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Division III  
State of Washington  
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No. 36636-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GLORIA ANN MERCER,

Appellant.

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BRIEF OF RESPONDENT

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### III. STATEMENT OF THE CASE

Defendant and Appellant Gloria Mercer (hereinafter “Ms. Mercer”) was convicted of Violation of the Uniform Controlled Substances Act— Possession of Heroin. CP 1.

On April 10, 2018, 2018, at approximately 10:49 p.m., Ms. Mercer was driving her car in Colville, Washington. CP 5. Ms. Mercer was stopped for a traffic issue, by former Officer Welch of the Colville Police Department. CP 5. Former Officer Welch noted Ms. Mercer’s behavior was nervous and frantic. RP at 79, lines 5-6.

Ms. Mercer was accompanied that night by her husband, Robert Mercer (hereinafter “Mr. Mercer”) and Tanner Mitchell (hereinafter “Mr. Mitchell”). CP 5. Former Officer Welch noted that all three individuals had prior contacts with law enforcement for drugs. CP 5. Former Officer Welch requested that Ms. Mercer remain in her vehicle during the traffic stop. CP 5. Former Officer Welch noted that when he returned to his patrol car, Ms. Mercer and her two passengers began to smoke cigarettes, which Welch knew was “...commonly done to attempt to conceal the odor of illegal drugs from narcotic dogs.” CP 5.

The use of cigarettes was to no avail because K9 Deputy Coon of the Stevens County Sheriff’s Office arrived and, after conducting a walk-around of the vehicle or “open air sniff” with his K9, soon advised that his

K9 had alerted to the odor of illegal drugs. CP 5. Officer Dustin Hughes, also with the Colville Police Department, arrived on scene and assisted in the subsequent searches. CP 8-9.

Former Officer Welch then approached Ms. Mercer and asked her to step out of her vehicle. CP 5. Ms. Mercer complied and was placed under arrest for a criminal traffic offense. CP 5. During search incident to arrest, former Officer Welch discovered "...a gray plastic pipe with brown residue...." CP 5. Based on his training and experience, former Officer Welch concluded that the pipe appeared to be one used for smoking drugs. CP 5. Ms. Mercer agreed to speak with the officers and she was issued citations for traffic infractions and was given a criminal citation for the criminal traffic violation. CP 5-6. Ms. Mercer "openly admitted to knowing the pipe was used to smoke drugs but said it belonged to a friend." CP 6. The brown residue in the pipe later tested positive for heroin. RP at 118, 121.

Both passengers then consented to searches of their persons and the portions of Ms. Mercer's vehicle where they had been riding. CP 6. A search of Mr. Mercer and Mr. Mitchell produced no drugs or paraphernalia. CP 6. However, upon searching Ms. Mercer's vehicle, the Officers found a black container with "miscellaneous smoking devices and tin foil which contained a brown residue." CP 6. Located in the trunk of Ms. Mercer's car

was a “needle which contained a brown liquid.” CP 6. The needle was concealed in a compartment in the trunk. CP 6 The liquid in the needle later tested positive for heroin and cocaine. RP at 120, 121-22. A glass pipe was located on the ground on the right side of the passenger door of the car. CP 6. Ms. and Mr. Mercer were heard to say things like “where did that come from,” “what’s that,” and “I can’t believe this.” CP 6. After he was read his Miranda rights, Mr. Mercer agreed to speak with the Officers. CP 6.

Mr. Mercer initially denied that the pipe and needle were his. CP 6. Eventually, Mr. Mercer changed his story and claimed ownership of both the pipe and the needle. CP 6.

Mr. Mitchell was read his Miranda rights and waived. CP 6. Mr. Mitchell claimed ownership of the container but denied that one of the pipes was his. CP 6. Mr. Mitchell told the officers that after former Officer Welch stopped Ms. Mercer’s car, Mr. Mitchell heard what sounded like a glass pipe hitting the ground outside the vehicle. CP 6. Former Officer Welch noted that this “...would correspond with [Mr. Mercer’s] confession and the location [the glass pipe] was found.” CP 6.

Ms. Mercer was subsequently charged with Violation of the Uniform Controlled Substances Act—Possession of Heroin. CP 1. Mr. Timothy Trageser (hereinafter Mr. Trageser) was appointed to represent Ms. Mercer and Mr. Trageser represented Ms. Mercer as trial counsel. RP

at 19. The State was represented by Mr. Kenneth Tyndal (hereinafter “Mr. Tyndal”), of the Stevens County Prosecutor’s Office. RP at 19.

Trial commenced on January 18, 2019. RP at 19. Later that day, the jury voted unanimously to convict Ms. Mercer of Possession of Heroin. CP 41. Ms. Mercer now appeals, claiming ineffective assistance of counsel. CP 56; Opening Brief of Appellant at 1.

#### IV. STATEMENT OF THE ISSUES

- I. Did Ms. Mercer receive effective assistance of counsel when her attorney used the passengers’ drug use and possession as part of Ms. Mercer’s trial strategy?

#### V. STANDARDS OF REVIEW

1. “The question of whether an attorney renders ineffective assistance is a mixed question of law and fact, reviewed de novo.” Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir., 1988); see also State v. White, 80 Wash.App. 406, 410, 907 P.2d 310 (Div. II, 1995). “Courts engage in a strong presumption counsel's representation was effective.” State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id.
2. Evidentiary rulings made by the superior court, are reviewed for abuse of discretion. State v. Saunders, 120 Wash.App. 800, 811, 86 P.3d 232, 238–39 (Div. II, 2004). Appellate courts “...review a trial court's decision on relevance and prejudicial effect for manifest

abuse of discretion. State v. Barry, 184 Wash.App. 790, 801–02, 339 P.3d 200, 206 (Div. III, 2014). “Abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Id. at 802. “Any error in a trial court's decision “requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” Id.

## VI. ARGUMENT

**1. Ms. Mercer received effective assistance of counsel because her trial attorney took the available facts and used them to Ms. Mercer's advantage.**

Ms. Mercer argues that she received ineffective assistance of counsel because she claims that her trial counsel should have objected to the admission of testimony about her passengers' use and possession of drugs and drug paraphernalia. As argued, *infra*, Ms. Mercer's attorney made the best out of a bad situation and bad facts. At trial, Ms. Mercer had two theories of her case: 1. The drugs and paraphernalia were not hers, and 2. The State was biased against her.

“Courts engage in a strong presumption counsel's representation was effective.” State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id.” “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on

the record established in the proceedings below.” Id. “The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation.” Id. at 337. The standard for ineffective assistance has been summarized as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

State v. Grier, 171 Wash.2d 17, 32–33, 246 P.3d 1260, 1268 (2011) (quoting State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987)).

“Under this standard, performance is deficient if it falls below an objective standard of reasonableness.” Id. at 33 (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984)). “The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.” Id.

“Finally, ‘[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

evaluate the conduct from counsel's perspective at the time.” Id. at 34 (quoting Strickland, 466 U.S. at 689).

“The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective.” State v. Kloepper, 179 Wash.App. 343, 355–56, 317 P.3d 1088, 1094 (Div. III, 2014). “Similarly, our case law recognizes that the decision to decline a limiting instruction for ER 404(b) evidence likewise is a tactical decision not to highlight damaging evidence.” Id. at 355-56; See also State v. Yarbrough, 151 Wash.App. 66, 210 P.3d 1029 (Div. II, 2009) (failure to propose a limiting instruction presumed to be a legitimate trial tactic not to reemphasize damaging evidence); State v. Price, 126 Wash.App. 617, 649, 109 P.3d 27 (Div. II, 2005) (“We can presume that counsel did not request a limiting instruction” for ER 404(b) evidence to avoid reemphasizing damaging evidence)(abrogated on other grounds by State v. Hampton, 184 Wash.2d 656, 361 P.3d 734 (2015)); State v. Barragan, 102 Wash.App. 754, 762, 9 P.3d 942 (Div. III, 2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). “The decision to not object to or seek a cure for damaging evidence is a classic tactical decision.” Id. at 356.

In Ms. Mercer's case, her trial attorney did the opposite of refusing to draw attention to the bad facts. Instead, Mr. Trageser used the bad facts to bolster his theory of the case.

There are three bad facts that Ms. Mercer's trial counsel used to Ms. Mercer's advantage. First, both of Ms. Mercer's passengers were in possession of drugs or drug paraphernalia at the time that Ms. Mercer was arrested. Second, Ms. Mercer's husband is an admitted drug abuser. Third, Ms. Mercer's daughter is in prison for drug abuse.

By admitting the evidence that the passengers possessed drugs and paraphernalia, Ms. Mercer's attorney was free to argue that the syringe in the trunk did not belong to Ms. Mercer, and that it did, in fact, belong to Mr. Mercer, who was an avowed drug abuser. If the jury had been barred from hearing about the drug possession of the passengers or Mr. Mercer's drug use, it's far less likely that they would believe two seemingly innocent passengers would ever have possessed drugs or paraphernalia. The drug abuse by Mr. Mercer and the drug possession by the passengers was therefore necessary to make it more reasonable that the drugs and paraphernalia belonged to the passengers. With those facts, Mr. Trageser was able to eliminate, or at least explain away, the syringe in the trunk; he was able to argue that the syringe belonged to Mr. Mercer.

Admittedly, arguments, such as that just discussed, can be used by both sides. Mr. Tyndal used Mr. Trageser's argument to cut against Ms. Mercer's affirmative defense of unwitting possession of the smoking device she had in her pocket. RP at 159. But Mr. Tyndal did not rely specifically on the fact that Mr. Mercer and Mr. Mitchell possessed drugs while they were riding in Ms. Mercer's car. Instead, Mr. Tyndal used those facts to "set the stage" for Ms. Mercer's affirmative defense. RP at 159. Mr. Tyndal also relied on Ms. Mercer's testimony at trial that her daughter, Mercedes Mercer, was in prison for drug abuse. RP at 159, lines 24-25. Mr. Tyndal was able to use Ms. Mercer's own testimony about how her husband, who was a passenger in her car on the night she was arrested, was an avowed drug abuser and claimed possession of the syringe in the trunk. RP at 159, 20-23.

Perhaps Ms. Mercer would like to argue that Mr. Tyndal did his job too well and that he shouldn't be allowed to argue the facts to the jury. To argue that position would be absurd; but it's just as absurd to argue that this Court should reverse and remand based upon the testimony from the officers and to argue that this Court should simultaneously ignore her testimony and the strategy of her trial attorney.

All of this is to say that Mr. Trageser had to make tactical decisions about Ms. Mercer's theory of the case and how to explain away two items

of evidence: the smoking device in Ms. Mercer's pocket and the syringe in the trunk of Ms. Mercer's car.

The syringe could be explained away by testimony that Mr. Mercer was a drug abuser, but this would only work if the jury was allowed to hear about Mr. Mercer's drug abuse and the fact that one of the passengers had dropped drug paraphernalia just outside of the car. CP 6. On direct examination, after testifying about her husband's drug use, Ms. Mercer testified that she knew nothing about the drug paraphernalia that was outside the passenger side of her vehicle. RP at 142, lines 3-9. The form of Mr. Trageser's question supported Ms. Mercer's theory of the case:

Mr. Trageser: "Okay. Alright. Do you know anything about the glass pipe that was found near the door of the –

Ms. Mercer: No, uh-uh.

Mr. Trageser: *Presumably the two males exited* when told?

Ms. Mercer: No, the only time I knew about it is when Hughes said there was a glass pipe there. That was the first time I heard of it.

RP at 142, lines 3-9 (emphasis added). Mr. Trageser inquired specifically about the possibility that the drugs and paraphernalia could have belonged to the passengers:

Mr. Trageser: I -- you have my consent, you can go into the

trunk, you can go anywhere you want and here we are, we've got two other males, males do do drugs too don't they?

Officer Welch: Correct.

Mr. Trageser: And we've got -- we have all of this stuff and we have two other males that were in the car, correct?

Officer Welch: Correct.

RP at 82, lines 14-20. Without the testimony about the passengers, Mr. Trageser would have asked the jury to believe that the syringe in the trunk of Ms. Mercer's car and the drug paraphernalia found outside the passengers' side of her car, were not Ms. Mercer's and that she had no idea how those items got there. Without more, no jury would have believed that claim. There was, however, a glimmer of hope that the jury would believe that claim if Mr. Trageser allowed testimony about how the passengers were drug abusers. Then, and only then, it is believable that the syringe and the glass smoking device did not belong to Ms. Mercer.

Clearly, Mr. Trageser was trying to portray the existence of the drug paraphernalia as evidence that someone other than Ms. Mercer was using drugs. The best way to do that is to convince the jury that her passengers were the drug users. The only way to make that believable is to allow testimony about Ms. Mercer's passengers' use and possession of drugs and paraphernalia. The two ways Mr. Trageser did that was to first allow

testimony about Mr. Mercer's possession of drugs and paraphernalia and second, to allow his client to testify about her husband's drug abuse.

*The second item of evidence is more problematic because it was located in Ms. Mercer's pocket at the time she was arrested. CP 5. Ms. Mercer testified two different times about her daughter's incarceration for drug abuse. RP at 131-33; 136-38. Ms. Mercer testified that she knew the straw was used as a drug smoking device and that "I've seen people straw putting stuff up their nose." RP at 137, line 2 (error in original).*

Further indication of Ms. Mercer's theory at trial, is found in Mr. Trageser's closing argument. In his closing argument, Mr. Trageser talked at length about Ms. Mercer's marriage to a drug user. RP at 171, lines 5-11. In his closing argument, Mr. Trageser also used the testimony about Ms. Mercer's daughter: "*My daughter is in prison for felony possession charges. I've been chasing this drug addiction thing with my daughter for a long time now. That's why I picked it up out of the yard. It doesn't belong in the yard. I live across the street from the school.*" RP at 170, lines 21-25. "*The husband uses drugs, he's got the needle, he's the drug user. I've been dealing with this crap around my house forever. But, she's married to somebody who admittedly has this needle.*" RP at 171, lines 5-11. "*They live together. She chose not to divorce him. So, she's gonna be around him and the habit. That's to her detriment.*" RP at 171, lines 7-10.

In her Opening Brief on appeal, Ms. Mercer seems to insinuate prosecutorial misconduct when she claims, “[e]ven the State appeared to concede pretrial that the evidence was not relevant and advised the court it would not elicit information, but then did anyway.” Opening Brief of Appellant at 10. Ms. Mercer dangerously misrepresents the facts of her case and the proceedings. At no point in time did Mr. Tyndal agree that Mr. Mitchell’s possession of a drug kit was irrelevant. Ms. Mercer and Mr. Trageser certain did not believe Mr. Mitchell’s possession was irrelevant because Ms. Mercer testified on direct examination about Mr. Mitchell’s possession:

Mr. Trageser:            Okay and you heard the officer testify that the bag containing the other drug related stuff was on Tanner Mitchell’s -- it belonged to Mitchell he believed?

Ms. Mercer:            Tanner’s backpack?

Mr. Trageser:            Yes.

Mr. Trageser:            Yeah, that was Tanner’s bag

RP at 141-42. Ms. Mercer also testified on direct examination about her husband’s drug use:

Mr. Trageser:            Okay and you heard the officer testify that your husband indicated to the officer that the needle and the drugs found in the trunk were his, correct?

Ms. Mercer:            Pardon me, I didn’t –

Mr. Trageser: You heard the officer testify that your husband told the officer that the needle was his?

Ms. Mercer: Yes, yes.

RP at 141, lines 15-21. Ms. Mercer didn't stop with testimony about her husband's drug use or Mr. Mitchell's possession; she testified about the glass smoking device found outside of her car:

Mr. Trageser: Okay, alright. Do you know anything about the glass pipe that was found near the door of the —

Ms. Mercer: No, uh-uh.

Mr. Trageser: Presumably the two males exited when told?

Ms. Mercer: No, the only time I knew about it is when Hughes said that there was a glass pipe there. That was the first time I heard of it.

RP at 142, lines 3-9. On cross-examination, Ms. Mercer claimed the syringe in the trunk belonged to her husband.

Mr. Tyndal: And [Mr. Mitchell] had drugs in his bag, is that right?

Ms. Mercer: Yes, that's what the officer said, yes. They found some stuff in there.

Mr. Tyndal: And your husband had drugs in the car, is that right?

Ms. Mercer: My husband had drugs in the car?

Mr. Tyndal: Yes.

Ms. Mercer: Yes, he said that that was his needle as far as what he said, yes.

RP at 145, lines 1-9. Clearly, Ms. Mercer testified about her passengers' possession and drug abuse just as much, if not more, than the officers did.

Ms. Mercer's secondary theory of her case was that the State was biased against her. The fact that Mr. Mitchell had not been charged as a result of his possession of drugs and paraphernalia on the night of the arrest was used by Mr. Trageser to *convince the jury that the State was biased against his client*. Mr. Trageser attempted to establish bias through his cross-examination of former Officer Welch:

Mr. Trageser: What kind of drugs did you find in the passenger compartment of the car?

Officer Welch: The passenger compartment I believe there was a *clear glass smoking device*.

Mr. Trageser: Back seat area?

Officer Welch: I wasn't searching the front or the back, I was searching the trunk.

Mr. Trageser: What did you find in the passenger compartment? I'll get to the trunk next, but *the passenger compartment, you got this pipe device out of my client's pants?*

Officer Welch: Mm-hmm.

Mr. Trageser: What did you find in the driver's area or in the backseat area, the passenger compartment?

Office Welch: The passenger compartment had a -- there was a backpack, there was some drug paraphernalia inside the backpack.

Mr. Trageser: *In the backseat?*

Officer Welch: Yes, in the backseat.

Mr. Trageser: Where Tanner Mitchell was sitting?

Officer Welch: Correct.

Mr. Trageser: Where's he at right now?

Officer Welch: *Mr. Mitchell?*

Mr. Trageser: Yeah.

Officer Welch: I'm unaware of where he's at.

Mr. Trageser: Was he charged? Not charged now.

Officer Welch: There's pending charges.

Mr. Trageser: *Pardon me?*

Officer Welch: I'm unaware of his case.

Mr. Trageser: He's not being prosecuted, but it's in the backseat on his lap right or near him?

Officer Welch: Correct.

Mr. Trageser: *Do you know why he wasn't charged?*

Officer Welch: No, I don't.

Mr. Trageser: Or prosecuted?

Officer Welch: No.

RP at 80-82. Mr. Trageser also used the fact that Mr. Mercer was charged with possession of heroin but would be tried in a different case:

Mr. Trageser: And in fact, Mr. Mercer is charged out of this case, isn't he, with heroin possession?

Officer Welch: I believe so, yes.

Mr. Trageser: And his jury trial is next month, isn't it?

Officer Welch: I'm not aware of his jury trial.

Mr. Trageser: And they're being tried separately? Ms. Mercer today, Mr. Mercer next month, correct?

Officer Welch: Correct.

Mr. Trageser: For heroin possession?

Officer Welch: As far as -- I'm not aware of Bob Mercer's trial, so --

Mr. Trageser: And you and the State really don't know who really owns this stuff, possesses this stuff, used this stuff, do you, between the two or do you?

Officer Welch: Well, the smoking device was found on Ms. Mercer.

Mr. Trageser: But Mr. Mercer admitted to possessing the syringe in the trunk, didn't he?

Officer Welch: He did.

RP at 75-76. Here is what Mr. Trageser argued in his closing about his theory of bias:

Has heroin possession, felonizing somebody for the first time for having residue in the pipe that you probably know who spoked it or snorted it, when knows when. Is that where we're at with felony possession now in this community because the prosecutor's office is taking the position that they believe yes, we are. Do you agree with your prosecutor? Did you elect this prosecutor whose office has taken this stance? Did you vote for the other prosecutor? You'll be sending a message with your verdict.

...

And, that's no laughing matter because she is here exactly for that cause that's exactly was the testimony as to how this started. I decided to arrest this woman, this young or this short frail woman. I decided to book her into jail for failing to transfer title. *And then, this prosecutor decided I want to felonize her at the same time.* You have the power to not let that happen because I think applying the law to these facts in that way is unreasonable.

RP at 172, lines 15-23; 173, lines 1-8 (emphasis added) (errors in original).

Perhaps Mr. Trageser's theory of the case was flawed. Perhaps his arguments had weaknesses. But at least Mr. Trageser had a theory of the case and arguments to present to the jury. The standard of effective assistance of counsel is not whether the trial attorney prevailed in the overall verdict or won on every point of law and argument. Ms. Mercer received effective assistance and her appeal goes to her dissatisfaction with the outcome.

- 2. The Superior Court did not err under Washington Evidence Rule 403 or 404(b), when it admitted evidence that Ms. Mercer's passengers also possessed controlled substances and paraphernalia.**

Assuming, *arguendo*, that the officers' testimony about the passengers' possession of drugs and paraphernalia is within the scope of WA ER 404(b), Ms. Mercer's invitation for this Court to review the admission of testimony is not proper.

"On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error." State v. Powell, 166 Wash.2d 73, 82, 206 P.3d 321, 327 (2009); see also WA RAP 2.5(a)(3). "We adopt a *strict approach* because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." State v. Powell, 166 Wash.2d at 82. "We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial." Id.

Ms. Mercer did not object at trial to admission of the testimony regarding the passengers. Ms. Mercer therefore did not preserve the issue for appeal. Thus, Ms. Mercer's complaints on appeal about the arguably ER 404(b) material and her claims of unfair prejudice under ER 403 can only be viewed in the context of whether she can support her claim of ineffective assistance of counsel.

- i. Even if the testimony about Ms. Mercer's passengers is 404(b) material, the evidence was used to combat against Ms. Mercer's affirmative defense of unwitting possession.

*The Superior Court did not violate the prohibitions of WA ER 404(b), when it admitted evidence that the passengers in Ms. Mercer's vehicle also possessed controlled substances and paraphernalia.*

Evidence Rule 404 prohibits testimony about "...other crimes, wrongs, or acts...[in order] to prove the character of a person in order to show action in conformity therewith." WA ER 404(b).

If anything, it was Ms. Mercer who attempted to use evidence to show action in conformity. It was Ms. Mercer who testified that her husband was a drug abuser. It was Ms. Mercer who testified that the syringe in the trunk belonged to her husband. By testifying as to her husband's drug abuse, Ms. Mercer was trying to show action of her passengers in conformity: that because her husband was a drug abuser, then it must be *his* syringe in the trunk.

- ii. The probative value of admitting the drug possession of the passengers substantially outweighed the danger of unfair prejudice.

*The test in Evidence Rule 403 is whether the probative value is substantially outweighed by the danger of unfair prejudice. The test, unlike what Ms. Mercer claims in her Opening Brief, is not whether the evidence*

substantially outweighed the probative value. Opening Brief of Appellant at 5.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....” WA ER 403. “A danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational decision.” State v. Barry, 184 Wash.App. 790, 801, 339 P.3d 200, 206 (Div. III, 2014) (internal quotations omitted).

Ms. Mercer supplies no convincing argument as to how the jury would have had an emotional response to testimony about her passengers. The best that Ms. Mercer can claim is that the jury would have believed Ms. Mercer was guilty by association. First, that isn’t an emotional response, it’s a *rational conclusion*. *Danger of unfair prejudice requires an emotional response, rather than a rational conclusion*. Second, even if it were an emotional response, the danger of unfair prejudice must substantially outweigh the probative value. Ms. Mercer demonstrated that she believed in the high probative value, based on the extent of her testimony and the *extensive use of the testimony by Mr. Trageser*.

Ms. Mercer testified that she would not possess or use drugs because she knows how bad drugs are and because possession or use of illegal drugs could result in her loss of medical care. RP at 134, lines 18-25. Ms. Mercer

asks this Court to overturn her possession conviction because several witnesses testified that Ms. Mercer's passengers were in possession of drugs at the same time she was. Ms. Mercer asks for reversal on this point, but neglects to acknowledge her own testimony about drugs.

Ms. Mercer's theory at trial was clearly that the syringe in the trunk did not belong to her and that her possession of the smoking device in her pocket was unwitting possession. Her explanation for the smoking device in her pocket was *that she had unwittingly picked up the smoking device out in the front yard and that it must have belonged to someone else, possibly her daughter, who was in prison for heroin possession.* RP at 131-32. Her explanation for the syringe in the trunk was that the syringe belonged to her husband. RP at 141, lines 15-21. Her theory was supported by her claim that *Mr. Mercer claimed the syringe in the trunk as his.* RP at 141, 19-21. The officers were therefore aiding Ms. Mercer's theory of the case when they testified that Ms. Mercer's passengers possessed drugs, thereby making it more likely that the drugs belonged to the passengers and *not* Ms. Mercer.

- iii. Even if this Court finds that the Superior Court abused its discretion on admission of testimony without objection from either side, the convictions should be upheld because the error was harmless.

The standard of review for evidentiary rulings is abuse of discretion. “We review the trial court's evidentiary decisions under an abuse of discretion standard.” State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). “A court abuses its discretion when it exercises such discretion in a manifestly unreasonable way or based on untenable grounds or reasons.” State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Appellate courts “...review a trial court's decision on relevance and prejudicial effect for manifest abuse of discretion.” State v. Barry, 184 Wash.App. at 801–02. “Abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Id. at 802. “Any error in a trial court's decision “requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” Id.

Evidentiary error may or may not be of constitutional magnitude. However, “[a]n evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude.” State v. Powell, 166 Wash. 2d 73, 84, 206 P.3d 321, 328 (2009). Even if the alleged error was constitutional, it is dubious whether the error was manifest. An error is manifest where it had practical and identifiable consequences in the trial of

the case.” Id. (internal quotation marks omitted). “The admission of evidence on an uncontested matter is not prejudicial error.” Id.

*If the evidentiary error is not of constitutional magnitude, it is subject to harmless error analysis. Improper admission of evidence may be harmless error. See State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010) (overruled on other grounds); see also State v. Dixon, 37 Wn.App. 867, 874-75, 684 P.2d 725 (Div. I, 1984) (erroneous admission of written statement as excited utterance was harmless error where trial judge heard essentially same details in victim's testimony. Error may not be prejudicial if, within reasonable probabilities, the error did not affect the outcome of the trial). “[If the error is not of a constitutional magnitude], error is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984); see also State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). “Admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.” State v. Ramirez-Estevez, 164 Wash.App. 284, 293, 263 P.3d 1257, 1262 (Div. II, 2011).*

The standard is different if it is constitutional error alleged; and requires harmless error beyond a reasonable doubt. State v. Coristine, 177

Wash.2d 370, 380, 300 P.3d 400 (2013) (citing Chapman v. California, 87 S.Ct. 824, 17 L.E.2d 705 (1967)). However, it does not appear that that Ms. Mercer suggests the claimed errors were constitutional in nature, or even that Ms. Mercer differentiates between the two types of error.

Interestingly, on appeal, Ms. Mercer does not draw this Court's attention to her own testimony, which was just as damning as that of the arresting officers. If Ms. Mercer believes the officers' testimony about her passengers was *damaging because the jury might conclude that she associates with drug users*, then her own testimony about her daughter being in prison for drug use and her husband being a current drug abuser is nothing short of destructive. Ms. Mercer asks this Court to reverse and remand based upon the testimony of the officers, but she says nothing about her own testimony, *which is even more detailed about the drug use of those around her*.

As argued *supra*, Mr. Trageser did not object to the testimony about Ms. Mercer's passengers. He obviously didn't object because he used the testimony in Ms. Mercer's defense.

Ms. Mercer claims that "...the verdict probably would have been different had the State not been permitted to argue that Mercer's possession...was not unwitting because she was surrounded by individuals who possessed and used drugs." Opening Brief of Appellant at 13.

However, Ms. Mercer forgets that she testified that she knew what the straw was: it was a device used for smoking drugs. RP at 147, lines 24-25; 148, lines 5-8. *Ms. Mercer provided all of the testimony necessary to convict her of possession:*

Mr. Tyndal: ...did you have any other wrappers, garbage in your pockets?

Ms. Mercer: I had some change. I had that -- that tool thing or whatever that I picked up.

Mr. Tyndal: So, you got rid of everything else except this smoking device, is that correct?

Ms. Mercer: Correct.

Mr. Tyndal: Forgot about that and had it in your pocket when you got stopped?

Ms. Mercer: Correct.

Mr. Tyndal: Alright and you told Officer Hughes and Officer Welch that you knew what it was, that it was a smoking device, is that correct?

Ms. Mercer: I told Officer, not Hughes, but the other gentleman that it was some kind of a smoking thing, yes.

Mr. Tyndal: And you knew that from your experience with your daughter and your husband?

Ms. Mercer: I've seen it, but --

Mr. Tyndal: Alright.

Ms. Mercer: I mean yeah.

Mr. Tyndal: Okay.

Ms. Mercer: But not, you know, I didn't know exactly what it was meant for.

Mr. Tyndal: Oh, give yourself some credit.

Ms. Mercer: It was smoking.

Mr. Tyndal: Yeah, but people don't smoke cigarettes out of it.

Ms. Mercer: Well, why would they smoke cigarettes out of it?

Mr. Tyndal: That's right.

Ms. Mercer: They would smoke --

Mr. Tyndal: So, you knew it was probably used to smoke drugs and you told the officer --

Ms. Mercer: I told them it was, yes, that it was -- looked like a tool that they smoke drugs with, yes.

Mr. Tyndal: But you didn't throw it away with the rest of the garbage that you picked up, is that correct?

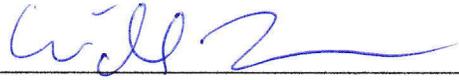
Ms. Mercer: That is correct. It was in my pocket.

RP at 147-48. The outcome would have been the same, with or without the testimony about her passengers, because of Ms. Mercer's testimony at trial.

## VII. CONCLUSION

For the reasons stated above, the State respectfully requests that Ms. Mercer's conviction be upheld and that Ms. Mercer's appeal be denied.

DATED this 20th day of November, 2019.



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Will Ferguson, WSBA 40978  
Special Deputy Prosecuting Attorney  
Office of the Stevens County Prosecuting Attorney

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