

NO. 35582-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALBERTO CARBONAL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine J. Nelson
and
The Honorable Brian Tollefson

No. 06-1-02350-3

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On May 26, 2006, ALBERTO CARBONAL, hereinafter "defendant," was charged by information with unlawfully possessing a controlled substance with intent to deliver in Pierce County Superior Court Cause No. 06-1-02350-3. CP 1

On August 9, 2006, the court, with the Honorable Judge Kathryn J. Nelson presiding, heard defendant's motion to dismiss, which it denied. RP1 45-46.¹ On August 18, 2006, the court entered its findings and conclusions on defendant's motion to dismiss. CP 26-29.

On August 30, 2006, both parties stipulated to the chain of custody of drug evidence, as well as to the accuracy of the crime laboratory's report. CP 32-33. At a CrR 3.5 hearing held the same day, the court ruled

¹ The volumes of the Verbatim Report of Proceedings (VRP) dated August 9, 2006, and August 10, 2006, respectively, are consecutively paginated and will be referred to as RP1. The volume of the VRP dated August 30, 2006, is individually paginated and will be referred to as RP2. The volumes of the VRP dated August 31, 2006, October, 20, 2006, and November 9, 2006, respectively, are consecutively paginated and will be referred to as RP3.

that statements made by the defendant to officers were admissible. RP2 21. On August 31, 2006, the defendant waived his right to a jury trial and all parties appeared for a bench trial before the Honorable Judge Brian Tollefson. CP 31, RP3 3-4. The defendant was found guilty as charged of unlawful possession of a controlled substance (cocaine) with intent to deliver. RP3 102. The court entered written findings of fact and conclusions of law regarding the bench trial on November 13, 2006. CP 37-42.

The defendant had an offender score of six due to multiple out-of-state convictions. RP3 113. His standard sentencing range was 60 months and a day to 120 months. RP3 113. On November 9, 2006, the court sentenced the defendant to 100 months incarceration, with credit for 167 days served. RP3 116. Additionally, the court ordered the defendant to serve 12 months in community custody and pay legal financial obligations totaling \$1,200.00. RP3 116. The defendant filed a timely Notice of Appeal on November 13, 2006. CP 59.

2. Facts From Trial

On May 25, 2006, the Lakewood Motel Sweep Team conducted a routine investigation of the La Casa Motel at 12807 Pacific Highway Southwest. RP3 9, 11. The team consisted of Lakewood Police Officers that monitor the area's motels for irregularities including criminal activity and deviations from safety standards. RP3 9. On that particular day, Officers Jeff Johnson, Shirley McLamore, Angel Figueroa, and two other officers conducted the search at approximately 6:30-6:45 p.m. RP3 9.

While running the registered guests for warrants, the officers discovered that Sean Rogers, the guest registered to room number 25 had an outstanding warrant. RP3 11-12. The officers went to that room, but the defendant, rather than the registered guest, answered the door and opened it about four inches so that the officers could see his face and little else. RP3 12, 13. Officer Johnson identified the team as Lakewood Police and asked if Rogers was in the room. RP3 13. The defendant indicated that he was alone. RP3 13. Officer Johnson observed the defendant nervously looking over his shoulder. RP3 13. When the defendant shifted his position, Officer Johnson was able to see into the room and, on a table near the window, observed what he believed to be crack cocaine. RP3 15. Officer Johnson entered the room and detained the defendant. RP3 17. On the table, the officers found a glass plate holding a razor blade, as well as several pieces of crack cocaine. RP3 17, See CP 30 (Exhibit One). Officer Figueroa found a separate stash of cocaine contained in a small bag inside the pocket of a black jacket that belonged to the defendant. RP3 18. The officers found no drug paraphernalia that could be used to ingest crack cocaine. RP3 23.

Upon realizing that the defendant spoke only Spanish, Officer Figueroa, a fluent Spanish speaker, interviewed the defendant. RP3 40. During the interview, the defendant indicated that he found the drugs. RP3 44. When asked what he was going to do with the drugs, he stated that he planned to use a small portion of the cocaine and sell the rest,

hoping to make approximately \$400.00. RP3 44. Additionally, he admitted that the cocaine in the jacket belonged to him. RP3 45, 46.

Officer Sean Conlon, an expert in the area of street level sales of controlled substances, testified in regard to general characteristics of street level drug sales. RP3 58. He indicated that rock cocaine is sold by the piece, rather than weight, and is often sold bare, without being placed in packaging materials. RP3 59. An absence of scales and packaging materials, therefore, is expected during an investigation into the sale of crack cocaine. RP3 61. He also testified that crack cocaine is initially formed into one large rock, or “cookie,” which is then cut down into smaller pieces that can be sold individually. RP3 61. The most commonly sold unit of crack cocaine at the street level is a \$20.00 rock. RP3 62. Typically, a person would not cut the “cookie” into several \$20.00 rocks suitable for individual sale if they intended to use the drugs themselves. RP3 64. The common \$20.00 rock can be split into about two or three smaller pieces, which each provide one “hit” from the crack pipe. RP3 65.

Once the rocks are sold, the user would require a means to ingest the drug. RP3 65. Officer Conlon stated that the most frequently used device is a glass pipe with copper wire mesh shoved in the end in order to hold the rock in place. RP3 69. He further stated that in a drug

investigation of a person possessing a large quantity of cocaine, the absence of any device used for ingestion is indicative of intent to sell rather than use the drugs. RP3 65.

Officer Conlon also testified in regard to Exhibits One and Two, photographs of the drugs as they were found during the investigation. RP3 61. After viewing Exhibit One, which showed the crack cocaine found on the table, Officer Conlon specified that 14 of the rocks shown in the picture were consistent with the commonly sold \$20.00 unit. RP3 62-63. Additionally, he identified three rocks of cocaine consistent with a \$40.00 unit, three larger rocks which appeared to be in the process of being cut, and a pile of smaller “chips” which fell off the rocks in the cutting process. RP3 63, 64. Officer Conlon estimated the street value of the rocks that had been cut at \$400.00, and the total value, including the uncut larger pieces, at \$700.00. RP3 71. Together, the rocks found on the table and in the separate bag amounted to 24.3 grams of crack cocaine. CP 12-13. Officer Conlon then stated that the sheer quantity of cocaine, aside from its layout, is indicative of intent to deliver rather than personal usage. RP3 65.

C. ARGUMENT.

1. THE TRIAL COURT'S "FINDINGS AS TO DISPUTED FACTS" AND "THE UNDISPUTED FACTS" ON DEFENDANT'S MOTION TO DISMISS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

- a. In making its findings and conclusions on the defendant's motion to dismiss, the trial court properly considered facts stated in the police report, and any error committed in the court considering the police report is invited error.

The doctrine of invited error provides that a party may not set up error at trial and then complain of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). The doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally, negligently, or unintentionally. See City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The Washington Supreme Court has observed that the invited error doctrine appears to require affirmative actions by the defendant in which "the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine." In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003), cert. denied, 540 U.S. 875, 124 S. Ct. 223, 157 L.Ed.2d 137 (2003) (defendant who sought admission of an exhibit at trial without requesting

limiting instruction precluded from raising challenge to the admission of such evidence). The doctrine has been applied to preclude review of errors of constitutional magnitude, including where an element of the offense was omitted from the “to convict” instruction. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990).

In the present case, the defendant expressly stipulated to facts contained in the police report as undisputed for purposes of his pre-trial motion to dismiss. CP 5. A stipulation is an express waiver that concedes the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it. State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). The defendant voluntarily relieved the State of its burden of proving the facts contained in the police report and requested the court, upon consideration of those facts, to dismiss the charge.

On appeal, however, the defendant contends that the trial court acted erroneously if it considered those facts to support its findings and conclusions because the motion to dismiss, in which the defendant made the stipulation, was not supported by a sworn affidavit. See Brief of Appellant at p. 23. The defendant relies on State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), which requires the defendant to file a sworn affidavit in support of his pre-trial motion to dismiss. Knapstad, 107 Wn.2d at 356. The defendant contends that, as a result of the procedural

deficiency, the facts in the police report should not be considered in a review for substantial evidence supporting the trial court's findings of fact.

The doctrine of invited error prohibits the defendant from complaining that the court erred by relying on the police report for factual support where it did so as a direct result of the defendant's stipulation. Any error that occurred was set up by the defendant's initial error in failing to file an affidavit. Furthermore, exclusion of the facts in the police report from a review for substantial evidence would benefit the defendant because the factual basis for the trial court's findings would be destroyed. The defendant cannot be allowed to benefit from errors which he set up at trial. Consequently, the facts from the police report should be considered in a review for substantial evidence supporting the trial court's findings of fact.

- b. The trial court's findings and conclusions on the defendant's motion to dismiss are supported by substantial evidence, consisting of the police report, testimony taken at the hearing, and two photographs.

The use of formal findings of fact and conclusions of law is the preferred practice to insure that the trial court has properly dealt with all of the issues below and to allow for a meaningful review of that court's decision. State v. Agee, 52 Wn. App. 380, 382, 760 P.2d 947 (1988). The role of the appellate court is to determine whether substantial evidence supports the findings of the trial court and whether those findings support the conclusions of law and the judgment. State v. Hashman, 46 Wn. App. 211, 217, 729 P.2d 651 (1986), review denied, 108 Wn.2d 1021 (1987).

Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court’s conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The trial court’s findings will not be disturbed on appeal if supported by substantial evidence. Id. at 217.

(i) There is Substantial Evidence Supporting “The Undisputed Facts.”

The defendant argues that “The Undisputed Facts” portion of the trial court’s “Findings and Conclusions on Defendant’s Motion to Dismiss” are not supported by substantial evidence. Brief of Appellant at p. 21. Particularly, the defendant challenges numbers two, three, four, five, six, and seven.² Brief of Appellant at p. 21.

As noted above, the facts provided by the police report were stipulated to as undisputed for the purposes of the motion to dismiss.³ Evidence offered at the hearing on the motion to dismiss consisted of the testimony of Officers Conlon and McLamore, as well as two photographs

² Appellant states that “Undisputed Fact” Number Seven is repeated and re-numbered as Number Eight. See Brief of Appellant at p. 21. Number Seven is not, in fact, repeated in the original document. Undisputed Fact Number Eight, as listed in Appellant’s Brief at p. 20, is actually Number Seven from the “Disputed Facts” section, which follows the “Undisputed Facts” section.

portraying the drug evidence as found in the motel room during the investigation.⁴ RP1 4, 28-29.

Undisputed fact number two states that, “the officers learned that the registered guest to room #25 had a confirmed warrant.” CP 26. The police report stated that “while conducting records checks of the registered guests, records relayed that S/Rogers who was registered to room #25, had a confirmed misdemeanor warrant out of Tacoma Municipal for a violation of a controlled substance.” CP 15. The police report clearly supports the court’s finding.

Undisputed fact number three states that, “[o]fficers went to room #25 and contacted an individual, later identified as Alberto Carbonal. Carbonal was the only individual in the room.” CP 26. At the hearing, Officer McLamore testified that she went into Room #25 at the La Casa Motel as part of the Motel Sweep Team. RP1 28. Similarly, the police report specifically mentions that the defendant, Alberto Carbonal, was contacted in Room #25 of the La Casa Motel. CP 15, 16. The police report, along with Officer McLamore’s testimony, are evidence that would persuade a fair-minded, rational person as to the truth of the court’s finding.

Undisputed fact number four states the following:

Inside the motel room on a table was a tray. The tray contained 3 large pieces of crack cocaine. In

³ See discussion at p. 6-8, *supra*.

⁴ The photograph admitted at the hearing as Exhibit One was later admitted at trial as Exhibit Two. The photograph admitted at the hearing as Exhibit Two was admitted at trial as Exhibit One.

addition to these larger pieces were 3 medium sized pieces of crack cocaine and 14 smaller “chips” of cocaine. A photo of the tray and cocaine was admitted at the hearing.

CP 26. The last sentence of the finding suggests that Exhibit Two, the photo portraying the layout of the tray, was the basis for the court’s determination. At the hearing, Officer McLamore testified that the photo, which she took, was a true and accurate depiction of the cocaine that was found in Room #25 on May 25, 2006. RP1 28-29. The court, in its finding, determines the total number of crack cocaine rocks on the tray to be 20 (three large, three medium, 14 smaller “chips”). Exhibit Two shows 20 individual pieces of crack cocaine on a tray located on the table in the motel room. See CP 24 (Exhibit Two). Regardless of how the rocks are classified by size, it is apparent that 14 of the pieces are similar in size, three pieces are a bit larger, and three others are even larger. See CP 25 (Exhibit Two). After looking at the photo, a fair-minded, rational person could be persuaded as to the truth of the court’s finding.

Undisputed fact number five states that:

Carbonal was advised of his Miranda warnings and told the officers that he had found the cocaine. When asked what he was going to do with the cocaine, defendant stated that he was going to use it for his personal use and sell the rest for money. When asked how much money he was looking at making, defendant said about \$400.

CP 26. Officer Figueroa’s supplemental police report indicates that, when asked where the cocaine came from, the defendant stated “he found it.” CP 17. The report then states that the defendant, “said he was going to use it for his personal use and sell the rest” for “about \$400.” CP 17. Similarly,

Officer Johnson's portion of the police report states that Officer Figueroa "advised A/Carbonal of his Miranda warnings in Spanish," before conducting an interview. CP 15. It also states that the defendant, when asked about the cocaine, told Officer Figueroa "that he uses some of it for personal use and also sells it for money." CP 15. The facts contained in the police report would persuade a fair-minded, rational person as to the truth of the court's finding.

Undisputed fact number six states that,

A black leather jacket was found on the bed within three feet of where Carbonal was standing. Carbonal told officers that the jacket was his. Inside the jacket was a beige plastic baggie containing pieces of crack cocaine.

CP 27. Officer Johnson's police report supports this finding as it states that,

Officer Figueroa located a black leather jacket lying on the bed within three feet of where A/Carbonal was standing. A/Carbonal told Officer Figueroa that the jacket was his. Officer Figueroa located a beige plastic baggie containing white colored pieces suspected to be crack cocaine in the right jacket pocket.

CP 15. Similarly, Officer Figueroa's report states that, "I searched his jacket and found a white rock substance wrapped in plastic in his right pocket." CP 17. The facts in the police report are consistent with a photograph admitted at the hearing, which shows a beige plastic bag containing crack cocaine. See CP 25 (Exhibit One). The police reports, as well as the photograph, constitute evidence sufficient to persuade a fair-minded, rational person as to the truth of the court's finding.

Undisputed fact number seven states that “no items were found in the hotel room which could be used to ingest the crack cocaine.” CP 27. The police report contains a property section which briefly describes the evidence collected during the investigation. CP 12-14. The report makes no mention of any paraphernalia that could be used to ingest the crack cocaine. In a drug investigation, it is probable that police officers would collect and enter as evidence any drug paraphernalia such as pipes, needles, or other devices used for ingestion. Due to the lack of any reference to such items in the police report, a rational, fair-minded person could be persuaded that no such device was present.

Assuming, *arguendo*, that the court finds that undisputed fact number seven is not supported by substantial evidence, such a determination would not render the conclusions of law or the court’s determinations based thereupon invalid. The conclusions of law which find support in undisputed fact number seven are similarly supported by other findings.⁵

(ii) There is Substantial Evidence Supporting the Court’s “Findings as to Disputed Facts.”

The defendant also alleges a lack of substantial evidence supporting findings numbered one through seven from the court’s “Findings as to Disputed Facts” portion of its findings and conclusions on the motion to dismiss. Brief of Appellant at p. 22.

⁵ See discussion at p. 17, *supra*.

Number one in the “Findings as to Disputed Facts” states that “[t]he layout of the cocaine on the tray along with the quantity of cocaine is indicative of an intent to deliver.” CP 28. At the hearing, Officer Conlon testified regarding the layout of the cocaine on the tray as shown in a photograph taken during the investigation. Officer Conlon testified as follows:

[State]: Okay, Exhibit 2 shows the layout of these 14 \$20 rock [sic] and the three \$40 rocks and larger pieces. In your opinion, in your training and experience and speaking with street level dealers of crack cocaine, would that type of a setup be more consistent with personal use or with street level dealing?

[Conlon]: Street level dealing, absolutely.

[State]: Why do you say that?

[Conlon]: Someone with personal use wouldn't go through the trouble of cutting the rocks up into little \$20 pieces when they are not going to smoke an entire \$20 piece at once. You would just chip it off as you need it, there's no reason to cut it into \$20 pieces. As I said, they are not going to stick that whole \$20 rock in their pipe.

RP1 15. Officer Conlon's testimony clearly supports the court's finding that the layout of the cocaine on the table was indicative of an intent to deliver. Furthermore, Officer Conlon provided a reasonable explanation for his opinion. His testimony is evidence from which a fair-minded, rational person could easily be persuaded as to of the truth of the finding.

Number two in the “Findings as to Disputed Facts” states that “[t]he defendant was in a hotel room with a phone which would serve as a means of communication with potential buyers.” CP 28. The police report attached to defendant's motion states that the defendant was arrested in the

motel room. CP 15, 16. Since nearly all motel rooms contain telephones, a reasonable inference can be drawn that the room the defendant was arrested in also contained a phone. Furthermore, Officer Conlon testified that, in prior investigations, he has dealt with individuals dealing crack cocaine out of motel rooms. RP1 16. A fair-minded, rational person could be persuaded that the defendant, who possessed 24.3 grams of cocaine in a motel room, may use the telephone to contact potential buyers.

Number three in the “Findings as to Disputed Facts” states that “[t]he lack of any paraphernalia in the hotel room which could be used to ingest the cocaine is also indicative of an intent to deliver.” CP 28. As noted above, undisputed fact number seven indicates that the officers found no drug paraphernalia which could be used to ingest cocaine. CP 26. At the motion hearing, Officer Conlon testified that in a drug investigation, the absence of any drug paraphernalia which could be used for ingestion is indicative of an intent to deliver. RP1 15. Officer Conlon testified as follows:

[State]: If there was no drug paraphernalia, no pipes, anything like that that could be used to ingest crack cocaine, what would that indicate to you as far as whether or not someone might be involved in street level dealing of cocaine?

[Conlon]: It would indicate to me that he’s selling cocaine, not using it.

RP1 15. Officer Conlon’s testimony is evidence that would lead a fair-minded, rational person to believe that an absence of such paraphernalia is indicative of an intent to deliver.

Number four in the “Findings as to Disputed Facts” states that “a separate quantity of cocaine was found in the pocket of a jacket belonging to defendant.” CP 28. In their police reports, Officers Johnson and Figueroa both stated that Officer Figueroa found a black leather jacket which contained a plastic baggie of suspected crack cocaine. CP 15, 17. Both reports also indicate that the defendant told Officer Figueroa that the jacket, as well as the cocaine in the pocket, belonged to him. CP 15, 17. The reports are consistent with Exhibit Two, a photograph of the beige plastic baggie containing crack cocaine, which was presented during the motion to dismiss hearing. RP1 28-29. The facts contained in the police reports, paired with the photograph, constitute evidence from which a fair-minded, rational person could be persuaded as to the truth of the court’s finding.

Findings as to Disputed Facts Numbers five through seven are actually conclusions of law. See CP 28. The trial court’s conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). An appellate court reviews whether the findings of fact support the conclusions of law. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

The conclusion of law contained in number five of the “Findings as to Disputed Facts” states that “taking all reasonable inferences in the light most favorable to the State, these factors constitute evidence of sufficient circumstances which would support a logical and reasonable inference of defendant’s possession of the cocaine and of his intent to

deliver the cocaine.” CP 28. The undisputed facts establish that the defendant found the cocaine, cut it into several \$20.00 pieces ready for delivery, and lacked any drug paraphernalia which could be used to ingest the cocaine. See CP 26-27. Taken together, the trial court’s findings of fact support the conclusion that the defendant intended to deliver the cocaine.

The conclusion of law contained in number six of the “Findings as to Disputed Facts” addresses the admissibility of statements made by the defendant to Officer Figueroa as well as the corpus delicti of the intent to deliver element of the crime charged. CP 28. The defendant raises those issues separately in Assignment of Error No. 3 and the state’s response can be found in that section of this brief.⁶

The conclusion of law contained in number seven of the “Findings as to Disputed Facts” is essentially the same as that contained in number five, except that it includes the defendant’s incriminating statement as a factor supporting a finding of intent to deliver. The conclusion that the defendant made the statement is supported by undisputed fact number four which states, “when asked what he was going to do with the cocaine, defendant stated that he was going to use it for his personal use and sell the rest for money.” CP 28. As noted above, further discussion on the incriminating statement made by the defendant will be discussed in response to the corpus delicti issue.

⁶ Discussion begins on p. 20 of this brief.

2. COUNSEL'S DECISION NOT TO OBJECT TO "THE UNDISPUTED FACTS" SECTION OF THE FINDINGS DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE WHERE THERE WAS A CLEAR TACTICAL REASON FOR NOT MAKING SUCH AN OBJECTION.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish that counsel was ineffective, the defendant bears the burden of showing that counsel's performance was deficient and that such deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

Counsel's performance was constitutionally deficient if it fell below an objective standard of reasonableness based on consideration of all the circumstances such that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. McFarland at 334-335, State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986). Courts gauge deficiency under a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based solely on matters within the trial record established at the proceedings below. McFarland, 127 Wn.2d at 335. Judicial scrutiny of the record is highly deferential in favor of counsel in order to eliminate the distorting

effects of hindsight. Strickland, 466 U.S. at 689. A defendant is prejudiced by a deficiency if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” McFarland, 127 Wn.2d at 336.

Defense counsel’s decision not to object to “The Undisputed Facts” portion of the trial court’s findings on the motion to dismiss was a clear tactical decision which was reasonable under the circumstances. For purposes of the motion only, the defendant stipulated to the facts in the police report as undisputed. CP 5. Upon comparison, it is apparent that many of the findings in “The Undisputed Facts” section are taken directly from the police report. Counsel’s decision not to object to that section of the factual findings was completely reasonable where, by prior stipulation, the defendant had already agreed that such facts were undisputed. Any objection to that section of the findings would have directly contradicted the defendant’s previous stipulation.

3. THE STATE OFFERED EVIDENCE SUFFICIENT TO ESTABLISH THE CORPUS DELICTI OF THE CRIME CHARGED INDEPENDENT OF THE DEFENDANT’S INCRIMINATING STATEMENTS.

Corpus delicti means the “body of the crime” and must be proved by evidence sufficient to support the inference that there has been a criminal act. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). A defendant’s incriminating statement alone is not sufficient to establish that a crime took place. Aten, 130 Wn.2d at 655-56; State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The State must present other

independent evidence to corroborate a defendant's incriminating statement. Aten, 130 Wn.2d at 656. In other words, the corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just a crime, but the specific crime with which the defendant has been charged. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

In determining whether there is sufficient independent evidence under the corpus delicti rule, the court reviews the evidence in the light most favorable to the State. Aten, 130 Wn.2d at 658. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration, or confirmation, of the crime described in a defendant's incriminating statement. Id. at 656. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved." Id. at 656 (quoting Vangerpen, 125 Wn.2d at 796). A "relatively modest amount of evidence" satisfies the independent evidence test. State v. Wright, 76 Wn. App. 811, 819, 888 P.2d 1214, review denied, 127 Wash. 2d 1010, 902 P.2d 163 (1995). If the independent evidence supports reasonable and logical inferences of both innocence and guilt, it is insufficient to corroborate a defendant's admission of guilt. Brockob, 159 Wn.2d at 329.

To support admission of the defendant's confession, the State had to present prima facie proof of possession of a controlled substance with intent to deliver. RCW 69.50.401(1). Intent to deliver may be inferred

where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability. State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41, review denied, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

However, an inference of intent to deliver cannot be based on bare possession of a controlled substance, absent other facts and circumstances. State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976).

In State v. Hagler, 74 Wn. App. 232, 872 P.2d 85 (1994), the court considered the 24 rocks of cocaine and large sum of money (\$342.00) in defendant's possession to be indicative of an intent to deliver. Hagler, 74 Wn. App. at 237. Similarly, in State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276, (1979) the court inferred intent to deliver where the defendant possessed an unusually large amount of uncut heroin, a smaller portion of heroin wrapped in a balloon, a quantity of lactose used for cutting heroin, and an empty balloon that could be used to package heroin. Simpson, 22 Wn. App. at 575-76.

The defendant, citing State v. Cobelli, 56 Wn. App. 921, 788 P.2d 1081 (1990), argues that there is a lack of independent evidence sufficient to corroborate the defendant's admission of intent to deliver. Brief of Appellant at p. 13, 26. In Cobelli, police officers observed the defendant carry out a series of short conversations with several "clusters" of people in a parking lot near a convenience store. Cobelli, 56 Wn. App. at 922. After the officers arrested the defendant, he removed baggies containing a total of 1.4 grams of marijuana and money from his pockets and admitted

selling two baggies of marijuana for \$10.00 each. Id. at 923. The court held that the defendant's confession was erroneously admitted because absent the confession, the State failed to establish the corpus delicti of an intent to deliver. Id. at 925.

In the present case, however, the evidence corroborating the defendant's statement is much stronger than that in Cobelli. Police recovered a total of 24.3 grams of cocaine (15.8 grams on the tray in the motel room, and 8.5 grams in a baggie in the defendant's jacket). The amount of cocaine was much larger and had a far higher street value, approximately \$400.00, than the drugs found in Cobelli.

Furthermore, like in Hagler and Simpson, several factors, in addition to quantity, indicated that the defendant intended to deliver the cocaine. A photograph admitted at the hearing showed the tray in the motel room, which contained 14 rocks of cocaine that could be sold for \$20.00 each, as well as six larger pieces in the process of being cut. See CP 25 (Exhibit One). Officer Conlon testified that \$20.00 rocks are the most commonly sold units in street level sales of crack cocaine and that the typical drug user would not cut them up in that manner unless he intended to sell them. RP1 13, 15. Furthermore, he testified that baggies or scales used to prepare the rocks for sale are not typically found in a drug investigation for crack cocaine because the rocks are commonly delivered without packaging materials and sold by the piece rather than weight. RP1 9. The several \$20.00 rocks which were found on the table were, in essence, equivalent to several packages of powder cocaine ready

for sale. Finally, no drug paraphernalia that could be used to ingest the cocaine was found in the motel room which, in Officer Conlon's opinion, indicates that the defendant intended to sell the drugs rather than use them. RP1 16.

The defendant asserts that the court's reliance on Officer Conlon's testimony was misplaced because he was not involved in the investigation and not sworn in as an expert for purposes of the hearing. Brief of Appellant at p. 27. Officer Conlon, however, was clearly testifying as an expert witness. Furthermore, the defendant fails to cite any Rule of Evidence (ER) regarding the opinion testimony of expert witnesses. In fact, ER 702 allows opinion testimony from a witness "qualified as an expert by knowledge, skill, experience, training, or education." Prior to eliciting Officer Conlon's opinions on the two photographs admitted at the hearing, the State asked several foundational questions which established Officer Conlon's expertise in the area of street level drug sales. RP1 4-7.

The defendant also cites State v. Brown, 68 Wn. App. 480, 843 P.2d 1098 (1993), where the court cautioned that, standing alone, police opinions regarding quantity or packaging of a controlled substance are insufficient to show an intent to deliver. Brief of Appellant at p. 30. In Brown, the officer's opinion regarding the quantity of the drugs in the defendant's possession was the only factor suggesting an intent to deliver. Brown, 68 Wn. App. at 484-85. The court held that the opinion was insufficient to support a finding of intent to deliver *beyond a reasonable doubt*. Brown, 68 Wn. App. at 485 (emphasis added).

The present case is distinguishable from Brown because Officer Conlon's opinion was not the sole factor in finding intent, but was offered in conjunction with two photographs, as well as the facts from the police report which the defendant stipulated to.⁷ Furthermore, the State was only required to provide prima facie corroboration of the defendant's statements, a lower standard than that required in Brown. The court properly considered Officer Conlon's testimony for purposes of the hearing because it was supplemented by other evidence.

Viewed in the light most favorable to the State, the evidence presented at the hearing, consisting of (1) the two photographs, (2) the facts from the police report, and (3) Officer Conlon's testimony, support a logical and reasonable inference that the defendant intended to deliver the cocaine. Because the State established the corpus delicti of the crime charged independently from the defendant's statements, the trial court properly considered the defendant's statement in denying the motion to dismiss.

4. THE COURT'S "FINDINGS OF FACT" NUMBERED VII AND IX, FROM "THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: BENCH TRIAL," ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. CrR 6.1(d). As argued above, an appellate court reviews the trial court's findings of fact to determine whether they are

⁷ See relevant discussion at p. 6-9, supra.

supported by substantial evidence.⁸ On appeal, the court “must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

The defendant alleges that factual finding numbered VII is not supported by substantial evidence “to the extent that it states that Mr. Carbonal confessed to the intent to deliver.” Brief of Appellant at p. 34. In fact, finding number VII states that “*Officer Figueroa testified that defendant made statements to him to the effect that he was going to sell some of the cocaine and that he was looking to make \$400.*” CP 39 (emphasis added). Rather than making a finding as to a fact disputed by the defendant, the finding simply identifies what the officer stated during his testimony.

In his testimony at trial, when asked about the conversation that he had with the defendant, Officer Figueroa stated that the defendant, “said it was cocaine for his personal use and that he was going to sell some of it because he wanted to get \$400, he needed \$400.” RP3 44. From Officer Figueroa’s testimony, a fair-minded, rational person could easily be persuaded that he made the statements identified by the court in factual finding number VII.

The defendant further argues that his testimony, in which he denied he would be “ignorant” enough to make such an incriminating statement, is more credible than the testimony given by the officers. Brief

⁸ See relevant discussion at p. 9-10, supra.

of Appellant at p. 35. The court, however, acknowledged the defendant's testimony while delivering its determination, stating that the defendant "denies making any statements about selling cocaine or the \$400." RP3 99. Subsequently, the judge stated, "I am persuaded, based on all the testimony and evidence, that he indeed did make statements that he planned to sell a portion of the rock cocaine and that he was looking to make \$400." RP3 101. Although it did not do so expressly, the court, in consideration of the conflicting testimony, made a determination that the testimony of the officers was more credible than that of the defendant. Such a determination must be deferred to on appeal. See Hernandez, 85 Wn. App. at 675.

Next, the defendant alleges that factual finding numbered IX is not supported by substantial evidence to the extent that it states that nothing in the motel room could be used as a smoking device. Brief of Appellant at p. 34. Factual finding numbered IX states that "[t]here were no items of paraphernalia associated with ingesting rock cocaine found in the motel room." CP 40. During his testimony at trial, Officer Johnson testified regarding the results of his investigation. The following colloquy took place:

[State]: Were there any items, drug paraphernalia, found other than the cocaine that was found on the tray with the razor blade, anything else found in that room?

[Johnson]: No.

[State]: How many pipes found in the room?

[Johnson]: Didn't find any.

[State]: Did you find anything in that room that could be used to ingest cocaine?

[Johnson]: No.

RP3 23 (excerpts omitted). Similarly, Officer Figueroa did not recall seeing any pipes or any other paraphernalia in the motel room which could be used to ingest cocaine. RP3 52. The officers' testimony was consistent with the property section of the police report, which does not list a single item of drug paraphernalia, such as a pipe or aluminum can, that would normally be used to ingest crack cocaine. See CP 30 (Exhibit Eight). The testimony of Officers Johnson and Figueroa, as well as the police report, are evidence from which a fair-minded, rational person could be persuaded as to the truth of the court's finding.

5. THE STATE OFFERED SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANT INTENDED TO DELIVER COCAINE WHERE: 1) HE POSSESSED 24.3 GRAMS OF COCAINE, 2) HE SPLIT THE CRACK COCAINE INTO 20 SEPARATE PIECES, 14 OF WHICH WERE THE SIZE MOST COMMONLY SOLD, 3) NO DRUG PARAPHERNALIA THAT COULD BE USED TO INGEST COCAINE WAS FOUND IN HIS POSSESSION, AND 4) HE STATED TO AN ARRESTING OFFICER THAT HE PLANNED TO SELL A PORTION OF THE CRACK COCAINE.

The evidence presented in a criminal trial is sufficient to support a conviction of the crime charged if a rational trier of fact, after viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). When the sufficiency of the evidence is

challenged, the court will admit the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).

Furthermore, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to convict the defendant of unlawful possession of a controlled substance with intent to deliver, the court was required to find beyond a reasonable doubt that (1) the defendant possessed a controlled substance (rock cocaine), (2) the defendant possessed the cocaine with the intent to deliver it, and (3) that the acts occurred in the State of Washington. CP 41.

The defendant admitted at trial that he was in possession of cocaine when arrested at the La Casa Motel on May 25, 2006. RP2 75-76. The only disputed element, therefore, is the intent to deliver the cocaine.

Criminal intent "may be inferred where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability." State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41 (1991). An inference of intent must flow rationally from the evidence produced. State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991), overruled on other grounds by State v. Silva-Baltazar, 125 Wn.2d 472, 886 P.2d 138 (1994). A trier of fact can infer intent from circumstantial evidence. State v. Simpson, 22 Wn. App. 572, 575, 590 P.2d 1276 (1979).

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). Possession of a controlled substance, by itself, is insufficient to establish an inference of an intent to deliver. Id. Washington cases in which intent to deliver was inferred from possession of narcotics all seem to involve at least one additional factor. See, e.g., State v. Llamas-Villa, 67 Wn. App. 448, 451, 836 P.2d 239 (1992) (additional factor was officer's observations).

Courts have identified various factors and circumstances which, when coupled with possession, permit an inference of intent to deliver. In State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976), the court considered whether the defendant intended to deliver five pounds of marijuana found in the back of his vehicle. Id. at 416. In concluding that the defendant intended to deliver the marijuana, the court considered the large quantity of drugs, the market value of the drugs, and a witness' testimony that the defendant had told him he intended to plead guilty. Id. at 418-19. The court also considered that marijuana is commonly sold in smaller units referred to as "lids," and that the defendant was able to divide the drugs up through the use of a gram scale. Id. at 418.

Like Harris, the present case does not involve "mere possession." Beyond quantity, factors that indicate the defendant's intent to deliver include the absence of drug paraphernalia used for ingestion (RP3 65), the

quantity of \$20.00 rocks prepared for sale (RP3 64), the street value of the drugs (RP3 64), and, most importantly, Officer Figueroa's testimony indicating that the defendant told him he planned to sell a portion of the drugs. (RP3 44, 52). Viewed in the light most favorable to the State, the evidence established that several factors were present from which the court properly inferred an intent to deliver.

The defendant likens the present case to multiple cases in which courts found that the defendant lacked an intent to deliver a controlled substance. Brief of Appellant at p. 30-31. For example, in State v. Brown, 68 Wn. App 480, 843 P.2d 1098 (1993), police observed the defendant in possession of an amount of crack cocaine valued at \$400.00. Id. at 482. Although the defendant was in an area known for drug sales and an officer testified that the quantity indicated drug sales, the court determined that the evidence was insufficient to establish intent to deliver. Id. at 485. Similarly, in State v. Davis, 79 Wn. App. 591, 904 P.2d 306 (1995), the court found that the defendant lacked intent to deliver despite the presence of 19 grams of marijuana in six individually wrapped baggies, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. Id. at 595-96.

The present case is clearly distinguishable from the abovementioned cases because the defendant admitted to Officer Figueroa that he intended to sell the drugs. RP3 44. When coupled with possession, the statements are sufficient to prove that the defendant

intended to deliver the cocaine. The statements are even more persuasive, however, when considered in light of the several factors discussed above. In its totality, the evidence presented by the State was sufficient to prove beyond a reasonable doubt that the defendant intended to deliver the cocaine.

6. THE DEFENDANT CAN MAKE NO VALID CHALLENGE TO THE VALIDITY OF THE SEARCH AND SEIZURE LEADING TO HIS ARREST.

- a. The defendant cannot challenge the validity of the search and seizure for the first time on appeal, in the context of an ineffective assistance of counsel claim.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn.2d at 686-87. However, “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” Lynn, 67 Wn. App. at 344.

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Rather, the asserted error must be “manifest,” or “truly of constitutional magnitude.” Scott, 110 Wn.2d at 688. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. Scott, 110 Wn.2d at 688; Lynn, 67 Wn. App. at 346. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Manifest error may occur where a criminal defendant does not receive effective assistance of counsel as required by the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish that counsel was ineffective, the defendant bears the burden of showing (1) that counsel’s performance was deficient, and (2) that such deficiency actually prejudiced him, not simply that “the errors had some conceivable effect on the outcome.” McFarland, 127 Wn.2d at 334; Strickland, 466 U.S. at 693. The burden is on a defendant alleging

ineffective assistance of counsel to show deficient representation based solely on matters within the trial record established at the proceedings below. McFarland, 127 Wn.2d at 335. Courts gauge deficiency under a strong presumption that counsel’s representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

In State v. McFarland, the Supreme Court determined that the defendants were barred from alleging constitutional errors arising from trial counsel’s failure to make a motion to suppress evidence obtained following a warrantless arrest. McFarland, 127 Wn.2d at 338. Because no motion to suppress was made at the trial level, the record did not indicate whether the trial court would have granted the motion. Id. at 334. The court held that without an affirmative showing of actual prejudice, the asserted error was not “manifest” and, therefore, not reviewable under RAP 2.5(a)(3). Id. at 338. It also held that even if the defendants were able to raise the issue, the limited record prevented the defendants from making the necessary showing of prejudice sufficient to rebut the strong presumption that counsel performed effectively. Id.

In the present case, the defendant alleges that counsel rendered ineffective assistance because she declined to challenge the Constitutionality of the search and seizure that led to his arrest. See Defendant’s Statement of Additional Grounds for Review at p. 1-2, 5. Particularly, the defendant alleges that the officers “did not demonstrate the probable cause necessary to conduct a lawful search of his motel

room.” Id. at p. 5. He further contends that “but for counsel’s failure to challenge the validity of probable cause to arrest, the outcome of the proceedings would have been different, as the State would not have been able to produce proof of probable cause.” Id.

The defendant cannot affirmatively show, from the record, that defense counsel’s decision not to challenge the warrantless arrest resulted in prejudice constituting “manifest error,” and is barred from alleging such error for the first time on appeal. Like in McFarland, the record surrounding the issue is limited because the defendant, at no point, questioned the validity of the search or seizure. The record simply establishes that the officers believed Sean Rogers was the guest registered to Room #25. From such testimony, defense counsel had no basis to challenge any search of the room.

In fact, the limited record from trial shows that the officers had probable cause to search the room, which supports defense counsel’s decision not to challenge the search and seizure. Under the “open view” doctrine, detection by an officer who is lawfully present at a vantage point and able to detect something by utilization of one or more of his senses does not constitute a search within the meaning of the Fourth Amendment. State v. Ross, 141 Wn.2d 304, 313, 4 P.3d 130 (2000) (citing State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981); State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994)). An “open view” observation is not a search at all but may provide probable cause for a constitutionally

Bobic, 140 Wn.2d 250, 254, 255, 258-59, 996 P.2d 610 (2000).

Furthermore, a police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. RCW 10.31.100.

The record shows that the officers, after learning that the guest registered to Room #25 had warrants, contacted that room and questioned the defendant. RP3 11-12. At that point, irrespective of whose name was registered to Room #25, no search or seizure had occurred because the defendant opened the door voluntarily and freely answered Officer Johnson's questions. See United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L.Ed.2d 497, (1980); State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990) (consensual conversation between citizen and officer does not implicate the Fourth Amendment). Upon seeing the alleged narcotics in open view, Officer Johnson had probable cause to enter the room and detain the defendant, which he did. See RCW 10.31.100. Because probable cause stemmed from Officer Johnson's open view observations, the search and seizure was lawful under the Fourth Amendment as well as art. I, § 7 of the Washington State Constitution. Even if defense counsel had challenged the validity of the search at trial, the record establishes that such a challenge would have been unsuccessful.

The defendant cannot demonstrate actual prejudice resulting from counsel's failure to challenge the search and seizure for lack of probable cause. Without a showing that the defendant's rights were actually

affected by the alleged constitutional error, the alleged error is not “manifest” under RAP 2.5(a)(3), and the claimed error may not be raised for the first time on appeal. Similarly, due to the limited record, the defendant is unable to make the necessary showing of prejudice sufficient to rebut the strong presumption that counsel performed effectively.

b. The defendant lacks standing to challenge the search of the motel guest registry.

Although the issue has not been specifically raised, the defendant may analogize the present case to the Supreme Court’s recent decision in State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), arguing that the search of the motel guest registry, which indirectly led to his arrest, violated article I, section 7 of the Washington State Constitution. In Jorden, the defendant was arrested in his hotel room for unlawful possession of cocaine after a Pierce County deputy sheriff conducted a random warrant check of the motel’s guests via the guest registry. Id. at 123. Upon learning that the defendant had two outstanding warrants, deputy sheriffs entered his motel room to make an arrest. Id. Once inside, officers saw cocaine in plain view. Id.

Prior to trial, Jorden moved to suppress evidence of the drugs and drug paraphernalia, arguing it was based on an illegal search. Id. at 125. Jorden asserted that the random check of the motel registry revealing his whereabouts constituted a violation of his privacy rights under article I, section 7, of the Washington State Constitution. Id. The Supreme Court agreed, stating that “[i]nformation contained in a motel registry constitutes

a private affair under *article I, section 7 of the Washington State Constitution*. The evidence obtained from the registry of the Golden Lion Motel, which led officers to Jorden’s room, was obtained through unlawful means and should have been excluded.” *Id.* at 131.

The State concedes that, according to Jorden, the random check of the motel guest registry at the La Casa Motel was unlawful. Unlike the defendant in Jorden, however, the defendant in the present case lacks standing to challenge the validity of the search of the registry.

Generally, a defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. State v. Simpson, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980). The defendant must personally claim a “‘justifiable,’ . . . ‘reasonable,’ or . . . ‘legitimate expectation of privacy’ that has been invaded by governmental action. Simpson, 95 Wn.2d at 175. The defendant has the burden of establishing the requisite privacy interest. See, e.g., Alderman v. United States, 394 U.S. 165, 173, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969). If the defendant’s evidence and the State’s evidence fail to establish whether the defendant has a valid privacy interest in the place searched or in the item seized, the Fourth Amendment analysis cannot proceed further. See State v. Picard, 90 Wn. App. 890, 896-97, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998).

As an exception to the general Fourth Amendment rules regarding standing, Washington courts grant automatic standing to defendants that have been charged with an offense that has possession of property as an

element. Simpson, 95 Wn.2d at 175, 181. Although automatic standing has been the subject of some controversy, and has been abandoned by the U.S. Supreme Court, it “still maintains a presence in Washington.” State v. Jones, 146 Wn.2d 328, 331-332, 45 P.3d 1062 (2002). A person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him. State v. Williams, 142 Wn.2d 17, 23, 11 P.3d 714 (2000). To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search and seizure. State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Inherent in the conditions for automatic standing is the principle that the “fruits of the search” bear a direct relationship to the search the defendant seeks to contest. Williams, 142 Wn.2d at 23.

Pertaining to a defendant’s ability to challenge the validity of a search, the automatic standing rule has no application where there is no conflict in the exercise of defendant’s Fourth and Fifth Amendment rights. Williams, 142 Wn.2d at 23. Moreover, the automatic standing rule may not be used where the defendant is not faced with “the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment.” Id. Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime. Id. However, a defendant who lacks automatic standing may still possess a legitimate expectation of privacy in the place searched or the thing seized, and on that basis be able to

challenge the search or seizure. State v. Carter, 127 Wn.2d 836, 841, 904 P.2d 290 (1995).

For instance, in State v. Williams, 142 Wn.2d at 23, the Supreme Court held that the defendant lacked automatic standing to challenge the search of a third-party's residence. In that case, the police arrested the defendant pursuant to an arrest warrant while he was a guest in a friend's house. Williams, 142 Wn.2d at 18. The police discovered heroin in the defendant's pocket when they searched him incident to his arrest. Id. The defendant argued that he was entitled to rely on automatic standing to challenge the entry into the third party's residence. Id. The Supreme Court disagreed, finding that there was an insufficient nexus between the contraband found during a search of the defendant's person incident to his arrest, and the officer's entry into the third party's residence. Williams, 142 Wn.2d at 23. The Court reasoned that the arrest, not the entry, led to the discovery of evidence, which supported the subsequent possession charge. Id. The defendant was not placed in the position of having to claim ownership of contraband or admit to any criminal conduct to challenge the entry into the residence where his possession of contraband was wholly unrelated to whether the police lawfully entered a third party's residence. Id.

The defendant in the present case, like the defendant in Williams, lacks automatic standing because there is an insufficient nexus between the contraband found during the search of the motel room and the officers' unlawful search of the guest registry. Prior to the defendant's arrest, there

were two separate searches: the unlawful search of the motel registry as part of the officers' routine investigation, and the lawful search of the motel room resulting from the open view observation. As discussed above, the search of the motel registry simply led the officers to the room in which the defendant was located. Once at the room, the officers engaged in a consensual conversation with defendant and entered the motel room only after making an open view observation of narcotics. The impetus for the officers' search was not the information in the guest registry, but rather the probable cause arising from their observation of narcotics. The drug evidence, therefore, is directly connected to the lawful search of the motel room, rather than the search of the motel guest registry. While the defendant has standing to challenge the search of the room, he does not have automatic standing to challenge the search of the guest registry.

The defendant fails to meet the requirements of the "automatic standing" rule because, similar to the defendant in Williams, he was not placed in the position of having to claim ownership of contraband or admit to any criminal conduct to challenge the unlawful search of the registry. The search of the registry occurred prior to, and separate from, the search of the motel room. Prior to trial, therefore, the defendant could have moved for suppression of evidence derived from the search without risking self-incrimination. As a result, the "automatic standing" rule is not warranted in the present case.

Additionally, the defendant in the present case, unlike the defendant in Jorden, fails to meet the general requirements of the Fourth Amendment necessary to challenge the search. In Jorden, the defendant was registered to the room in which the search occurred. Jorden, 160 Wn.2d at 123. The record in the present case, however, established that Sean Rogers, rather than the defendant, was the guest registered to Room #25. RP3 11-12. The defendant cannot personally claim a justifiable, reasonable, or legitimate expectation of privacy in the motel guest registry because his personal information was not contained therein.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that the conviction be affirmed.

DATED: July 30, 2007.

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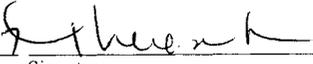
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STATE OF WASHINGTON
BY 

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.31.07 
Date Signature