

FILED  
Court of Appeals  
Division III  
State of Washington  
11/13/2017 8:41 AM  
35210-2-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JAMES E. BOYD, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The police violated Boyd's constitutional privacy rights by searching and seizing without a warrant, without reasonable suspicion of criminal activity and without a valid exigent circumstance.
2. The trial court erred by denying the motion to suppress the illegally obtained contraband.
3. The trial court erred in denying the motion to dismiss the charges based on the illegal obtaining of the contraband.
4. The state failed to prove the substance analyzed by the crime lab was the same substance retrieved from Boyd.
5. Boyd assigns error to the trial court's findings of fact and conclusions of law following the motion to suppress/dismiss. CP 180-83.
6. The trial court impermissibly imposed legal financial obligations without first determining Boyd's ability to pay.
7. This Court should deny the state appellate costs.

## **II. ISSUES PRESENTED**

1. Did the trial court err in entering its CrR 3.6 findings of fact, where each of those findings is supported by substantial evidence?
2. Did the trial court err when it entered its conclusions of law that law enforcement did not misuse its community caretaking function when it responded to assist medics attending to a combative patient, and where, during the time law enforcement was present on scene, they were advised the defendant had a felony arrest warrant?

3. Did the State sufficiently establish the chain of custody for the controlled substance found on Mr. Boyd's person at the time of his arrest?
4. Did sufficient evidence exist proving that Mr. Boyd possessed methamphetamine, where any minor discrepancies in the chain of custody go to the weight of the evidence, not its admissibility?
5. Whether the defendant preserved his claim that the trial court erred in imposing mandatory LFOs where no objection was made at sentencing?
6. Whether the defendant's circumstances have changed since the trial court found him indigent such that this Court may impose appellate costs in the event the State prevails, and whether, given that standard, this Court even need consider whether the defendant has a mental health condition relevant to the imposition of appellate costs?

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

The defendant was charged in the Spokane County Superior Court by amended information, filed March 15, 2017, with one count of possession of a controlled substance, methamphetamine, occurring on or about July 10, 2016. CP 90.

#### Factual History.<sup>1</sup>

Officer Dale Harvey, of the Spokane Police Department, responded to the Downtowner Motel, in Spokane, Washington, on July 10, 2016, to

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<sup>1</sup> Additional facts may be included in the State's Argument, below, as necessary and relevant.

assist the fire department in attending to a combative patient. RP 99-102.<sup>2</sup> Officer Harvey identified the patient as James Boyd, the defendant. RP 102.

The officer ultimately placed the defendant under arrest for a DOC warrant<sup>3</sup> and a search incident to arrest of his person revealed a syringe in his pocket. RP 103-105; 11/3/16 RP 10, 16. The syringe contained a brown-colored substance that the officer believed, based upon his training and experience, to be heroin. RP 105-106. Officer Harvey tested the substance within the syringe with a NIK test kit, and the result indicated to the officer that the syringe contained heroin. RP 107-108. The officer placed the syringe on property after placing it in an envelope, and taping it with evidence tape to prevent tampering. RP 110.

Detective Vandenberg, also with the Spokane Police Department, retrieved the syringe for testing, and knowing that the Washington State crime lab does not accept syringes for testing, followed his “standard procedure” to extract some of the liquid from the syringe, and placed it in a vial to send to the lab. RP 180, 183, 197-198. After sealing the vial and

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<sup>2</sup> The consecutively paginated trial and sentencing transcript shall be referred to as “RP.” The transcript of defendant’s motion to suppress and dismiss shall be referred to as “11/3/16 RP.”

<sup>3</sup> The jury did not hear of the existence of a DOC warrant. This testimony was elicited only during the suppression hearing. 11/3/16 RP 10, 16.

labelling it, he took the vial to the laboratory for testing. RP 184, 195, 198-199.

Sheri Jenkins, a Washington State Patrol Crime Lab chemist, performed two separate tests on the substance, and determined it to be methamphetamine. RP 251-259. Ms. Jenkins also detected the presence of monoacetylmorphine, a chemical compound that is formed when heroin breaks down. RP 264. Ms. Jenkins believed that monoacetylmorphine could be present in the sample if the syringe containing the substance had previously contained heroin or a morphine compound, or if there had been a “drawback” of blood containing the compound. RP 264-265. Although methamphetamine is usually clear when in liquid form, the substance she tested could have contained blood, explaining its reddish-brown color. RP 265. Presumptive NIK test results, in Ms. Jenkins’ opinion, are susceptible to misinterpretation by law enforcement officers. RP 266-267.

#### Procedural History.

The defendant moved the court to suppress the fruits of the search of his person, alleging that Officer Harvey “misused” his community caretaking function, and the search and seizure of Mr. Boyd were unjustified. CP 6. The State responded to the motion. CP 35-39. The court held an evidentiary hearing on the issue, and ultimately determined, based on its findings of fact, further detailed below, that law enforcement did not

misuse its community caretaking function by remaining in the defendant's hotel room while he was attended to by medics, and in delaying their departure to confirm the existence of a warrant they knew about before medics left. CP 180-183.

At trial, the defendant argued that the controlled substance tested by the crime lab had been tampered with or swapped with the substance originally located on Mr. Boyd's person. RP 317-329. The jury convicted the defendant, as charged, of possession of a controlled substance, methamphetamine. CP 107.

The trial court sentenced the defendant, who had an offender score of "9+," to a standard range sentence of a year and a day. CP 157, 159. The trial court imposed 6 months of community custody as an exceptional sentence downward. CP 157, 160. It imposed legal financial obligations totaling \$800, which included a \$500 victim assessment, \$200 filing fee, and \$100 DNA collection fee. CP 161.

The defendant timely appealed.

## IV. ARGUMENT

### A. LAW ENFORCEMENT OFFICERS APPROPRIATELY USED THEIR COMMUNITY CARETAKING FUNCTION; BY THE TIME MEDICS DEPARTED THE HOTEL ROOM, OFFICERS WERE AWARE MR. BOYD HAD A WARRANT FOR HIS ARREST.

#### 1. Standard of Review

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Fry*, 142 Wn. App. 456, 460, 174 P.3d 1258 (2008), *aff'd*, 168 Wn.2d 1, 228 P.3d 1 (2010). Findings of fact are reviewed for substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* When a conclusion of law is erroneously labeled as a finding of fact, this Court reviews it de novo as a conclusion of law. *Casterline v. Roberts*, 168 Wn. App. 376, 383, 284 P.3d 743 (2012).

Here, the defendant apparently challenges all of the court's findings of fact and conclusions of law, as he does not assign error to specific findings. Appellant's Br. at 11. Mr. Boyd fails to argue how the challenged findings are unsupported. This Court generally does not consider claims unsupported by argument or citation to legal authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). It should, therefore, not consider the defendant's

claim which fails to assign error to specific findings of fact and fails to provide reasons why those findings are erroneous.

2. The Trial Court's Findings of Fact are Sufficiently Supported by the Record.

Defendant's unsupported argument that the findings of fact are erroneous is belied by the record of the CrR 3.6 hearing, the clerk's papers, and the bodycam video admitted in this case, all considered by the trial court, along with the defendant's motion to suppress and memorandum, the State's response and the pleadings filed in the case. CP 180. The defendant attached the CAD report, a transcript of the original 911 call, a transcript of the bodycam footage,<sup>4</sup> the probable cause affidavit, and the police report to his motion to suppress. CP 11-34.

Finding of Fact 1:<sup>5</sup> "An employee from the Downtowner Motel called 911 to report an unresponsive person who was not a guest of the motel, in room 105." CP 180. This finding of fact is supported by the record. CP 14, 15, 34.

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<sup>4</sup> The transcript of the bodycam video was prepared by the public defender's office. Several words are noted as "inaudible" and the court noted that the defendant's acknowledgement of the syringe in his pocket at the time of the arrest was not transcribed, RP 63, 69, and Officer Harvey testified that portions of the transcription were inaccurate. 11/3/16 RP 17-19. Because the transcript of the bodycam video is incomplete, the State designated the video for the court's review on November 13, 2017.

<sup>5</sup> The defendant objected to Findings of Fact 1 and 2 below based on a question as to whether the caller was an employee of the motel. RP 12-13. Interestingly, the defendant's own motion to suppress refers to the original caller as a female employee of the Downtowner Motel. CP 6.

Finding of Fact 2: “After determining that no assault occurred, the 911 operator connected the employee to the fire department.” CP 180. This finding of fact is supported by the record. CP 15-16.

Finding of Fact 3:<sup>6</sup> “When the fire department arrived on scene the unresponsive person had become combative, and they asked for law enforcement’s assistance.” CP 180. This finding of fact is supported by the record. CP 20, 34; 11/3/16 RP 7.

Finding of Fact 4:<sup>7</sup> “When Officer Harvey of the Spokane Police Department arrived on scene, the fire department stated that Mr. Boyd had calmed down but they were still attending to Mr. Boyd.” CP 180. This finding of fact is supported by the record. CP 20-21; 11/3/16 RP 7-8.

Finding of Fact 5: “The testimony of Mr. Boyd along with the body camera video shows that Mr. Boyd stated to fire personnel that he had previously had grand mal seizures which would indicate that he was not

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<sup>6</sup> Below, the defendant objected to this finding based on the lack of testimony from any fire department personnel. However, hearsay is admissible in CrR 3.6 motions. ER 104 (“Preliminary questions concerning ... the admissibility of evidence shall be determined by the court ... [i]n making its determination, it is not bound by the Rules of Evidence”); ER 1101 (Rules of Evidence need not be applied in determining preliminary questions of fact).

<sup>7</sup> Below, the defendant objected to this finding apparently also on the basis of hearsay. “I think there’s some evidence in regard to that. It’s still in dispute. I mean there’s nothing on the video that shows an agitated Mr. Boyd.” RP 14.

calm when they arrived on scene.”<sup>8</sup> CP 180. This finding of fact is supported by the record. CP 21, 33-34.

Finding of Fact 6:<sup>9</sup> “The Fire Department’s response to the scene was due to their primary activity which is treatment.” CP 180. This finding of fact is supported by the record. 11/3/16 RP 6-7.

Finding of Fact 7: “Mr. Boyd refused to be taken to the hospital and denied any drug use. At that point, the fire department recognized this was the end of the scope of their authority.” CP 180. This finding of fact is supported by the record. CP 21-22

Finding of Fact 8:<sup>10</sup> “As the fire department was leaving there was a brief conversation with Officer Harvey that this motel/location was the number two place for methamphetamine in downtown Spokane.” CP 180. This finding of fact is supported by the record. CP 22-23.

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<sup>8</sup> To the extent that the court found that the defendant’s statement that he suffered from grand mal seizures would indicate he was not calm when the fire department arrived, the State agrees that this finding of fact is unsupported by the record. However, the State does not concede that the record lacks evidence that the defendant was combative when fire department personnel arrived. The fact that this finding of fact is unsupported by the evidence is irrelevant to whether law enforcement exceeded the scope of its community caretaking function.

<sup>9</sup> Defendant’s objection to this finding of fact was also based on the lack of any fire department personnel testifying at the hearing. RP 14.

<sup>10</sup> Defendant’s objection to this finding of fact was based on the lack of “appropriate context” for the finding. RP 14.

Finding of Fact 9:<sup>11</sup> “While the fire department was still attending to Mr. Boyd, Officer Harvey asked them for Mr. Boyd’s name and date of birth.” CP 180. This finding of fact is supported by the record. CP 21-22; 11/3/16 RP 8.

Finding of Fact 10:<sup>12</sup> “Officer Harvey testified that this was standard procedure to determine if a person had warrants, mental health concerns or any previous violent contacts.” CP 180. This finding of fact is supported by the record. 11/3/16 RP 9.

Finding of Fact 11:<sup>13</sup> “No questions by law enforcement were directed at Mr. Boyd.” CP 180. This finding of fact is supported by the record. 11/3/16 RP 8, 14. However, because there was a question as to whether Mr. Boyd was in the correct room at the motel, a different law enforcement officer later asked the defendant questions to ascertain whether he belonged in Room 105. 11/3/16 RP 10-11.

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<sup>11</sup> Defendant objected to this finding, stating “the testimony was contested as to whether or not – who specifically asked that question.” RP 16.

<sup>12</sup> Defendant objected to this finding below, stating that it was vague, “isn’t necessarily supported by the record” or the court’s oral ruling. RP 16.

<sup>13</sup> Defendant objected to this finding based on a scrivener’s error in the original draft of the findings of fact and conclusions of law that was corrected before the document was signed and filed, and on the basis that it is not sufficiently supported by the record. RP 17.

Finding of Fact 12:<sup>14</sup> “As they were leaving the scene, fire personnel thanked the officers for responding to the scene. This is a clear indication that the fire department called in law enforcement for assistance.” CP 180. This finding of fact is supported by the record. CP 23.

Finding of Fact 13:<sup>15</sup> “Although Mr. Boyd had calmed down, he was previously combative and could become so again.” CP 180. This finding of fact is supported by the record. CP 20; 11/3/16 RP 8-9, 13, 22, 24, 27-28.

Finding of Fact 14:<sup>16</sup> “The defendant was detained by law enforcement once the fire department left the scene and Officer Harvey was waiting for confirmation of the warrant that was discovered when he ran Mr. Boyd’s information through police dispatch.”<sup>17</sup> CP 181. This finding of fact is supported by the record. CP 22, 25, 31; 11/3/16 RP 15-16, 23. Specifically, Officer Harvey testified that he was aware of the possible existence of a felony warrant prior to the fire department leaving the room. 11/3/16 RP 23.

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<sup>14</sup> Defendant objected to this finding of fact based on lack of supporting evidence. RP 18.

<sup>15</sup> Defendant objected to this finding based on lack of support in the record. RP 18.

<sup>16</sup> Defendant objected to this finding based on lack of support in the record. RP 18.

<sup>17</sup> See Body Cam Video: Two minutes and 59 seconds into the video is the approximate time Officer Harvey may be heard calling into radio dispatch to conduct a warrant check on Mr. Boyd. 11/3/16 RP 14. The fire department left the room approximately one minute later. 11/3/16 RP 14-15. Nine seconds after the fire department left, (four minutes, six seconds into the video) Officer Harvey advised another officer that the situation was “stat one,” meaning the defendant had a felony warrant. 11/3/16 RP 15.

Finding of Fact 15: “After the fire department left, law enforcement detained Mr. Boyd for a reasonable amount of time to confirm that the warrant was active.” CP 181. This finding of fact is supported by the record. CP 22-25, 31, 33, 34; 11/3/16 RP 16. To the extent that this finding of fact passes judgment on the reasonableness of the officer’s actions, it is a conclusion of law.

Finding of Fact 16:<sup>18</sup> “This period was ‘a bit of a stall’ but in the overall scope, this was not an improper detention to confirm the warrant that the police were investigating.” CP 181. This finding of fact is a mixed finding of fact and conclusion of law. The finding of fact portion (that this period was “a bit of a stall”) is properly based on Officer Harvey’s testimony that he was apprised of the existence of a felony warrant nine seconds after fire department personnel left, but needed to await confirmation of the warrant before placing the defendant under arrest. 11/3/16 RP 16; Body Cam Video (4:04 – indication of “stat one” meaning the presence of a felony warrant; 4:32 – asking the defendant to put on his shoes; 5:56 – formally placing the defendant under arrest for the warrant).

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<sup>18</sup> Defendant objected to this finding based on its lack of context, which could explain the addition of finding of fact 15 in the final version of the signed and filed findings of fact. RP 18.

Finding of Fact 17:<sup>19</sup> “There was no violation of the scope of the community caretaking function because the police authority from the moment they arrived was to assist the fire department in case there was further combative behavior by Mr. Boyd and there was a need for law enforcement intervention.” CP 181. This finding of fact should be treated as a conclusion of law.

3. Law Enforcement Did Not Overextend Its Stay in the Hotel Room Occupied by Mr. Boyd.

“As a general rule, warrantless searches and seizures are per se unreasonable” under the Fourth Amendment to the United States Constitution. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). “Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant ... outweigh the reasons for prior recourse to a neutral magistrate.” *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The State bears the burden of showing a seizure without a warrant falls within one of these exceptions. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). One such exception is law enforcement’s community caretaking function.

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<sup>19</sup> Defendant objected to this finding based on insufficient support in the record. RP 19.

The community caretaking function exception was first announced in *Cady v. Dombrowski*, which observed with respect to the Fourth Amendment of the United States Constitution that

Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as *community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*

As noted in *Cady*, the community caretaking function exception is totally divorced from a criminal investigation.

*Kinzy*, 141 Wn.2d at 385 (emphasis in original), citing *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

In Washington, our courts have extended the community caretaking function to include routine checks on health and safety, both of which may require law enforcement to render aid or assistance. *Id.* at 386. This warrant exception applies when “(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.” *Id.* at 386-87.

Based on the fire department’s call that Mr. Boyd was combative and they were in need of law enforcement assistance, law enforcement acted

properly within their community caretaking function by responding to and remaining on scene to assist the medics, even though Mr. Boyd was not combative at the time they were present in the room. Officer Harvey testified that he remained on scene in the event that Mr. Boyd became combative again. This was his subjective intent, it was not unreasonable, and law enforcement did not conduct any search of the premises or otherwise exceed the scope of its community caretaking function during the contact.

Mr. Boyd indicates that once the fire department “dispelled the reason for the police request as well as any medical emergency, the police no longer had the right to detain Boyd.” Appellant’s Br. at 15. But, at the time that medical personnel left the hotel room, Officer Harvey already had knowledge of the potential existence of an arrest warrant. 11/3/16 RP 23; CP 182 (Findings of Fact 14 and 15). Thus, law enforcement’s community caretaking function allowed them entry into the room, to ensure that fire personnel were safe while treating Mr. Boyd; thereafter, notice of the existence of a possible felony arrest warrant provided law enforcement a basis to remain in the room after the fire department left. *See, e.g. State v. Hatchie*, 161 Wn.2d 390, 396, 166 P.3d 698 (2007) (“Under both federal and Washington State law, a felony arrest warrant gives the police the authority to enter the house of the accused for a brief period of time”).

Defendant indicates that “once Boyd was no longer in need of medical assistance – which occurred before the police arrived – further detention was impermissible.” Appellant’s Br. at 15. However, law enforcement was not called to the scene to render aid to Mr. Boyd, but rather to provide support to medical personnel in the event that Mr. Boyd became combative again. Under the Fourth Amendment, it was reasonable for law enforcement to remain in the room until medics completed their task of assisting Mr. Boyd and exited the room. As above, by the time that occurred, Officer Harvey was already aware of the existence of a felony warrant and remained in the room awaiting its confirmation. This was not an unreasonable action under the Fourth Amendment. Therefore, the trial court did not err in entering its conclusions of law which stated: “it was reasonable for [law enforcement] to remain in the room due to Mr. Boyd’s prior combative behavior” and “it was reasonable for law enforcement to briefly detain Mr. Boyd to confirm the warrant.” CP 182 (Conclusions of Law 2 and 3). Therefore, this claim fails.

**B. THE EVIDENCE PRESENTED AT TRIAL THAT MR. BOYD POSSESSED METHAMPHETAMINE WAS SUFFICIENT FOR A CONVICTION; ANY PROBLEMS WITH THE CHAIN OF CUSTODY GO TO THE WEIGHT OF THE EVIDENCE, NOT ITS ADMISSIBILITY.**

The defendant maintains that the State failed to establish the chain of custody of the controlled substance from the time it was removed from

Mr. Boyd's person, to the time that it was tested by Ms. Jenkins of the Washington State Crime Lab. He argues that, because the State allegedly failed to establish the chain of custody, it was unable to prove, beyond a reasonable doubt, that the controlled substance in his possession was methamphetamine.

1. Standard of Review.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

*State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

With regard to the chain of custody of a physical object, our Supreme Court has stated:

Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *Brown v. General Motors Corp.*, 67 Wn.2d 278, 285, 407 P.2d 461 (1965); *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). Factors to be considered “include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.” *Gallego*, at 917. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. *See* cases cited in 5 K. Tegland, Wash. Prac. § 90 (2d ed. 1982). Identity and condition of an exhibit are always subject to rebuttal. *State v. Music*, 79 Wn.2d 699, 713, 489 P.2d 159 (1971), *vacated as to the death penalty*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 764 (1972). The jury is free to disregard evidence upon its finding that the article was not properly

identified or there has been a change in its character. *Gallego*, at 917. *However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.* K. Tegland, § 90, at 203. *The trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse.* *Kiessling v. Northwest Greyhound Lines, Inc.*, 38 Wn.2d 289, 295, 229 P.2d 335 (1951).

*State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) (emphasis added).

In *State v. Roche*, Division One of this court elaborated:

[W]here evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *Id.* This more stringent test requires the proponent to establish a chain of custody “with sufficient completeness to render it *improbable* that the original item has either been exchanged with another or been contaminated or tampered with.” *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989). Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. *Campbell*, 103 Wn.2d at 21, 691 P.2d 929. The proponent need **not** identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. *Campbell*, 103 Wn.2d at 21, 691 P.2d 929. “[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility.” *Id.*

114 Wn. App. 424, 436, 59 P.3d 682 (2002) (emphasis in original).

Based upon *Campbell*, here, the trial court’s decision to admit the methamphetamine and the results of the laboratory tests is subject to review

for “clear abuse” of discretion. Any defects in the chain of custody of the controlled substance go to the weight of the evidence, not its admissibility.

2. The State Presented Sufficient Facts Establishing the Chain of Custody of the Methamphetamine.

To establish the chain of custody of the controlled substance, the State called each of the individuals who handled the drug from the time it was taken from the defendant. Officer Harvey removed the syringe from the defendant’s pocket. RP 104. He kept the syringe in his possession until he could perform a NIK test on it; it was placed into a Ziploc baggie. RP 106, 111. Once at the jail, Officer Harvey performed the NIK test, placing some of the substance into the testing device. RP 107. Officer Harvey then placed the syringe in a plastic cylinder, and placed that case into a manila envelope. RP 110. He taped up the envelope with evidence tape to prevent tampering. RP 110. He labelled the envelope with a case number and description of the item. RP 110. He placed the item in police property. RP 110-111. During trial, he identified the envelope and sticker which included the case number, as being in the same or substantially the same condition as when he placed the item on property, with the exception that there was new tape and a biohazard sticker on the envelope. RP 112. He also identified the cylinder containing the syringe as being in the same or substantially same condition

as when he placed it on property, except for the lack of the tape securing the lid of the cylinder. RP 114.

Detective Vandenberg received a request to transfer the substance to the crime lab for testing, and, knowing that the crime lab would not accept syringes, he created a separate evidence item, item number 2, which was the liquid from the syringe. RP 180-181. The detective received the syringe from property personnel in a sealed drug envelope and signed for the item. RP 181. When he received the syringe, the envelope was sealed with evidence tape, and he checked to ensure it had not been opened. RP 182. He took the syringe to an area of the property facility where small vials with lids are kept, and set down a piece of paper that is on a roll, cut the envelope open along the untaped edge, removed the syringe, and very carefully placed the contents of the syringe into a small vial and sealed it. RP 183. He did not handle any other drugs simultaneously with the drugs in question. RP 197. He returned the syringe back to the Sharps container, resealed its envelope, and placed his initials and a description of the action taken on the tape. RP 183. At trial, he recognized his handwriting and initials on the envelope. RP 183. He sealed the small plastic vial, placed evidence tape around the lip, and wrote his initials on the vial. RP 184. He placed the new evidence item into a different drug envelope, labelled it, and sealed it with evidence tape, affixing his initials and other identifying information to the

envelope. RP 184. He then checked the newly created item into police property, and immediately checked it out to transport it to the crime lab; he also checked the syringe back into property. RP 184, 198. He took the vial to the Washington State Patrol Crime Lab in Cheney, Washington, met with the custodian working at the intake counter, and turned the evidence over to the lab. RP 199. To the extent that this evidence was marked with blue tape and stickers from the crime lab and a courtroom evidence label, the evidence appeared different at trial than when Detective Vandenberg took it to the lab. RP 199-200. At trial, he recognized both the syringe and the vial containing liquid from the syringe. RP 182, 184, 195-196, 200, 204.

Kristin Herron, a property custodian for the Spokane Police Department also handled the evidence. RP 214-215. The property room did not accept items of property unless they were sealed. RP 216. Items were tracked by bar code, and data involving the location of property and who handled that property was logged into a computer. RP 217. Drug items were placed in the property room vault, a small, secure room within the facility, accessible without an escort by only seven employees. RP 217-218.

Ms. Herron received the syringe placed on property by Officer Harvey, logged its weight, and placed it in Bulk Storage Bin 51 on Drug Shelf 12, because it was a bulkier item. RP 221. She later retrieved the item from the vault and placed it on the “pulled property shelf” in anticipation of

Detective Vandenberg's need to transport its contents to the lab. RP 221-222. She signed the item out to Detective Vandenberg, and, after he had separated the liquid from the syringe<sup>20</sup> and made a separate item, she logged the syringe back into the property room, and logged the vial into the system; she then immediately checked the vial back out to the detective for transport to the lab. RP 223. When the item was returned from the lab, Ms. Herron checked it back into the property facility, checking to ensure it was sealed. RP 224. She stored the vial in a different location in the vault because it was not a bulky item. RP 224.

Property custodian Michael Fetcho also handled the evidence. RP 232-233. He checked the item out of the vault to Detective Vandenberg for trial. RP 233. At the time he checked the items out, he located the items in the same locations indicated by the computer logging system. RP 233.

Sheri Jenkins also identified the vial containing the controlled substance. RP 240. She recognized the blue crime lab tape on the envelope, her initials, the case number, and a bright pink label placed on the package by the lab's evidence custodian when the evidence is logged into the lab's system. RP 240, 246. She also recognized a piece of red evidence tape on the package, also including her initials. RP 241, 245.

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<sup>20</sup> Ms. Herron testified that the procedure used by Detective Vandenberg to separate the drug from the syringe is "standard." RP 223.

The WSP crime lab is a secure building, and its property vault is only accessible by property custodians. RP 242-243. When Ms. Jenkins was assigned the current case, she requested the vial be pulled from the secure vault and taken to the evidence counter. RP 246-247. There, she and the evidence custodian conducted a “secure transfer” of the item, requiring each person to enter a PIN number into the computer system. RP 247. Ms. Jenkins then stored the item in her secure evidence locker, accessible by a key kept on her lanyard, or by a key kept by the laboratory manager. RP 247. Once Ms. Jenkins was ready to analyze the substance, she removed the evidence from her locker and compared the evidence to the paperwork requesting testing. RP 247.

Based on this evidence, the chain of custody was sufficiently established at trial. The defendant claims that the protocol used by Detective Vandenberg to transfer the liquid from the syringe to the vial raises “significant issues related to contamination or tampering because the detective did not testify to using sterile equipment or a sterile environment.” This complaint goes to the weight of the evidence, not its admissibility. The jury considered the defendant’s argument that the syringe and vial were mislabeled or mismanaged, RP 319-324, and rejected it. Ms. Jenkins also explained the potential reasons for the discrepancy between the officer’s belief that the substance was heroin, and the scientific test results indicating

the substance was methamphetamine. RP 259, 263-269. Sufficient evidence was, therefore, presented at trial that the defendant possessed methamphetamine.

**C. THE COURT ONLY IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS; NO INQUIRY INTO THE DEFENDANT’S ABILITY TO PAY WAS REQUIRED.**

1. The Defendant May Not Raise This LFO Challenge for the First Time on Appeal.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5.

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in

good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor not allowing review of this belatedly raised issue. *See State v. Stoddard*, 192 Wn. App. 222, 226-27, 366 P.3d 474 (2016) (alleged substantive due process violation was not manifest error; refusing to consider it as unpreserved).

Additionally, any error in the trial court’s imposition of mandatory costs is not manifest. *State v. Shelton*, 194 Wn. App. 660, 670-72, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002 (2017). The defendant largely concedes the alleged error is unpreserved, and claims no constitutional violation. Appellant’s Br. at 22-23. This Court should not accept defendant’s invitation to review an issue he failed to preserve in the lower court.

2. The LFOs Imposed Were All Mandatory; No Inquiry by the Trial Court Was Required.

The defendant claims, without support or citation to authority, that some of the LFOs imposed by the trial court are discretionary LFOs.

Appellant's Br. at 9-10, 27. However, as conceded by the defendant, the trial court only imposed the \$200 filing fee, the \$500 victim fee, and the \$100 DNA fee.

All of the LFOs imposed at Mr. Boyd's sentencing are mandatory. RCW 36.18.020(2)(h) ("Upon conviction or plea of guilty ... an adult defendant in a criminal case *shall* be liable for a fee of two hundred dollars") (emphasis added); RCW 7.68.035(1)(a) ("[T]here *shall* be imposed upon such convicted person ... five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor") (emphasis added); RCW 43.43.7541 ("Every sentence imposed for a crime specified in RCW 43.43.7541 *must* include a fee of one hundred dollars") (emphasis added). Because these LFOs are mandatory, no inquiry need be made into the defendant's inquiry to pay, and, as above, absent an objection to the imposition of costs without such an inquiry, the claim of error is unpreserved.

**D. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision

terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined the defendant was indigent for purposes of his appeal on February 24, 2017, based on a declaration provided by the defendant. CP 170-173, 175-176. The State is unaware of any change or improvement in the defendant's circumstances. Should the defendant be unsuccessful on appeal, the Court should only impose appellate costs in conformity with RAP 14.2, as amended.

The Court need not consider defendant's additional argument under RCW 9.94A.777 that his mental health condition of substance abuse should also be considered when determining whether this Court should impose

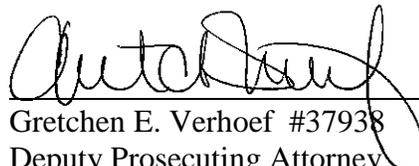
appellate costs. RAP 14.2 is clear that, unless the defendant's circumstances have changed, the presumption of indigency remains throughout the appeal process. There is no need to resort to any other rule of law in order to determine that the defendant should not be ordered to pay costs on appeal.

## V. CONCLUSION

Law enforcement did not illegally detain the defendant or overstep its community caretaking function. The chain of custody of the defendant's methamphetamine was sufficiently established at trial. No objection was made below to the imposition of only mandatory Legal Financial Obligations; therefore, that claim is both meritless and unpreserved. The State respectfully requests that this Court affirm the lower court and jury verdict.

Dated this 13 day of November, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES E. BOYD,

Appellant.

NO. 35210-2-III

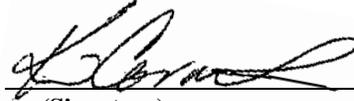
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 13, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lise Ellner  
liseellnerlaw@comcast.net

11/13/2017  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**November 13, 2017 - 8:41 AM**

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**Appellate Court Case Title:** State of Washington v. James Edward Boyd  
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