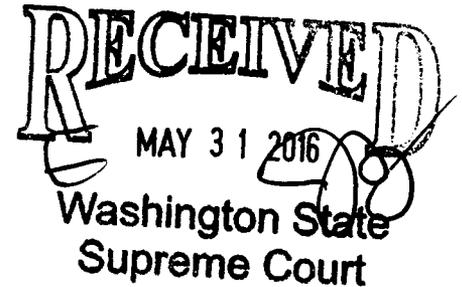


Supreme Court No. 93172-1
Court of Appeals No. 33267-5-III



**Supreme Court
of the State of Washington**

City Of Yakima, on behalf of the Yakima City
Narcotics Unit, Detective Division of the Yakima
Police Department,

Respondent,

v.

Real Property Known as 1606 W. King Street,
located in the City of Yakima, Washington,

Defendant,

John E. Gangwish, property owner/claimant,

Petitioner.

Petition for Review

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1. Identity of Petitioner

John E. Gangwish, owner of the subject property, Claimant in the trial court and Appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

City of Yakima v. 1606 W. King St., No. 33267-5-III (Apr. 28, 2016).

A copy of the decision is included in the Appendix at pages 1-9.

3. Issues Presented for Review

1. The Eighth Amendment prohibits civil forfeiture as an excessive fine unless the property was instrumental to the crime. Although the trial court and the Court of Appeals found that Gangwish's home had a history of being used for drug sales, neither court found that the home was an instrumental means of committing the crime, which could have been committed anywhere. Was the forfeiture of Gangwish's home invalid as an excessive fine under the Eighth Amendment?

2. The forfeiture statute requires a "substantial nexus" between the drug sales and the real property. Although the trial court and the Court of Appeals found that Gangwish's home had a history of being used for drug sales, neither court found that the home was an instrumental means of committing the crime, which could have been committed anywhere. Did the courts err in finding a "substantial nexus" under the statute?

4. Statement of the Case

The City of Yakima chose 1606 W. King Street to be the City's first ever forfeiture of real property under RCW 69.50.505(1)(h) (part of the Uniform Controlled Substances Act). The owner of the house since 1995, John Gangwish, was not guilty of any crime that could form a predicate for forfeiture under the statute. *Cf.* RP 29-30 (he was convicted of possession, not manufacture or distribution). The predicate crime for the City's forfeiture action was committed by Jeannie Luppino-Cronk, an occasional guest of one of Gangwish's tenants. RP 28, 109. Luppino-Cronk was convicted of Possession of Methamphetamine with Intent to Deliver, arising from a police raid of Gangwish's house on April 5, 2012. RP 24-28.

The statute authorizing civil forfeiture of real property being used in controlled substance violations reads, in principal part, as follows:

(1) The following are subject to seizure and forfeiture and no property right exists in them:

...

(h) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance, or which have been acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property.

RCW 69.50.505(1)(h).

At trial, the City did not present any evidence that the house had been acquired through proceeds of illegal drug transactions. The City did not present any evidence that the house was used for manufacturing, compounding, processing, importing, or exporting of any controlled substance. The City did not present any evidence that Gangwish himself sold or delivered any controlled substance from the house. Only Luppino-Cronk was selling drugs from the house. *See* RP 144. The issues at trial were whether Gangwish had actual knowledge of Luppino-Cronk's illegal transactions and whether there was a substantial nexus between her crime and the real property. *See* RP 143.

After a bench trial, the court entered findings of fact and conclusions of law. CP 47-50. The trial court concluded that Gangwish had actual knowledge and participated in the illegal drug activity and that there was a substantial nexus between the drug sales and the real property. CP 50. The trial court entered final judgment forfeiting the property to the City of Yakima. CP 39-40.

On appeal, Gangwish argued that forfeiture of his home for the crimes of another was an unconstitutionally excessive penalty under the Eighth Amendment because the house was not instrumental to the crime (Br. of App. at 6-12); that the trial court's findings did not support a conclusion that there was a substantial nexus between the property and the crime (Br. of App. at 13); and that the trial court's findings did not support a conclusion that Gangwish had actual knowledge that Luppino-Cronk was selling methamphetamine from the house (Br. of App. at 14-15). In the event

of reversal, Gangwish requested an award of attorney's fees under RAP 18.1 and RCW 69.50.505(6). Br. of App. at 15.

Division III of the Court of Appeals affirmed the forfeiture. App. 1. The court held that there was a substantial nexus between the property and drug sales, relying primarily on the trial court's findings of 1) the three controlled buys from the property; 2) the existence of a hand-dug tunnel behind the house containing moldy marijuana plants; 3) drug paraphernalia, including unused baggies, pipes, and digital scales found in the home; 4) suspicious foot traffic to and from the home at all hours of the day; and 5) additional controlled buys from the property after forfeiture proceedings had been initiated. App. 6-7; *see also* CP 48-49. The court also held that substantial evidence supported a finding that Gangwish had actual knowledge that the property was being used in illegal drug sales. App. 7. The court declined to address Gangwish's constitutional claims, holding that an excessive fine determination would require a proportionality analysis and that the record was insufficient to conduct such an analysis. App. 8-9.

Gangwish requests this court accept review of the Constitutional issue and the statutory "substantial nexus" analysis.

5. Argument

A petition for review should be accepted when the case involves a significant question of law under the Constitution of the United States or an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3) and (4).

5.1 The case involves a significant question of law under the Constitution of the United States.

Civil forfeiture of real property used in connection with drug crimes is “punishment” subject to the limitations of the Eighth Amendment’s Excessive Fines Clause. *State v. Clark*, 124 Wn.2d 90, 103, 875 P.2d 613 (1994). “The purpose of the Excessive Fines Clause is to limit the government’s power to extract payments as punishment for an offense.” *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)). “To the extent civil forfeiture constitutes an excessive fine, it will be invalid.” *State v. Catlett*, 133 Wn.2d 355, 369 n.9, 945 P.2d 700 (1997) (citing *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)).

The Eighth Amendment analysis to determine if a particular forfeiture of real property is permissible includes both “instrumentality” and “proportionality” factors. *Tellevik v. 6717 100th Street S.W.*, 83 Wn. App. 366, 374, 921 P.2d 1088 (1996). “Instrumentality” is concerned with the closeness of the relationship, or nexus, between the property and the criminal offense. *Id.* at 373; *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995). “Proportionality” involves a comparison of the value of the property being forfeited with the culpability of the owner’s conduct. *Id.*; *6380 Little Canyon Rd.*, 59 F.3d at 982.

The Ninth Circuit Court of Appeals has clarified that the excessive fine analysis for forfeiture of real property is not a balancing of factors, but

is a two-pronged test. *6380 Little Canyon Rd.*, 59 F.3d at 982. First, the property must have been an “instrumentality” of the crime. *Id.* The court specified that “**any** forfeiture must meet the instrumentality test.” *Id.* at 983 (emphasis added). As a result, “instrumentality is a **threshold** test.” *Id.* at 985 (emphasis added). Proportionality analysis is only necessary if the court first finds the property was instrumental to the crime. *Id.* at 985.

The Court of Appeals applied an incorrect legal standard when it rejected Gangwish’s instrumentality test arguments. The instrumentality test derives from Justice Scalia’s concurring opinion in *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488, (1993). *6380 Little Canyon Rd.*, 59 F.3d at 982. In *Austin*, Justice Scalia explains the theory behind civil forfeiture: that the lawful property has itself committed an offense, rendering the property “guilty.” *Austin*, 509 U.S. at 624 (Scalia, J., concurring). Forfeiture is invalid under the Eighth Amendment “if it applies to property that cannot properly be regarded as an instrumentality of the offense.” *Id.* at 627-28. Justice Scalia provides, as an example, that forfeiture of “the building . . . in which an isolated drug sale happens to occur” would be an invalid, excessive fine. *Id.* at 628.

The instrumentality test requires the government to prove a “substantial connection” between the property and the crime. *6380 Little Canyon Rd.*, 59 F.3d at 985. A “substantial connection” requires more than merely showing that the property was used in the sale of drugs, and more, even, than showing that the property “facilitated” the crime (that is, made it less difficult to commit). *Id.* at 985 n.11. The court contrasted the higher

standard of “substantial connection” with the “lower threshold” set by the language of the Federal civil forfeiture statute, 21 U.S.C. § 881(a)(7), which requires only that the real property was “used, or intended to be used ... to commit, or to facilitate the commission of” a drug felony. *Id.* The court noted, “It is therefore possible for a property forfeiture to satisfy the [Federal] statutory nexus requirement, yet fail the test of the Excessive Fines Clause.” *Id.*¹

It follows that the “substantial connection” must be a relationship akin to necessity. Other courts have stated that the property must be “an **integral** part of the commission of the crime.” *6625 Zumirez Drive*, 845 F. Supp. at 734 (emphasis added). The Supreme Court explained in a later case that “instrumentality” in this context means “**the actual means by which an offense was committed.**” *United States v. Bajakajian*, 524 U.S. 321, 333 n.8, 118 S. Ct. 2028, 141 L.Ed.2d 314, (1998).

Examples of property that could be “guilty” in this manner include “the distillery in *Dobbins’s Distillery v. United States*, 96 U.S. 395, 24 L. Ed. 637 (1878), or the pirate vessel in *Harmony v. United States*, 43 U.S. 210, 2 How. 210, 11 L. Ed. 239 (1844).” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993) (Thomas, J., concurring in part and dissenting in part). The distillery, along with its

¹ The same is not true of the statute at issue here, RCW 69.50.505(1)(h), which requires not only that the property is “being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance,” but also that “a **substantial nexus** exists between the commercial production or sale of the controlled substance and the real property.”

fixtures and apparatus, were the actual means of producing spirits that were illegally concealed from revenue agents. The vessel was the actual means of committing piracy upon the high seas. Unlike those cases, Gangwish's house was not the actual means of committing a forfeitable offense.

The offense at issue in this case—possession with intent to deliver—is committed by means of possessing and selling or intending to sell a controlled substance, in this case, methamphetamine. The **controlled substance** is the “actual means by which an offense was committed.” Gangwish's house was merely the place where the delivery occurred. While Gangwish's house may have been a **convenient** place for Luppino-Cronk's sales, there was no evidence or finding that any quality or characteristic of the house made it **instrumental** to her crimes. In fact, the sales could have occurred anywhere, such as out of Luppino-Cronk's car, where she kept her sales ledgers. Even if the house “facilitated” Luppino-Cronk's crimes, the house did not have the “substantial connection” to those crimes that is required by the instrumentality test. Forfeiture of the house does not remove any resource that was necessary to Luppino-Cronk's criminal enterprise; she can just as easily continue to sell elsewhere. Under the proper legal standard, forfeiture of the house was an invalid, excessive fine.

This same analysis applies under the forfeiture statute itself. The statute requires that real property can only be forfeited if “a **substantial nexus** exists between the commercial production or sale of the controlled substance and the real property.” RCW 69.50.505(1)(h) (emphasis added). The legislature chose to require not just any connection between the property

and the sale, but a “substantial” one. A “substantial connection,” as shown above, requires not just that the property “facilitated” the crime or made it easier in some way, but that the property was the actual means by which the offense was committed. By the statute’s plain language, only property that passes the Eighth Amendment’s instrumentality test can be validly forfeited under the statute.

The Court of Appeals incorrectly applied a much lower standard for the required “substantial nexus.” Rather than determining whether the real property was instrumental to the crime or the actual means by which the crime was committed, the Court of Appeals held that “the Property had a significant history involving drug production and sales.” App. 6. A history of use over time shows, at best, only that the property facilitated the crime, not that it was instrumental to the crime. The higher standard required by the Eighth Amendment was not met. This Court should accept review to set forth and apply the correct standard under the Eighth Amendment and the statute. Forfeiture of Gangwish’s house was invalid under the statute and under the U.S. Constitution.

5.2 The case involves an issue of substantial public interest that should be determined by this Court.

“Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993).

Civil forfeiture threatens the constitutional rights of all Americans. Using civil forfeiture, the government can take your home, business, cash, car or other property on the mere suspicion that it is somehow connected to criminal activity—and without ever convicting or even charging you with a crime. Most people unfamiliar with this process would find it hard to believe that such a power exists in a country that is supposed to recognize and hold dear rights to private property and due process of law.

Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Ed. (Nov. 2015), at 2 (available at <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>).

Property forfeiture laws have been enacted at the federal and state level as a tool for fighting organized crime, major drug activity, and other crimes motivated by greed. Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime*, 19 Seattle U. L. Rev. 217, 244 (1996). In 1989, Washington’s drug forfeiture law was amended to include forfeiture of real property that was either purchased with proceeds of drug crimes or used to facilitate drug crimes. *Id.*; Laws of 1989, ch. 271, §§ 211-212. The legislature declared:

[D]rug-related offenses are difficult to eradicate because of the profits derived from the criminal activities, which can be invested in legitimate assets and later used for further criminal activities; and the forfeiture of real assets where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking.

Laws of 1989, ch. 271, § 211. The legislature also acknowledged that forfeiture of real property “is a powerful tool,” which, if used improperly, could lead to “manifest injustice.” *Id.* Federal and state courts have recognized the injustice that too often results. *E.g., Tellevik v. 6717 100th Street S.W.*, 83 Wn. App. 366, 921 P.2d 1088 (1996).

Justice Scalia observed that greater scrutiny is often required when the government stands to benefit from imposing a penalty:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; [whereas] fines are a source of revenue. . . . It makes more sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, 979 n.9, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (Scalia, J., plurality opinion) (quoted in *6380 Little Canyon Rd.*, 59 F.3d at 984). In Washington, 90 percent of forfeiture proceeds are retained by law enforcement. *See Policing for Profit* at 14; RCW 69.50.505(9) and (10).

The potential for abuse of civil forfeiture is great. The real property of individuals across the state is at risk if the legal standards of “substantial nexus” and “instrumentality” under the forfeiture statute and under the Eighth Amendment are not upheld and properly applied. The failure of the lower courts in this case to apply those standards is an issue of substantial public interest that should be determined by this Court. This Court should accept review in order to set forth and apply the proper standards.

6. Conclusion

This case involves a significant question of law under the United States Constitution. The Court of Appeals failed to understand and apply the instrumentality test required under the Eighth Amendment, as that test has been developed by the federal courts. Overreaching by law enforcement in using civil forfeiture is also an issue of substantial public interest that should be addressed by this Court. This Court should accept review and reverse the decision of the Court of Appeals.

Respectfully submitted this 27th day of May, 2016.

/s/ Kevin Hochhalter

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7. Appendix

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(Apr. 28, 2016).....App 1-9

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On May 27, 2016, I filed the foregoing document with the Court and served a copy on the undersigned in the manner indicated:

Court of Appeals, Div. I11 500 N. Cedar Street Spokane, WA 99201-1905	<input type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Filing <input type="checkbox"/> Hand Delivery
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CITY OF YAKIMA, on behalf of the)
Yakima City Narcotics unit, Detective)
Division of the Yakima Police)
Department,)

Respondent,)

v.)

REAL PROPERTY KNOWN AS 1606 W.)
KING ST., LOCATED IN THE CITY OF)
YAKIMA, WASHINGTON, AND ALL)
APPURTENANCES AND)
IMPROVEMENTS THEREON,)

Defendant in rem,)

and)

JOHN E. GANGWISH, property)
owner/claimant,)

Appellant.)

No. 33267-5-III

UNPUBLISHED OPINION

PENNELL, J. — John Gangwish appeals a civil forfeiture judgment divesting him of real property due to controlled substances violations. Because substantial evidence supports the forfeiture and there is insufficient evidence to support a constitutional challenge, we affirm.

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FACTS

On February 6, 2013, the city of Yakima (the City) initiated an action for civil forfeiture of real property commonly known as 1606 W. King Street (the Property). John Gangwish has owned the Property since 1995. Mr. Gangwish lived in the basement of the residence on the Property and rented out the upstairs. The forfeiture action stemmed from Jeannie Luppino-Cronk selling methamphetamine at the Property. Ms. Luppino-Cronk was a friend of Mr. Gangwish's tenant and stayed at the Property from time to time. The City alleged the Property was used for methamphetamine distribution with Mr. Gangwish's knowledge.

Evidence produced during the two-day forfeiture trial revealed the City began investigating the Property for drug trafficking based on an informant's tip. In March 2012, the Yakima Police Department facilitated three controlled methamphetamine purchases at the Property. In each controlled purchase, Ms. Luppino-Cronk was the supplier. Mr. Gangwish was not observed during any of the purchases, but he later admitted he had been using methamphetamine for the past 10 years and had once purchased methamphetamine from Ms. Luppino-Cronk.

On April 5, 2012, the police executed a search warrant on the Property. In an upstairs bedroom, police found almost one-half an ounce of methamphetamine in Ms.

Luppino-Cronk's purse. While upstairs, police found drug paraphernalia out in the open—including several used drug baggies, over 100 unused baggies, drug pipes, and digital scales. A search of Ms. Luppino-Cronk's car yielded drug-related ledgers. In Mr. Gangwish's basement bedroom, police found a baggie of methamphetamine, a drug pipe, and the monitor to at least one camera that surveilled the exterior of the Property. The baggie in Mr. Gangwish's room had a "#1" written on it in blue ink. The police discovered similarly marked baggies throughout the home, and at least one similar baggie was used during a controlled buy. In addition to the methamphetamine and paraphernalia, the search uncovered additional drug evidence including a moldy, hand-dug underground marijuana grow operation in the backyard of the Property. And Mr. Gangwish's brother, who lived next door, testified that individuals would come and go from the Property at all hours. On occasion, Mr. Gangwish's brother picked up baggies and other litter left by the Property's visitors.

Police arrested both Mr. Gangwish and Ms. Luppino-Cronk at the time of the April 2012 search. Mr. Gangwish told the police he allowed people to use methamphetamine inside his house but denied knowing anyone was selling drugs from the Property. Ms. Luppino-Cronk subsequently pleaded guilty to possession of methamphetamine with intent to deliver. Mr. Gangwish pleaded guilty to possession of methamphetamine and

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was sentenced on October 31, 2013. Mr. Gangwish was also charged with maintaining a drug dwelling, but the charge was subsequently dismissed.

In early October 2013—while Mr. Gangwish’s methamphetamine possession case was still pending and he was free from custody—the Yakima police conducted two more controlled purchases at the Property. This resulted in another search warrant, executed on October 17, 2013. During this second search, police found a methamphetamine pipe in one of Mr. Gangwish’s tenant’s rooms and a cellular telephone in Mr. Gangwish’s room that contained a drug-related text message.

Following a bench trial, the trial court issued a letter opinion, findings of fact and conclusions of law, and a judgment ordering forfeiture of the Property to the City. Mr. Gangwish appeals.

ANALYSIS

Standard of Review

This court reviews a bench trial decision to determine whether the findings of fact are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *Swanyside Valley Irrig. Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002), *aff’d*, 149 Wn.2d 873, 73 P.3d 369 (2003). The label applied to a finding or conclusion is not determinative as this court “will treat it for what it really

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is.” *The-Anh Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014) (quoting *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987)).

“‘Substantial evidence’ is the ‘quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true.’” *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 256, 262 P.3d 1239 (2011) (quoting *Clayton v. Wilson*, 168 Wn.2d 57, 63, 227 P.3d 278 (2010)). When assessing the sufficiency of the evidence, this court defers to the trier of fact to determine the persuasiveness of the evidence, only considers evidence favorable to the party prevailing below, and employs a presumption favoring the trial court’s findings. *Buck Mountain Owner’s Ass’n v. Prestwich*, 174 Wn. App. 702, 713-14, 308 P.3d 644 (2013). This court will not disturb findings supported by substantial evidence even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Further, “[u]nchallenged findings of fact are verities on appeal.” *Buck Mountain Owner’s Ass’n*, 174 Wn. App. at 714.

Statutory Claims

The Uniform Controlled Substances Act, chapter 69.50 RCW, allows the government to seek civil forfeiture of:

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All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance . . . if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property.

RCW 69.50.505(1)(h).

“[T]he burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.” RCW 69.50.505(5). This burden can be satisfied by direct or circumstantial evidence. *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006).

Mr. Gangwish first challenges the trial court's finding of a “substantial nexus” between the Property and drug sales pursuant to RCW 69.50.505(1)(h). Mr. Gangwish concedes several undercover drug sales took place at the Property. Nevertheless, he argues the evidence of nexus was insufficient because Ms. Luppino-Cronk's drug business was mobile and did not largely depend on his residence. We are unpersuaded. At trial, the City produced extensive evidence showing the Property had a significant history involving drug production and sales. Of particular note are (1) the hand-dug tunnel below the home containing an old marijuana grow, (2) drug trafficking supplies (such as ledgers and numerous empty baggies bearing the “#1” mark) found throughout

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the Property, (3) the testimony from Mr. Gangwish's brother and Sergeant Michael Costello about on-going suspicious foot traffic to and from the home at all hours, and (4) the continued availability of drugs from the residence after the first law enforcement raid and initiation of legal forfeiture proceedings.

Mr. Gangwish also challenges the court's finding¹ that he knew the Property was being used in illegal drug sales. Again, this effort fails. Mr. Gangwish admitted he had purchased methamphetamine from Ms. Luppino-Cronk. He also had video security equipment connected to his bedroom, suggesting he was monitoring activities at the Property, including Ms. Luppino-Cronk's drug sales and the suspicious foot traffic. Furthermore, it is beyond dispute that by the time police executed the initial search warrant, Mr. Gangwish knew the Property had played host to illegal drug sales. Yet the sales did not stop there. Two more controlled purchases were conducted at the Property. During a subsequent search, law enforcement found a cell phone in Mr. Gangwish's room containing coded messaging referring to either the distribution or use of methamphetamine.

¹ Although labeled a conclusion of law, we may properly interpret this as a finding. *Nguyen*, 179 Wn. App. at 163.

The only evidence that Mr. Gangwish was not aware of drug distribution at the Property is his own denial. But the trial court found Mr. Gangwish's testimony not entirely credible. We will not disturb this finding on appeal.

Constitutional Claims

Apart from his statutory claims, Mr. Gangwish argues the forfeiture judgment violates the Eighth Amendment to the U.S. Constitution as an excessive fine. This argument was not raised in the trial court. Under RAP 2.5(a)(3), we may review an unpreserved error if the appellant demonstrates "manifest error affecting a constitutional right." In order to meet the rule's criteria, (1) the error must be "truly of constitutional magnitude," and (2) the appellant must demonstrate that the alleged error is "manifest." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). "If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

In the current case, evaluating whether the forfeiture order amounts to an excessive fine requires a proportionality analysis.² Important to this analysis is the value of the

² Our ruling regarding nexus forecloses Mr. Gangwish's argument under the Eighth Amendment's instrumentality test.

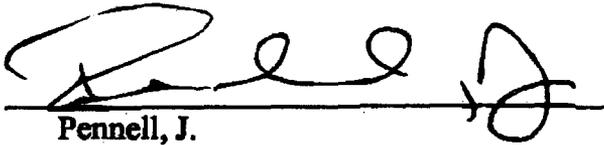
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forfeited property. *See Tellevik v. 6717 100th St. S.W.*, 83 Wn. App. 366, 375-76, 921 P.2d 1088 (1996). But the appellate record does not indicate the Property's value or the amount of equity held by Mr. Gangwish. Given this gap, we decline to review Mr. Gangwish's constitutional claims under RAP 2.5(a)(3).

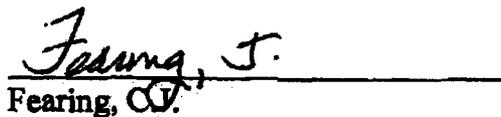
CONCLUSION

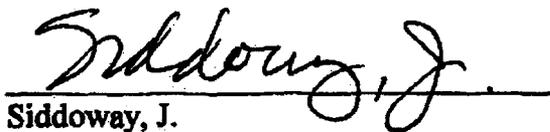
Based on the foregoing, the trial court's judgment ordering forfeiture is affirmed, and Mr. Gangwish's request for attorney fees is denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Pennell, J.

WE CONCUR:


Fearing, J.


Siddoway, J.