in the video that was played during trial. The first statement is largely cumulative of his prior statements about having “fucked up” and about generally being involved in the crimes. Ex. 93 at 7, 30, 36-37. The second statement is

verbatim of a statement he made earlier in the video where he asked Officer Loyd if he was going to prison. *Id.* at 11. Given the cumulative nature of the extrinsic evidence, there are no reasonable grounds to believe that the Defendant was prejudiced.

A decision from Division I of this Court illustrates the point. *State v. Carpenter*, 52 Wn. App. 680, 685-86, 763 P.2d 455 (1988). In *Carpenter*, the defendant was charged in the shooting of one of her extended family members. *Id.* at 682. She argued that the shooting was accidental and that she had purchased the gun to commit suicide; suicide notes were introduced by the defense to corroborate her story. *Id.* During closing argument, the State referenced a copy of the suicide notes that contained the prosecutor's own highlighting and annotations. *Id.* at 682-83. By mistake, the prosecutor's copy of the notes went back to the jury. *Id.* at 683. Division I found no prejudice in the jury's exposure to the extrinsic evidence because the highlighting and annotations "merely paralleled the prosecutor's remarks" during closing. *Id.* at 686. *But see Briggs*, 55 Wn. App. at 58 (finding prejudice because extrinsic evidence, though cumulative, "involved the central issue of the case, which was sharply disputed"). Here, given the overwhelming evidence of guilt and the cumulative nature of the extrinsic evidence, the Defendant was not prejudiced.

The Defendant argues that the jury’s exposure to statements about him apologizing to “that guy” in the backseat of the car and his expression of anxiety about going to prison resulted in prejudice. This argument fails. First, the Defendant has not shown from the record that the jury heard his statement about apologizing to “that guy” in the backseat of the car. That statement occurred more than two minutes into the extra video footage, which the record indicates the jury did not see or hear. *Compare* CP 120, *with* Ex. 94 at 52:10.<sup>10</sup> Second, the prison statement was essentially verbatim of the Defendant’s statement to Officer Loyd during the admissible portion of the video.

Further, the fact that the jury returned a verdict shortly after viewing the video says little about the impact of the extrinsic evidence. The first time the jury saw the video—the second day of trial on a Friday afternoon—they had had not yet heard a chronological account of the entire night’s events. After hearing Donini and Chadwick’s testimony the following week, detailing how the crimes unfolded, it was only natural to want to see the video a second time to place it in proper context. Viewing the Defendant’s demeanor and hearing his admissions no doubt served as

---

<sup>10</sup> Even if the jury heard this statement—which the record does not support—the statement was largely cumulative of the Defendant’s statement during the admissible portion of the video where he expressed repeated remorse for scaring “that gentleman.” Ex. 93 at 19.

a capstone on the bulk of evidence presented over the previous several days.

Because the record shows that the extrinsic evidence was merely cumulative of the overwhelming evidence of the Defendant's guilt, the trial court did not abuse its discretion in finding the jury's exposure to the extrinsic evidence harmless. Accordingly, this Court should affirm the trial court's denial of the motion for new trial.

B. This Court Should Not Consider the Defendant's Newly Raised Privacy Act Argument Because a Violation of the Privacy Act Cannot be a Manifest Constitutional Error

An appellate court may refuse to review a claim of error not raised before the trial court. RAP 2.5(a). But a party may, for the first time on appeal, raise a claim of "manifest error affecting a constitutional right." *Id.* "In order to benefit from this exception, 'the appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial.'" *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). RAP 2.5(a) thus imposes two requirements on the appellant: (1) to show that the error is of a constitutional magnitude, *id.* at 677, and (2) to demonstrate that the error is "manifest," i.e. that it had "practical and identifiable consequences in the trial of the case," *id.* at 676 (quoting *O'Hara*, 167 Wn.2d at 99).

Here, the Defendant did not raise the Privacy Act argument before the trial court. Accordingly, this Court should review this claim of error only if the Defendant can demonstrate that the claim involves a “manifest error affecting a constitutional right.” RAP 2.5(a). The Defendant cannot make this showing because the admission of evidence contrary to the Privacy Act is a statutory violation, not a constitutional violation. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Courtney*, 137 Wn. App. 376, 383, 153 P.3d 238 (2007). Given that a Privacy Act violation is not an error of “constitutional magnitude” for purposes of RAP 2.5(a), this Court should decline to review this claim.

Even if the Court did consider the Privacy Act claim, the error was harmless. A violation of the Privacy Act “is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Cunningham*, 93 Wn.2d at 831. Here, if the Court concludes that the jury’s exposure to the extrinsic evidence is harmless beyond a reasonable doubt (as discussed above under the Defendant’s first claim of error), then it must reject any claim of error under the Privacy Act as well.

C. The Defendant Was Not Denied the Effective Assistance of Counsel By Counsel's Failure to Request a Curative Instruction on a Harmless Error

To succeed on a claim of ineffective assistance of counsel, the “defendant must first show that counsel’s performance was deficient—that it fell below an objective standard of reasonableness. *Courtney*, 137 Wn. App. at 384 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Second, there must be a showing that the “defendant was prejudiced by trial counsel’s deficient performance. *Id.* (citing *Thomas*, 109 Wn.2d at 225-26). A defendant is prejudiced if, “but for counsel’s errors at trial, the result of the trial would have been different.” *Id.* (citing *Thomas*, 109 Wn.2d at 226).

The Defendant argues that, had defense counsel objected to the additional video footage played for the jury as a Privacy Act violation, the trial court would have instructed the jury to disregard the footage, and the result of the trial would have been different. If the Court concludes that there is no “reasonable ground to believe that the defendant may have been prejudiced” by the extrinsic evidence, *Pete*, 152 Wn.2d at 555 n.4, then the Court must also conclude that defense counsel’s objection under the Privacy Act would not have altered the result of the trial. In other words, if the extrinsic evidence was harmless, the Defendant could not have been prejudiced by his attorney’s failure to ask for a curative

instruction. A harmless error simply needs no curing. Thus, even assuming defense counsel's performance was deficient, a harmless-error finding by this Court would undermine any claim of prejudice.

D. This Court Should Not Consider the Defendant's Newly Raised Challenge to the Jury Instructions Because the Trial Court's Variations From the Pattern Instructions Are Not Manifest Constitutional Errors

The Defendant did not object to the trial court's jury instructions at the time of trial. The analysis under RAP 2.5(a) therefore applies as a threshold matter to the Defendant's challenge to the jury instructions.

1. The Defendant has not Shown that Use of the Trial Court's "To Convict" Instructions was a Manifest Constitutional Error

The Defendant claims that using the word "should" in the "to convict" instructions allowed the jury to find the Defendant guilty in the absence of proof beyond a reasonable doubt. The implication is that the jury, after weighing all the evidence, had a reasonable doubt as to one or more of the elements for a particular crime, but nonetheless relied on the word "should" to find the Defendant guilty.

This Court should decline review because the Defendant has not shown that the alleged errors are "manifest."<sup>11</sup> "A constitutional error is

---

<sup>11</sup> The State assumes, for the sake of this argument, that an alleged error of this type may fall within the category of errors that the State Supreme Court has deemed

manifest if the appellant can show actual prejudice, i.e., there must be a ‘plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.’” *Gordon*, 172 Wn.2d at 676 (quoting *O’Hara*, 167 Wn.2d at 99). “A purely formalistic error is insufficient,” as is an error that “appears to be purely abstract and theoretical.” *State v. Lynn*, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992).

The Defendant cannot meet this burden. First, use of the word “should” in this context conveyed essentially the same meaning as the phrase, “it will be your duty” taken from the pattern instructions. The word “should” is used to express “duty, obligation, necessity, propriety, or expediency.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2104 (1993). The term “duty” likewise denotes “obligatory tasks, conduct, service, or functions.” *Id.* at 705. In both cases, the jury is instructed that, based on its findings regarding the evidence, it has an obligation to return a verdict of guilty or not guilty. Yet neither term actually requires the jury to return a verdict one way or the other; both fall short of the stronger obligatory language of “must,” which, if used, may itself elicit an argument on appeal. *See State v. Brown*, 130 Wn. App. 767, 770, 124 P.3d 663 (2005) (rejecting defendant’s argument that “duty” language in

---

“constitutional.” *See O’Hara*, 167 Wn.2d at 101 (citing *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977)).

the “to convict” instruction misinformed jury about its ability to nullify the verdict). The trial court’s instructions struck the proper balance by informing the jury of its responsibilities while not directing any particular verdict.

Second, the jury instructions read in their entirety adequately conveyed to the jury its responsibility to find the Defendant not guilty if the evidence was lacking. Instruction 3 on “Charges and Burden of Proof,” for example, instructed the jury as follows:

The defendant’s plea of not guilty puts in issue, to be decided by the jury, each element of each crime charged. The State is the plaintiff and has the burden of proving each of these elements beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists. The defendant is presumed innocent. This presumption continues throughout the entire trial *unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.*

CP at 50 (emphasis added). This instruction informed the jury that, if it had a reasonable doubt as to any element, the presumption of innocence remained. When read together with the “to convict” instructions, this instruction made the jury’s responsibility clear: return a verdict of guilty only if the State proved each element beyond a reasonable doubt.

Further, the “to convict” instructions themselves adequately informed the jury of this responsibility. Each “to convict” instruction directed the jury that it should return a verdict of guilty under only one

scenario: if it found from the evidence that each element of the crime had been proven beyond a reasonable doubt. *See, e.g.*, CP at 60. The scenario that the Defendant posits was not left open to the jury—i.e. to find the Defendant guilty even when the jury had reasonable doubts about the evidence of guilt. It is “purely abstract and theoretical,” *Lynn*, 67 Wn. App. at 345-46, to speculate that the jury would use the word “should” as an alternative scenario under which it could find the Defendant guilty—especially when that scenario necessarily involved a jury finding that the evidence was lacking.

Read in their entirety and in proper context, the jury instructions correctly informed the jury of its responsibility in reaching a verdict. The trial court’s use of a word that conveyed essentially the same meaning as the pattern instructions was not a “manifest” error.

2. The Defendant has not Shown that Use of the Trial Court’s Introductory Instructions was a Manifest Constitutional Error

The Defendant contends that the trial court’s introductory instructions were deficient because they omitted some of the language from the pattern instructions. Based on these omissions, the Defendant argues the jury was left in a position where it “might have believed” certain things about the case. Appellant’s Br. at 31. As the language of the Defendant’s brief suggests, this argument “appears to be purely

abstract and theoretical.” *Lynn*, 67 Wn. App. at 345-46. The trial court could have instructed on any number of topics taken from the pattern instructions, but it chose to focus on those instructions it saw as most germane to the jury’s responsibilities. The Defendant did not object to these omissions. Nor has he cited any authority showing that the trial court’s decision to leave out particular language was prejudicial.

As our State Supreme Court has recognized, the pattern instructions, “are not the law—they ‘are not mandatory, nor are they in any sense preapproved by the Supreme Court.’” *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005) (quoting 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 31.2, 261 (2003)). The trial court’s instructions strayed from the pattern instructions, but not in manner that prejudiced the Defendant. Given the Defendant’s failure to show a manifest constitutional error, this Court should reject the belated challenge to the jury instructions.

E. A Rational Trier of Fact Could Have Found the Defendant Guilty of Possession of a Controlled Substance Based on His Possession of Methamphetamine Residue

“In a challenge to the sufficiency of the evidence the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d

1225 (2011) (citing *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008)).

To find the Defendant guilty of possession of a controlled substance, the State had to prove that the Defendant “possess[ed] a controlled substance.” RCW 69.50.4013; *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.02 (3d Ed). Methamphetamine is a “controlled substance.” RCW 69.50.206(d)(2); former RCW 69.50.101(d) (2010).

A rational juror could find from the evidence in this case that the Defendant possessed methamphetamine. At trial, the jury heard evidence that the Defendant admitted to possessing methamphetamine in his motel room. This information was presented through the testimony of Officer Loyd and the Defendant’s own video-recorded statements. The jury also heard that officers, in executing a search warrant of the Defendant’s room, located a cd with white residue on its surface. The white substance was visible to the naked eye. *See* VRP (Jan. 21, 2011) at 189-91. A forensic scientist from the Washington State Patrol Crime Laboratory testified that the white residue found on the cd contained methamphetamine. VRP (Jan. 24, 2011) at 274. The analyst testified that he extracted two milligrams of the powder to run the tests that identified the presence of methamphetamine. *Id.* at 277. Taking this evidence in the light most

favorable to the State, sufficient evidence exists to support the Defendant's conviction for possession of a controlled substance.

The Defendant does not argue that there was insufficient evidence that he possessed methamphetamine residue. Instead, the Defendant seems to contend that evidence of possession of methamphetamine *residue* in and of itself does not constitute a violation of RCW 69.50.4013. The Defendant asks this Court to read into RCW 69.50.4013 a requirement that the State prove possession of a certain quantity of a controlled substance.

This argument is inconsistent with the plain language of the statute, which does not require possession of any certain amount of a controlled substance to support a conviction. The statute simply provides that it is "unlawful for any person to possess a controlled substance." RCW 69.50.4013. If the Legislature intended to impose a minimum-quantity requirement, it could have done so. This Court should reject the Defendant's invitation to read a minimum-quantity requirement into RCW 69.50.4013.

The Defendant's argument is also contrary to Washington case law. In *State v. Malone*, Division II of this Court held that the possession-of-a-controlled-substance statute "does not require that a minimum amount of drug be possessed, but that possession of any amount can

support a conviction.” 72 Wn. App. 429, 439, 864 P.2d 990 (1994);<sup>12</sup> *see also State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991) (citing *State v. Larkins*, 79 Wn.2d 392, 394, 486 P.2d 95 (1971) (noting that “[t]here is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction” under the possession statute))).

Similarly, in *Larkins*, the defendant was convicted under RCW 69.33.230, which prohibited the possession of any narcotic drug, when he was found with an empty pill bottle containing residue of a narcotic drug. 79 Wn.2d at 392-93. The State Supreme Court rejected Larkin’s argument that the statute prohibited only possession of a usable amount of drugs. *Id.* at 393-94. Recognizing that the statute did not contain a minimum-quantity requirement, the Court said it would not “substitute [its own] wisdom for that of the legislature.” *Id.* at 394.

Washington law prohibits the unlawful possession of any amount of a controlled substance. The evidence in this case showed that the Defendant possessed methamphetamine residue. Because a rational tier of fact could find the Defendant guilty of possession of a controlled substance, this Court should affirm the conviction.

---

<sup>12</sup> The *Malone* court’s analysis was based on the language of former RCW 69.50.401(d) (1998), the predecessor statute to RCW 69.50.4013. Laws of 2003, ch. 53, §§ 331, 334. Both statutes proscribe the unlawful possession of a controlled substance and are silent regarding any minimum quantity.

F. The Record Does Not Reflect a Basis for Imposing Legal Financial Obligations (LFOs) Other than \$100 in Restitution

A trial court need not make “formal findings of fact about a defendant’s present or future ability to pay LFOs.” *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). But “the record must be sufficient for [an appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden’ imposed by LFOs under the clearly erroneous standard.” *Id.* (quoting *Baldwin*, 63 Wn. App. at 312).

At sentencing, the trial court imposed \$1,450 in LFOs. The State is unable to determine from the record whether the trial court took into account the Defendant’s financial resources and ability to pay in imposing these obligations.

A restitution hearing was held at a later date. At that time, the trial court imposed \$100 in restitution based on the Defendant’s stipulation to that amount. VRP (Sept. 23, 2011) at 89, 110. In stipulating to the restitution, the Defendant essentially admitted to having the ability to pay based on his financial resources. The trial court’s order imposing \$100 in restitution, therefore, was not clearly erroneous.

G. The Defendant Has Not Established Error Based on His Statement of Additional Grounds

The Defendant's statement of additional grounds appears to raise three main arguments. First, he contends that the trial court erred in not making written findings regarding the admissibility of his statements pursuant to a CrR 3.5 hearing. Second, he asserts that the trial court erred in permitting the jury to watch the video interview during its deliberations. Third, he claims that he was prejudiced by the extra video footage the jury saw on its second viewing of the video.

The trial court was not required to make any written findings regarding the admissibility of the Defendant's statements because the Defendant stipulated to their admissibility. Appellant's Statement of Additional Grounds, App. C. While a pretrial CrR 3.5 hearing on the admissibility of a defendant's statement is usually mandatory, a defendant may make a knowing and intentional waiver of this right through a stipulation. *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976); *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). Because the Defendant's stipulation obviated the need for CrR 3.5 findings, the trial court did not err.

As to the Defendant's second claim of error, the trial court's decision to allow the jury to watch the video interview during

deliberations is reviewed for an abuse of discretion. *State v. Koontz*, 145 Wn.2d 650, 658, 41 P.3d 475 (2002). The *Koontz* court suggested several guidelines in allowing a video tape of testimony to be replayed to the jury during deliberations:

Protections to prevent undue emphasis in the manner of video replay may include replay in open court, court control over replay, and review by both counsel before presentation to the jury. Other protections may include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to answer a specific jury inquiry against the danger of allowing a witness to testify a second time. It is seldom proper to replay the entire testimony of a witness. These considerations are not exhaustive but should be evaluated before a videotape replay is presented to a deliberating jury.

*Id.* at 657.

Here, the trial court was faithful to the guidance from *Koontz* and took several precautions in allowing the jury to view the video. The video was played in open court. The court directed the video to be played in the same manner as during trial, which both counsel had previously viewed. The court inquired of the presiding juror about how much of the video the jury needed to see. VRP (Jan. 26, 2011) at 681-82. Only when the presiding juror said they needed to see the segments of the video viewed during trial did the court allow the second viewing. *Id.* at 682-83. The

court was persuaded that a second viewing was appropriate because the video was in fact a properly admitted exhibit, which the trial court felt a jury is generally entitled to examine during deliberations. *Id.* at 683-84.<sup>13</sup> As a final precaution, the trial court gave the jury an instruction that the court was not commenting on the value or weight of the evidence and that the jury needed to deliberate with all the evidence in mind, not just the video evidence. *Id.* at 684. Given the trial court's care in presenting the video testimony to the jury, there was no abuse of discretion.

The Defendant's third argument parallels his first assignment of error asserted by his appellate counsel. As discussed above, this argument fails because the jury's exposure to the extrinsic evidence was harmless.

## V. CONCLUSION

The trial court properly exercised its discretion in finding that the jury's exposure to two minutes of innocuous video footage was harmless. If this Court affirms that finding, then it can summarily dispose of a number of the Defendant's other challenges that are rooted in the alleged prejudice from the jury's second viewing of the video. Still, this Court should reach only those issues that were raised at the trial court given the Defendant's failure to establish manifest constitutional error.

---

<sup>13</sup> This is different from cases such as *Koontz*, where the video was of actual trial testimony from one or more witnesses. *See, e.g., Koontz*, 145 Wn.2d at 651.

The Defendant's trial was not perfect, but it was fair. The State therefore respectfully asks this Court to affirm the Defendant's convictions.

DATED this 5th day of July, 2012

Respectfully submitted:

D. ANGUS LEE  
Grant County Prosecuting Attorney

/s/ Ryan Ellersick  
Ryan J. Ellersick, WSBA #43346  
Deputy Prosecuting Attorney  
PO Box 37  
Ephrata, WA 98823  
Phone: (509) 754-2011  
rellersick@co.grant.wa.us