

FILED
Court of Appeals
Division III
State of Washington
7/11/2018 3:51 PM

NO. 356191

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERESA JEAN ALATORRE,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 4242
Pasco, Washington 99302
(509) 545-3543

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Should this Court accept review of suppression claims raised for the first time on appeal without sufficient record for review and without a showing that the alleged error is of truly constitutional magnitude resulting in actual prejudice?
2. Should this Court accept review of unpreserved suppression claims where the record is not sufficiently developed for the Defendant to claim automatic standing or deny that she abandoned the property?
3. Was there an unlawful seizure where police approached an unlicensed driver in a parked car and arrested him on probable cause of driving with a suspended license? Was there an unlawful seizure of the Defendant where she got out of a

parked car and left the area only to return and promptly be arrested for probable cause of a felony?

3. Are police required to obtain a warrant before a narcotics canine may inhale on a public roadway in proximity to a parked vehicle?
4. Is the detective's expert testimony, based on his training and experience and providing a helpful explanation of how drug dealers apportion their product and how drug users ingest substances, impermissible opinion testimony such that a court would have manifestly abused its discretion to admit it had a timely objection been made?
5. Is there sufficient evidence of intent to deliver?
6. Should the court impose appellate costs if the State substantially prevails?

IV. STATEMENT OF THE CASE

The Defendant Teresa Alatorre has been convicted by a jury of possessing methamphetamine with intent to deliver. CP 54, 57.

The YWCA in Walla Walla includes a women's shelter for victims of domestic violence. RP 83, 90, 125. On April 12, 2017, the

shelter staff observed Raymond “Chip” Tyrell in a red Escort station wagon parked in the alley next to the shelter. RP 84-85, 91, 96, 101, 107, 128, 130-31, 149. The staff understood that Mr. Tyrell had victimized one of their residents, and he was not welcome at the shelter. RP 107, 128, 151, 155-56. Nevertheless, he had been frequenting the alley to meet with two shelter residents, his girlfriend Tabitha Stevens and the Defendant. RP 84-89, 101-02, 114-15, 137. Both women were sitting outside when he arrived. RP 127-28, 138, 152. The Defendant Ms. Alatorre approached the car with her bag/backpack, sat down in the backseat, and closed the door. RP 85-87, 105, 108, 128-30. She was willing to pay Mr. Tyrell to drive her to the casino. RP 113-14. But he would not take her without Ms. Stevens, who had re-entered the shelter. RP 106, 113-14, 116, 129.

The director of client services called police to report the driver for trespassing. RP 84-85, 130-31, 151. Walla Walla police officers Henzel, Fulmer, and Martindale responded to the call. RP 36-38, 162-63. Officer Henzel was the first to arrive and the first to contact Mr. Tyrell. RP 163-64. He passed away before trial. RP 165. Mr. Tyrell was arrested for driving with a suspended license. RP 39, 43, 110.

At some point while police were involved with Mr. Tyrell, the

Defendant exited the vehicle with a black bag and left the area. RP 40, 71, 80.

Ofc. Fulmer ran his K-9 around the parked car. RP 43, 45. When the dog alerted, Mr. Tyrell gave police permission to search the vehicle. RP 44, 110. Police located a smaller, black bag in the backseat where the Defendant had been sitting. RP 44. It was a torn, insulated lunch bag with velcro and zip closures and two compartments. RP 48, 54, 182. In the smaller compartment, there were 13 small bags of methamphetamine. RP 25-33, 43-46, 54, 78. But there were no tools used to ingest the drug. RP 72. The lunch bag also held the Defendant's EBT card, her paperwork from the Social Security Administration, information about Milton-Freewater services and bus routes, some toiletries, and a couple pens. RP 48-51. No other drug-related items were recovered from Mr. Tyrell's car. RP 53-54.

While police were photographing evidence, the Defendant returned to the alley and was arrested for possession with intent to deliver. RP 59. She possessed no drug paraphernalia on her person when arrested. RP 258.

Interviewed after her arrest, the Defendant told police that she

had a backpack and her torn, insulated lunch bag with her “that day” when she tried to catch a ride to the casino from Mr. Tyrell. RP 180-81. She startled when the officer expressed an interest in the lunch bag, and tried to walk back her statement. RP 181-82, 200-01. Confronted with the contents of her lunch bag, the Defendant feigned ignorance. RP 183. At trial, she would claim that she had lost her purse a couple days earlier and that her lunch bag (which contained no currency) was her purse. RP 280, 283.

At trial, the court qualified Detective Steve Harris as an expert witness with regard to narcotics investigations. RP 215-19. He testified that a person who uses methamphetamine will frequently carry “up to” an eighth of an ounce (3.5 grams) on their person for personal use, often in a small plastic bag like a craft bag or the tied-off corner of a sandwich bag. RP 220-25. That small amount would cost between \$100-150 on the street. RP 223-24. Methamphetamine is frequently sold by the eight ball (3.5 grams), teener (half an eight ball), 40 sack (\$40), or 20 sack (\$20) – with the 20 sack being the smallest amount which can be purchased at a time. RP 225.

The Defendant possessed 13 bags of methamphetamine. Of these, 11 held very small amounts, such that the methamphetamine

in all 11 bags together only amounted to approximately one gram. RP 225-26. If the amount in those 11 bags were combined for a single sale, it would only cost about \$60. RP 225-26. But broken down into 11 – “20 sacks” as they were, it could bring in \$220. RP 226. Therefore, the obvious reason someone would possess so many “20 sacks” would be to make a profit in re-sale. *Id.* The detective testified that a seller would pre-package the product “in a safe place” before going out to make deliveries. RP 227. That way, “you have it on hand, [and] you don’t have to find some place to try to break this down and put it in little bags.” *Id.*

The other two bags held a somewhat larger amount with a street value of \$40 and \$60 apiece. RP 227. This would be convenient for buyers who wanted to purchase in this amount. *Id.*

Det. Harris testified that he had not seen drug ledgers much in recent years, as drug dealers were being increasingly careful to arrange for exchanges to occur away from their homes where they keep their ledgers. RP 228-29. However, the presence of a ledger, scales, small packaging, or large quantities suggested the drug was possessed for distribution. RP 229-30.

Methamphetamine is ingested primarily by heating the drug in

a small glass pipe with a butane lighter and then inhaling the fumes or vapors. RP 224. The detective testified that the absence of paraphernalia like a pipe or straw suggests the person is not possessing it for personal use. RP 232.

V. ARGUMENT

- A. FOR CLAIMS 1 THROUGH 4, THE DEFENDANT MUST DEMONSTRATE ERROR OF TRULY CONSTITUTIONAL MAGNITUDE WHICH ACTUALLY RESULTED IN PRACTICAL AND IDENTIFIABLE CONSEQUENCES AT TRIAL.

The Defendant's first four¹ claims regard suppression issues that were not raised to the trial court. When a party does not raise an issue below, she deprives the trial court of an opportunity to correct error and to create a proper record from which review can be had. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (failing to preserve error undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources). Therefore, this Court may and should refuse to review these four claims. RAP 2.5(a)(3).

A party who seeks review of an unpreserved issue must

¹ The Defendant acknowledges that the first three claims were not preserved for review. Appellant's Brief (AB) at 11. In fact, the first four were not preserved for review. See Respondent's Brief, *infra* at 18-20.

demonstrate a manifest error affecting a constitutional right or a significant change in law. *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). The Defendant does not claim that the law has changed since her trial. Therefore, she must address the four step analysis for alleged constitutional error raised for the first time on appeal. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

It is not enough to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. *State v. Lynn*, 67 Wn.App. at 346. Almost any assertion can be framed in constitutional terms, e.g. any allegation of hearsay could simply reference the Confrontation Clause. The Defendant must show that the claim is truly of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). She must show how, in the context of the trial, the alleged error was “manifest,” actually affecting her rights resulting in practical and identifiable consequences in the trial. *State v. McFarland*, 127 Wn.2d at 333. If the facts necessary to adjudicate the claim are not in the record, then no actual prejudice can be shown and the error is not manifest. *Id.*

The Defendant observes that there is a legal standard that must be met. Appellant’s Brief (AB) at 11. But she fails to apply it to

her specific claims.

B. WHERE ERROR WAS NOT PRESERVED THE DEFENDANT LACKS A RECORD TO DEMONSTRATE AUTOMATIC STANDING VERSUS VOLUNTARY ABANDONMENT.

The Defendant claims she has standing to challenge the lawfulness of the search and seizure of Mr. Tyrell's car. AB 11-12. A defendant has "automatic standing" to challenge the legality of a seizure where (1) possession is an essential element of the offense and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). The Defendant Alatorre was not in possession of the lunch bag at the time of the search of the vehicle.

The Defendant claimed in her testimony that she lost the lunch bag. RP 280, 283. Lost or mislaid property is not considered abandoned. *State v. Kealey*, 80 Wn. App. 162, 173, 907 P.2d 319 (1995). However, the jury did not believe her. They found beyond a reasonable doubt that she knowingly possessed the drugs in her bag.

The Defendant walked away from her property. It is very common for persons in possession of illegal drugs, when contacted by law enforcement, to stash the drugs in a vehicle or to walk away without their drugs. RP 219-20. She did both. When a defendant

leaves property behind when confronted by police, the property is abandoned. *State v. Samalia*, 186 Wn. App. 224, 344 P.3d 722 (2015) (defendant abandoned cell phone when he fled stolen car).

One of the exceptions to the warrant requirement is for voluntarily abandoned property. *State v. Reynolds*, 144 Wash.2d 282, 287, 27 P.3d 200 (2001). As we explained in *Reynolds*, “Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.” *Id.*

....
Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b), at 574 (3d ed.1996). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *State v. Dugas*, 109 Wash.App. 592, 595, 36 P.3d 577 (2001). The issue is not abandonment in the strict property right sense but, rather, “ ‘whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.’ ” *Id.* (quoting *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir.1993)); see also *United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986). Thus, Evans must show a reasonable expectation of privacy in the briefcase and that he did not voluntarily abandon it.

State v. Evans, 159 Wn.2d 402, 407–09, 150 P.3d 105, 108-09 (2007).

Police may retrieve voluntarily abandoned property without

violating the privacy of the person who discarded it. *State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001) (coat discarded by passenger onto the pavement of the lawfully stopped vehicle was legally searched by police); *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002) (refuse placed in a neighbor's garbage can); *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997) (drugs thrown into the bushes by defendant before the defendant was actually seized by police were lawfully searched without a warrant); *State v. Nettles*, 70 Wn. App. 706, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994) (drugs dropped by defendant before the defendant was actually seized by police were lawfully searched without a warrant).

The Defendant Alatorre cannot show that she did not abandon the lunch bag, especially absent a record that would have been created had she preserved error. Therefore, she lacks standing to make these challenges.

C. POLICE DID NOT SEIZE THE OCCUPANTS OF A PARKED VEHICLE BY APPROACHING THEM FOR CONSENSUAL CONVERSATION AND WHERE NO RECORD DEMONSTRATES THAT THEY DID NOT FEEL FREE TO LEAVE UP UNTIL THE POINT THAT THEY WERE ARRESTED ON PROBABLE CAUSE OF CRIMES.

The Defendant claims that either the vehicle, "the vehicle

occupants,” or Mr. Tyrell was seized when police approached a parked car and asked to speak with the driver. AB at 12, 14. She cannot establish manifest, constitutional error based on police contact with loitering persons who reasonably would have felt free to leave until the point that they were arrested on probable cause of a crime.

Insofar as the Defendant alleges that Mr. Tyrell was seized, the Defendant does not have standing to complain about the police conversation with Mr. Tyrell, which resulted in probable cause for his arrest for DWLS.

Even if she had standing, she has no record, because she failed to make a timely suppression motion. It is apparent that officers did not review their notes for these questions where no suppression motion had been made. RP 43. And the State had no cause to elicit in significant detail police testimony as to (1) the lawful cause to engage Mr. Tyrell, (2) Mr. Tyrell’s willingness to engage in conversation, and (3) whether it would have been reasonable for a person in Mr. Tyrell’s situation to feel free to leave. The Court must refuse to review the claim.

If we were to rely solely on Mr. Tyrell’s testimony, he said that he was immediately arrested on probable cause of DWLS. RP 109-

10. It is lawful to arrest on probable cause of a crime. RCW 10.31.100; *State v. Mierz*, 72 Wn. App. 783, 792-93, 866 P.2d 65, 71-72 (1994), *opinion corrected*, 875 P.2d 1228 (Wash. Ct. App. 1994), and *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995) (arrest is permitted in a public place with probable cause of a crime).

Insofar as the Defendant alleges that she (a vehicle occupant) was seized, the record is that she walked away. RP 43. She was not seized. Before there was probable cause for her arrest, there was a consensual and permissive encounter during which a reasonable person under the totality of the circumstances would feel free to walk away. And the Defendant did, in fact, walk away. Initially, police asked her to exit the vehicle and leave. RP 70-71. Officer Fulmer told her if she wanted to stick around and observe, then for his own safety he would like to check her bag for weapons. She chose to stay for a short while. She observed the canine sniff. And then she walked away – without any seizure by the police.

When she returned, police had probable cause for possession with intent. And she was arrested.

Insofar as the claim is that the vehicle was seized, the vehicle was parked. The driver was not going anywhere, but just waiting. RP

109 (“Nothing was happening. They were dragging their feet”). There is no “stop” of a vehicle that is not in motion. There was a contact.

Not every encounter between a citizen and a police officer rises to the stature of a seizure. By simply engaging a person in conversation, an officer does not thereby “seize” that person. Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted.

State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347, 1350 (1990)

...a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free “to disregard the police and go about his business,” *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547, 1552, 113 L.Ed.2d 690 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968): “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”

Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion), for example, we explained that “law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen,

or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”

Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991).

This claim is not reviewable under RAP 2.5(a)(3). There was no unlawful seizure.

D. THE SEARCH OF THE ABANDONED BAG WAS LAWFUL.

The Defendant claims that police lacked legal authority to search her lunch bag. AB at 15-17. In the absence of motions and hearing, the evidence is that she abandoned the bag. Abandonment is an exception to the Warrants Clause. *State v. Evans*, 159 Wn.2d at 407–09. The Defendant cannot show manifest, prejudicial, constitutional error where police had the owner’s consent to search the vehicle and where no warrant is required to search an abandoned bag.

E. THE CANINE SNIFF OF THE AIR IN A PUBLIC ROADWAY WAS LAWFUL.

The Defendant claims that police need a warrant before applying a canine to the exterior of a car parked in a public place. AB at 18-22. This is not the case. *State v. Mecham*, 186 Wn.2d 128,

147, 380 P.3d 414 (2016) (favorably referencing *Hartzell* for the proposition that a “canine sniff outside of car window is not a search because suspects have no reasonable expectation of privacy in air outside a car window”); *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989) (no warrant required for a canine to smell a package at post office); *State v. Boyce*, 44 Wn.App. 724, 729-30, 723 P.2d 28 (1986) (a canine sniff from an area where the defendant does not have a reasonable expectation of privacy and which is itself minimally intrusive is not a search); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (no warrant required for a canine to smell a safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (no warrant required for a canine to smell a parcel in bus terminal).

A canine sniff from a lawful vantage point is not intrusive. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110 (1983) (A “canine sniff” is much less intrusive than a typical search; it does not require opening luggage or exposing noncontraband items that otherwise would remain hidden from public view; and it only discloses the presence or absence of contraband); *State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593, 600 (1994) (“a

dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection”).

The Defendant argues that a dog’s nose is comparable to thermal imaging. AB at 19 (citing *State v. Young, supra* (warrant required for thermal imaging)). It is not. A dog’s nose is not a modern technology which evolves rapidly and provides a broad range of information. *State v. Hall*, 4 Ohio Dec. 147 (Com. Pleas 1896) (discussing history of tracking by bloodhounds). It is a common tool like a flashlight, which enhances a person’s ability to sense from a lawful vantage point. *Cf. State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996) (flashlight view through a window into a mobile home is not an unconstitutional search). The dog smells particles (the odor) which *emanate from* the car into the public domain.

The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation, or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of an incriminating nature other than the narcotics being sought can be discovered through the dog’s reaction to the odor of the narcotics.

State v. Wolohan, 23 Wn. App. at 820, quoting *People v. Campbell*, 367 N.E.2d 949, 953-54 (Ill. 2d 1977), *cert. denied*, 435 U.S. 942

(1978).

The Defendant claims that *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998) requires suppression. AB at 20-21. This is incorrect. It is the heightened constitutional protection of a home which justifies the *Dearman* holding. *State v. Dearman*, 92 Wn. App. at 635. The Defendant argues that the law equates a public road with a private curtilage. AB at 21. It does not. Washington law does not treat a public space differently because a car is parked there. The canine sniff in a public area did not require a warrant.

F. THE DETECTIVE'S UNCHALLENGED TESTIMONY WAS PROPER TO ADMIT.

The Defendant claims that the expert testimony intruded upon the province of the jury. AB at 22-24. Such a claim cannot be raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). The Defendant did not raise this challenge at the trial level.

During Det. Harris' testimony, the Defendant made no objection of improper opinion. The Defendant suggests that the issue was preserved *prior* to Det. Harris taking the stand. AB at 7 (citing RP 208). This is false. At that time, the defense only claimed that the

detective should have generated a written report and that his testimony would be a waste of time. ER 403.

I know for a fact I haven't received any written report as to anything he will actually testify about. He is not an officer in this case. I think any testimony that the triers of fact here, from Detective or Officer Harris will just provide undue delay of getting this case over with, it will be a waste of time and it will be a needless presentation of cumulative evidence. He'll have simply just read the reports that the actual arresting officers are here to testify to.

RP 206. The court inquired what the testimony would be. RP 206. The prosecutor gave a summary of the anticipated testimony. RP 206-08. And the court overruled the defense objection, finding the testimony to be relevant, not a waste of time. RP 208.

The defense counsel acknowledged that the prosecutor had advised him in writing about the substance of the detective's testimony and provided the detective's contact information. RP 208-09. However, counsel again complained that "there has been no written report." RP 208. There is no requirement that the prosecution cause a report to be created where none exists. CrR 4.7(a)(2)(ii) (prosecutor must provide defense with "any reports [the experts] have submitted to the prosecuting attorney"). The court found "there is adequate disclosure in this general area." RP 209. "So it sounds like

you are aware of the general subject matter. I think that's adequate under these circumstances so I'm going to allow it." RP 210.

When defense complained that the detective's training and experience did not meet the *Frye* standard, the court held that the *Frye* analysis did not apply where there no scientific testing was offered. RP 209-10.

At no time did the Defendant claim an intrusion on the jury's province so as to preserve this claim for review on appeal.

Where, as here, the objection was not preserved, the defendant must demonstrate review is permitted under RAP 2.5(a)(3). She must first identify a constitutional claim, demonstrate the error is "manifest" and truly of constitutional dimension, and show how it actually prejudiced her rights. *State v. Kirkman*, 159 Wn.2d at 926-27. The court will analyze whether error was harmless. *Id.*

The trial judge's admission of expert testimony is reviewed for abuse of discretion. *Kirkman*, 159 Wn.2d at 927. Opinion testimony is not objectionable in itself, after all, expert testimony is necessarily opinion testimony. ER 702. Nor is an opinion impermissible because it relates to ultimate issues. Experts are expressly permitted to opine on ultimate issues. ER 704. However, an expert may not testify

“based on one’s belief or idea rather than on direct knowledge of the facts at issue” to indicate the guilt or innocence of a defendant. *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *State v. Demery*, 144 Wn.2d at 759.

It would be impermissible to opine on the veracity of the defendant. *Kirkman*, 159 Wn.2d at 927. That did not happen here. Det. Harris expressed no opinion on the credibility of the Defendant. Indeed, the Defendant had not testified at this point in the trial and would not testify on this topic. Instead, the detective properly testified as to his specialized knowledge obtained through training and experience, which was helpful to the jury, and did not resolve for the jury the Defendant’s guilt.

The Defendant claims that the detective testified that her proximity to the drugs required the jury to find that the drugs were hers. AB at 24. That was not the testimony and definitely not the

State's theory. The detective gave generalized testimony about how drug users are careful, not reckless, with the object of their addiction. RP 216. The State's theory was that the Defendant was not a drug user, which is why she was not carrying a pipe. Rather possession was established by the fact that the drugs were in the Defendant's bag with her identification in the location where she had just been sitting, and because she told Officer Bump that she was in possession of that bag throughout the day.

Det. Harris' testimony was not comparable to that in *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). There two experts made direct and explicit expressions of personal belief as to the defendant's possessing pseudoephedrine with intent to manufacture in conclusory terms parroting the legal standard. *Montgomery*, 163 Wn.2d at 588 (detective testifying: "those items were purchased for manufacturing"; forensic scientist testifying: "this pseudoephedrine is possessed with intent"). Det. Harris testified what his training and experience suggested about the significance of packaging and lack of devices for ingestion. Nowhere did he express an opinion on the Defendant's guilt.

The Defendant's reliance on *United States v. Boissoneault*,

926 F.2d 230 (2d. Cir. 1991) is misplaced. There, although the court commented that the expert testimony was not helpful, it did not reach the challenge to the expert testimony. *Boissoneault*, 926 F.2d at 233 (“We need not decide whether the district court’s decision to admit the challenged testimony was manifestly erroneous”). Rather, it held there was insufficient evidence to convict. *Id.* at 233-34.

The Defendant cannot demonstrate error, much less manifest constitutional error which would permit review.

G. THERE IS SUFFICIENT EVIDENCE THAT POSSESSION WAS WITH INTENT TO DELIVER.

The Defendant claims there is insufficient evidence of the element of intent to deliver.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After

viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The Defendant alleges that the State relied “entirely upon the amount” to establish this element, noting that possessing a large quantity of a narcotic is not enough in itself to show intent to deliver. AB at 25 (citing *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995) and *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994)). She argues that, because she possessed less than 3.5 grams, the State must provide additional indicia of intent to deliver. AB at 26. This misconstrues both the law and the facts.

The State’s evidence was that a methamphetamine user may carry as much as 3.5 grams for personal use. The Defendant possessed **less** than this, not even 2 grams. Therefore, it is not possible to say the State relied on amount. The amount was appropriate for personal use. Nor legally can the State rely upon amount to prove intent, regardless of the amount. “Mere possession

of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver.” *State v. O’Connor*, 155 Wn. App. 282, 290, 229 P.3d 880, 883 (2010).

The evidence of intent to deliver is the packaging and the lack of paraphernalia for use.

The Defendant possessed 13 bags of methamphetamine, 11 of those in “20 bag” amounts. If the content of the 11 bags was consolidated into a single bag, it would sell for \$60. However, in 11 separate bags, it would sell for \$220. There would be no reason for a user to divide her stash up in this way. And there would be no reason for a user to purchase in this way – increasing the cost to herself by almost four times. The only reason for someone to be carrying methamphetamine packaged in this way would be for sale.

In addition, the Defendant was not carrying any tool for ingestion. Det. Harris testified that a user is never far from the drug. But without a tool for ingestion, what good is the drug to a user? The most common tool, by far, is a glass pipe. The Defendant was not holding a pipe and lighter. She was not holding a syringe or even a straw. This provides a strong inference that she was not a drug user.

RP 232.

In order to catch a ride to a casino, the Defendant was willing to give an abuser access to his victim. If she was herself a fellow domestic violence survivor, as she must have represented herself to be in order to stay at the shelter, then this seems callous or desperate. But she was not a desperate addict in need of a fix. She had 13 bags of fixes if she were so inclined. Instead, she was in a hurry to get to a casino where there would be plenty of customers.

Based on the standard of review, a rational trier of fact could have found the element of intent to deliver beyond a reasonable doubt.

H. APPELLATE COSTS ARE PERMITTED REGARDLESS OF APPOINTMENT OF COUNSEL.

The Defendant asks this Court not to impose appellate costs on her if the State substantially prevails on appeal. She argues that she is indigent for purposes of appointment of counsel, has “substantial” debt, and has no assets or income *while incarcerated*. The argument is not helpful.

First, indigency for purposes of appointment of counsel is not dispositive of ability to pay costs.

Second, at 59 years old and with 10 adult children (RP 276), the Defendant's debt in her Continued Indigency Report of less than \$5000 (or \$105/mo) is not substantial. She also has a significant network of support.

Third, the Defendant will be released soon, if she has not already been released. She began to serve a 16 month sentence in October 2017. CP 60. If she earned all her possible early release, she could have been released in May on this matter. RCW 9.94A.729(3)(d).

At sentencing, the court only imposed the mandatory LFO's after defense counsel explained that pending trial, the Defendant had been staying at the Tent City. RP 359, 361-62. However, this seems atypical of her circumstances generally – indicative mostly of recent domestic violence and her arrest on this crime.

In her updated Indigency Report, she indicates no barrier to employment. At the time of her trial, the Defendant testified that she had her own income. RP 282. She was using her own funds to help a gentleman friend. She carpeted and painted his room, got him a washer and dryer, and paid his bills. *Id.* When the relationship became domestically violent, she moved out of his home and into the

shelter. *Id.* After she brought an abuser to the shelter and was found dealing drugs, she had to find another place to live.

The court may impose appellate costs.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 11, 2018.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

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| <p>Andrea Burkhart Andrea@2arrows.net</p> | <p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 11, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p> |
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July 11, 2018 - 3:51 PM

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