

**FILED**

**FEB 15 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

APPELLATE COURT NUMBER 30101-0-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

RACHAEL A. CASSELL,

Defendant/Appellant.

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RESPONDENT'S BRIEF

---

June L. Riley, WSBA# 29198  
Deputy Prosecuting Attorney  
Columbia County  
116 N. Third Street  
Dayton, WA 99328  
509-382-1197

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**A. COUNTER STATEMENT TO ASSIGNMENT OF ERROR**

1. Sufficient evidence existed to convict Cassell.

**B. COUNTER STATEMENT TO ISSUES PERTAINING TO  
ASSIGNMENT OF ERROR**

2. Sufficient Evidence Was Presented That The Substance Found  
In Cassell's Home Was Marijuana.

**C. STATEMENT OF CASE**

Deputy Nicholas Henzel of the Columbia County Sheriff Department was on duty on March 13, 2011. (RP 14). Deputy Henzel responded to a domestic violence call from a Tamatha Eifert. (RP 15). Deputy Henzel learned that William Eddie Tewalt, was the domestic violence suspect. (RP 15). Deputy Henzel discovered that Mr. Tewalt was staying at the house of his girlfriend, and Appellant herein, Rachel Cassell. (RP14). (Appellant hereafter referred to as Cassell). Deputy Henzel learned that a warrant existed for Mr. Tewalt. (RP 14). Deputy Henzel initially responded to the alley behind Cassell's home. (RP 16). Deputy Don Foley also responded with Deputy Henzel. (RP 16). Deputy Foley knocked on the front door and announced himself. (RP 17). Deputy Henzel then saw Mr. Tewalt poke his head out of the back bedroom window. (RP 17). It appeared that Mr. Tewalt was going to try to escape out of the window. (RP 17). Deputy Henzel called out to Mr. Tewalt. (RP 17). Mr. Tewalt was told he had an outstanding warrant for his arrest from

Benton County. (RP 17). Mr. Tewalt said that the warrant was no good and went back in to the home. (RP 17).

Deputy Henzel had another Deputy watch the back of the home while he returned to the Sheriff Department to prepare a search warrant. (RP 18). Once the search warrant was granted, Deputy Henzel and Deputy Foley entered the home. (RP 18). As the deputies were searching the house for Mr. Tewalt they found a marijuana pipe, with residue, sitting on a dresser next to a bicycle which Deputy Henzel had previously seen Mr. Tewalt ride. (RP 18). Once Mr. Tewalt was taken into custody Deputy Henzel called the judge for an amendment to the search warrant to expand the scope of the search to include narcotics and paraphernalia. (RP 19). The amendment to the search warrant was granted. (RP 19). In the main living area, Deputy Henzel found roaches in an ashtray and a bong with black water and residue contained inside. (RP 19-20).

The Deputies also searched the back bedroom which contained women's clothing and products. (RP 20). Deputy Henzel found several pipes with residue, a box of white pills and a baggie of methamphetamine. (RP 20). Deputy Henzel conducted two field tests on the roaches which tested positive as marijuana. (RP 42). Deputy Henzel sent the marijuana to the crime lab for testing. (RP 44). The lab returned the marijuana with a memo stating that they no longer test marijuana for less than felony level cases. (RP 44). Deputy Henzel field tested the marijuana again at that time and obtained a positive result for marijuana. (RP 44).

At trial, Deputy Henzel testified that he had been employed as a law enforcement officer with Columbia County Sheriff Department for five years. (RP 12). He testified that he served in the military as an MP for five years prior to his employment with Columbia County. (RP 12). Deputy Henzel testified that he was trained on how to identify marijuana. (RP 12). That training consisted of being given marijuana to look at, hold and smell in its unused form and its raw form. (RP 12). He was also trained at a controlled burn where some marijuana buds were rolled up into a paper and burnt so he could recognize the smell of burnt marijuana. (RP 12). Deputy Henzel testified that he receives continuing education on crimes involving marijuana. (RP 12). Deputy Henzel testified that he had investigated more than one hundred crimes involving marijuana and paraphernalia. (RP 13). Deputy Henzel testified that he identified marijuana by the smell, look and presence of paraphernalia and contraband commonly associated with the use and ingestion of marijuana. (RP 13). Deputy Henzel testified that he had, on prior occasions, testified in court as to his identification of substances as marijuana or marijuana residue. (RP 13).

Bench trial was held on June 27, 2011. Cassell was charged with Possession of Marijuana, less than 40 grams and Possession of Methamphetamine and Use of Paraphernalia. Cassell was convicted on all three charges. (RP 105).

## **D. ARGUMENT**

### **1. Sufficient Evidence Existed That The Substance Found In Cassell's Home Was Marijuana.**

A review of sufficiency of evidence requires that the evidence be viewed in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wash.2d 899, 906-907, 567 P.2d 1136 (1977). The inferences drawn from the evidence must be interpreted most strongly against defendant. *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.*

The appellate court should defer to the fact finder on the persuasiveness of the evidence. *State v. Thomas*, 150 Wash. 2d 821, 874-875, 83 P.3d 970 (2004).

Sufficient evidence exists to satisfy the element that Cassell was in possession of marijuana. A law enforcement officer can opine that a substance is marijuana. *Matter of Reismiller*, 101 Wash.2d 291, 678 P.2d 323 (1984).

The introduction of a chemical analysis of a suspected controlled substance is not essential to conviction even in a criminal trial proceeding; lay testimony and circumstantial evidence may be sufficient to establish the identity of the substance. (Citations omitted).

**a. Sufficient Foundation Was Presented As To Deputy Henzel's Knowledge And Experience To Identify Marijuana.**

The foundational evidence which Deputy Henzel provided to the trial court as to his ability to identify marijuana was as follows:

- a. Deputy Henzel had 10 years experience in law enforcement. (RP 12).
- b. Deputy Henzel was trained to identify marijuana. (RP 12).
- c. Deputy Henzel's training consisted of learning to identify marijuana by sight, feel and smell, both burned and not burned. (RP 12).
- d. Deputy Henzel investigated over one hundred crimes involving marijuana and the use of paraphernalia. (RP 13).
- e. Deputy Henzel received continuing education regarding crimes involving marijuana. (RP 12).
- f. During investigations involving marijuana, Deputy Henzel identified marijuana by the smell, look and by the paraphernalia and contraband commonly associated with the use and ingestion of marijuana. (RP 13).
- g. Deputy Henzel had testified on previous occasions as to his identification of marijuana. (RP 13).

The following additional circumstantial evidence supports Deputy Henzel's identification of the substance found in Cassell's home as marijuana:

- a. Several marijuana pipes were found in Cassell's home. (RP 18, 20, 38). Deputy Henzel testified that the identification of these items as drug paraphernalia is based upon training and experience. (RP 18, 38).
- b. Bags with marijuana leaves stamped on them were found in Cassell's home; this is also paraphernalia as testified to by Deputy Henzel. (RP 21, 33, 34). Deputy Henzel testified that this recognition was based upon his training and experience. (RP 21, 33, 34)
- c. Miscellaneous paraphernalia was found throughout the home, specifically a "sneak a toke", scraping tools, knife and copper wire with residue. (RP 38, 39). Deputy Henzel testified that his recognition of these items as marijuana paraphernalia was based upon his training and experience. (RP 38, 39). The presence of these items supports the identification of the substance and resin as marijuana.
- d. Burnt residue was found in the pipes and bong. (RP 38, 39). Deputy Henzel testified that this recognition was based upon his training and experience. (RP 38, 39).
- e. A bong was found in Cassell's home which contained residue and black water. (RP 19, 41). Deputy Henzel testified that this recognition was based upon his training and experience. (RP 19, 41).

f. Roaches were found in an ashtray which contained no cigarette butts. (RP 19, 42, 54). Deputy Henzel testified that this recognition was based upon his training and experience. (RP 19, 42, 54).

g. Deputy Henzel field tested the roaches two times with the result that they tested positive as being marijuana. (RP 42). He conducted another field test after the substance was sent back from the crime lab with the same positive result for marijuana. (RP 44).

h. Mr. Tewalt stated the “weed pipe” in the first room was his. (RP 58). This identification by another person of an item of drug paraphernalia with the admission that it was used for “weed” provides supporting evidence that Deputy Henzel’s identification of the substance as marijuana is sufficient.

Each time Deputy Henzel identified a substance as marijuana or an item as marijuana paraphernalia, his identification was preceded by the fact that it was based upon his training and experience. This relates his testimony back to what he learned in his training and experience in how to identify these substances.

**b. The Appellate Court Must Defer To The Fact Finder On The Persuasiveness Of The Evidence.**

The court must defer to the trier of fact on the issue of persuasiveness of the evidence. *State v. Hernandez*, 85 Wash.App 672, 935 P.2d 623 (1997).

This court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.

At page 675.

Defense counsel objected to Deputy Henzel's identification of the resin as marijuana resin. (RP 39). The objection was overruled. (RP 39). The trial court held that sufficient foundation was laid based upon Deputy Henzel's testimony of his training and experience in investigating crimes involving marijuana and paraphernalia. (RP 39).

Deputy Henzel's testimony included the factors which he has been trained to use to identify marijuana. Each statement of identification during Deputy Henzel's testimony included that it was based upon his training and experience. Cassell's argument is specious.

**c. Factors Of Identification Other Than Deputy Henzel's Training And Experience Were Presented To The Court.**

The court in *State v. Colquitt*, 133 Wash.App. 789, 137 P.3d 892 (2006) held that circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case. The court discussed a non-exhaustive list of factors which could be considered:

Whether the State has met its burden of establishing identity of a controlled substance depends on non-exhaustive list of factors, including (1) testimony by witnesses who have significant amount of experience with drug in question, (2) corroborating testimony by officers or other experts as to identification of substance, (3) references made to drug by defendant and others, (4) prior involvement by defendant in drug trafficking, (5) behavior characteristic of use

or possession of particular controlled substance,  
and (6) sensory identification of substance if  
substance is sufficiently unique.

at page 898

As set forth above, many of the *Colquitt* factors were testified to by Deputy Henzel. Deputy Henzel identified the substance based upon his training and experience which included learning how to identify marijuana and its resin by sight, touch, smell and surrounding paraphernalia. (RP 12-13). Mr. Tewalt also indicated that the paraphernalia had been used for ingesting marijuana when he identified his “weed pipe”. (RP 39). There were several pipes used for smoking marijuana present, a bong with black water and marijuana residue. (RP 18, 19, 20, 38, 39, 41). Two separate field tests were conducted with positive results showing the substance to be marijuana. (42, 44).

Defendant’s reliance on *United States v. Dominguez*, 992 F.2d 678, 510 U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993) is misplaced. In the *Dominguez* case the court found that the identity of the substance was not sufficient because the record was unclear as to what the DEA agent relied upon to make the identification. The identification of the substance as cocaine was based upon taped conversations, not testimony based upon training and experience. Additionally, the DEA agent in *Dominquez* was uncertain that the substance she received was authentic. No such uncertainty exists here. In this matter, Deputy Henzel clearly testifies that his identification is based upon his training and experience which

encompasses identification of marijuana and marijuana resin by sight, feel, smell and accompanying items of paraphernalia.

Cassell cites *State v. Roche*, 114 Wash.App. 424, 59 P.3d 682 (2002) asserting that *Roche* requires a confession and a positive lab result for the evidence to be sufficient for conviction. This is a misstatement of the law.

The *Roche* courts basis for overturning the conviction was the fact that the crime lab technician who tested the alleged methamphetamine was found to be using heroine on the job in the crime lab. The *Roche* court concluded that because of the malfeasance of the crime lab technician, Roche should not have been tried or sentenced at all. (at page 440). The *Roche* case is inapplicable to the within matter.

*In Re Personal Restraint of Delmarter*, 124 Wash.App. 154, 163-164, 101 P.3d 111 (2004) is inapplicable. The *Delmarter* court found that Delmarter's reliance on *Roche* was misplaced. The court looked to the fact that Delmarter failed to present any evidence that the identification of the drugs by the lab was incorrect. Since no such evidence was presented (as is one basis for a PRP) the conviction was upheld.

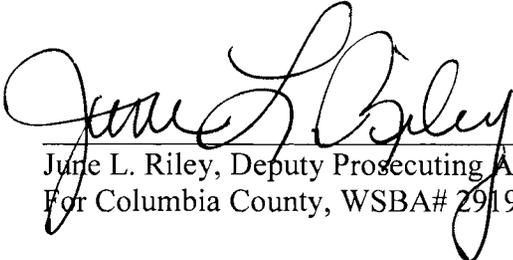
Cassell's assertion that a confession and lab test is required for sufficient evidence is a misstatement of the law. Such requirement does not exist. The appellate court should defer to the finding of the trial court that sufficient evidence was presented for Deputy Henzel's identification of marijuana in Cassell's home.

Each time Deputy Henzel identified a substance as marijuana or an item as marijuana paraphernalia, his identification was preceded by the fact that it was based upon his training and experience. This relates his testimony back to what he learned in his training and experience in how to identify these substances. Thus, each identification included the factors he was trained to use in making the identification. Sufficient evidence was presented. This appeal fails.

#### **E. CONCLUSION**

For the foregoing reasons, it is respectfully requested that this appeal be denied.

Dated: February 14, 2012

  
June L. Riley, Deputy Prosecuting Attorney  
For Columbia County, WSBA# 29198

**FILED**

**FEB 15 2012**

**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_**

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

STATE OF WASHINGTON,	)	Court of Appeals Case No: 30101-0-III
Respondent	)	
v.	)	DECLARATION OF MAILING
	)	
RACHEL L. CASSELL,	)	
Appellant	)	

I declare and certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct: that on this day I deposited in the mail of the United States of America a properly stamped envelope addressed as follows:

Honorable Renee S. Townsley  
Court of Appeals, Division III  
500 N. Cedar Street  
Spokane, WA 99201-1905

David N. Gasch  
Gasch Law Office  
PO Box 30339  
Spokane, WA 99223

Declaration of Mailing

Rea L. Culwell, Columbia County Prosecuting Attorney  
116 N. 3<sup>rd</sup> Street  
Dayton, WA 99328  
(509) 382-1197

1 This envelope contained a copy of the following document(s): Respondent's Brief.

2 I also declare that as of this date, Rachel Cassell's whereabouts are unknown. I was  
3 informed on Friday, February 10, 2012 that she had been released from the custody of  
4 Department of Corrections and was in an undisclosed treatment facility.

5 Dated February 14, 2012, Executed in Dayton, Washington.

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7 Julie E. Karl, Legal Assistant  
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