

No. 45049-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CHANDRA WITT,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

**1. Ms. Witt's statement that she delivered drugs in exchange for the copper pipes was not probative of knowledge that the pipes were stolen.**

The trial court abused its discretion when it concluded that Ms. Witt's statement that she exchanged methamphetamine for the copper pipes at issue was admissible. The trial court incorrectly concluded that the delivery of a controlled substance established knowledge of "what's going on as far as this being an illegal transaction and possession of something stolen." 5/7/13 RP 11. The prosecution asserts that the method of payment (i.e., drugs) for the property (i.e., copper pipes) reflects on Ms. Witt's guilty knowledge. Response Brief at 6. The prosecution cites to *United States v. Carrasco*, 257 F.3d 1045 (9th Cir. 2001), for the proposition that possession of drug paraphernalia is relevant to proving knowing possession of a firearm. Response Brief at 6.

However, *Carrasco* and the line of cases that precede it do not establish that evidence of narcotics trafficking is relevant to the mens rea for every other crime with which a defendant may be charged. Rather, *Carrasco* applies to evidence of drug trafficking as it relates specifically to proving unlawful possession of a firearm. *Carrasco*, 257

F.3d at 1048. Evidence of narcotics trafficking may be properly admitted to show knowing possession of a firearm because firearms are “known tools of the trade of narcotics dealing because of the inherent danger in that line of work.” *E.g., id.* (baggies and scale were evidence of drug trafficking and admissible to show knowing possession of firearm found in their proximity); *United States v. Butcher*, 926 F.2d 811, 816 (9th Cir. 1991) (evidence of drug trafficking may be properly admitted to show knowing possession of a weapon); *United States v. Crespo de Llano*, 838 F.2d 1006, 1018 (9th Cir. 1987) (possession of firearms can be relevant to show involvement in the narcotics trade); *United States v. Simon*, 767 F.2d 524, 527 (8th Cir. 1985) (evidence that defendant was packaging drugs for sale at the time of his arrest relevant to show he was in possession of firearms found in the room).

This line of cases establish that evidence of narcotics trafficking may be admissible to establish knowing possession of a firearm. These cases rely on the connection between narcotics sales and firearm possession in order to reach this conclusion. Unlike a firearm, copper pipes are not a known “tool” of narcotics trafficking. There is no connection between stolen property and narcotics distribution analogous to the connection between firearms and narcotics distribution

established in *Carrasco*. The State's reliance on this line of cases is misplaced because these cases apply only to evidence of narcotics trafficking as it relates exclusively to knowing possession of a firearm. The consideration exchanged for the copper pipes does not establish whether Ms. Witt knew the pipes were stolen. This evidence was not relevant and its admission was manifestly unreasonable.

**2. Even if Ms. Witt's statement that she delivered methamphetamine had some minimal probative value, it was greatly outweighed by the evidence's prejudicial effect.**

The trial court abused its discretion when it determined that the prejudicial nature of the evidence was outweighed by its probative value. The trial court stated, "I recognize I have to do somewhat of a balancing, but the balancing is whether it's relevant." 5/7/13 RP 11. The prosecution argues that it was critical for the jury to understand the circumstances in which Ms. Witt received the property because such circumstances reflect directly on her state of mind. Response Brief at 5. The prosecution, however, does not acknowledge the alternative evidence available and admitted at trial to establish Ms. Witt's state of mind. This alternative evidence must be considered as part of the ER 403 balancing of probative value and prejudicial effect.

Under ER 403, which is incorporated into the fourth prong of the ER 404(b) analysis, even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by unfair prejudice. *See State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). A trial court should consider the following factors when analyzing evidence under ER 403: (1) the importance of the fact of consequence for which the evidence is offered; (2) the strength of the chain of inferences necessary to establish that fact of consequence; (3) the availability of alternative means of proof; (4) whether the evidence offered is being disputed; and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987).

At trial, the prosecution elicited testimony that Ms. Witt assumed the copper pipes were stolen. 5/7/13 RP 94. Additionally, a written statement attributed to Ms. Witt and admitted into evidence indicated that she told Michelle Hinkle that “Rick had stolen” the copper pipes. Ex. 22. These alternative methods of proof, which the trial court failed to factor into its ER 403 analysis, must be considered when determining the admissibility of Ms. Witt’s statement.

Permitting the jury to hear that Ms. Witt delivered a controlled substance was overly inflammatory in comparison with the alternative evidence proving knowledge that was introduced at trial. The trial court committed prejudicial error when admitting this evidence and thus Ms. Witt's conviction should be reversed.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Ms. Witt respectfully requests this Court reverse her conviction and remand for a new trial

DATED this 14<sup>th</sup> day of April, 2014.

Respectfully submitted,



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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
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v.	)	NO. 45049-6-II
	)	
CHANDRA WITT,	)	
	)	
APPELLANT.	)	

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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF APRIL, 2014.

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# WASHINGTON APPELLATE PROJECT

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