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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. Appellant was unlawfully arrested based on a warrantless search that violated Wash. Const. art. 1, § 7 and the Fourth Amendment.
2. The trial court failed to instruct the jury that proximity alone is insufficient to prove constructive possession.
3. The State did not prove simple possession.
4. The Information and the to-convict instruction included the extraneous element of unlawful possession which the State failed to prove.
5. The jury fee exceeded the court's statutory authority.

B. Issues Pertaining to Assignments of Error

1. Did the Sheriff's Deputy on duty at the jail violate Wash. Const. art. 1, § 7 and the Fourth Amendment by routinely conducting gratuitous searches into the status of visitors' driver's licenses?
2. Did the evidence support the giving of a "mere proximity" instruction to supplement the instruction on constructive possession?
3. Did the State prove simple possession?
4. Did the to-convict instruction introduce the additional element that the alleged possession of a controlled substance was "unlawful"?
5. Was the evidence insufficient to prove the law-of-the-case element of unlawful possession?
6. Is a jury fee of \$1,604.53 authorized by statute?

III. STATEMENT OF THE CASE

Jennifer Joy Hathaway visited someone in the Port Angeles jail on the evening of July 16, 2008. RP 35.¹ Jefferson County Sheriff's Deputy Brian Anderson was on duty. Following standard jail procedures, Anderson performed routine investigations of all the jail visitors. He ran a check on Hathaway's driver's license and discovered it was suspended. RP 36-37.

When Hathaway left the jail after her visit, Anderson was waiting in the parking lot in his patrol car. RP 38. Hathaway got into a car and drove away, and Anderson followed. RP 39. Anderson pulled Hathaway over on Old Hadlock Road, less than a mile from the jail. RP 40.

Anderson again ran Hathaway's driver's license and confirmed that it was suspended. RP 41. Anderson arrested Hathaway. He handcuffed her and walked her over to his patrol car where he conducted a search incident to arrest. RP 42. Anderson did not say whether Hathaway's hands were cuffed behind or in front of her. While Anderson was bent over, searching Hathaway's leg down by her foot, he heard a sort of a "tink" sound. RP 43. Anderson thought this sound came from something hitting the ground. He then noticed a small plastic vial on the ground near Hathaway's right foot. RP 44.

¹ The transcribed proceedings are contained in a single volume, designated RP. The trial begins at RP 30. Sentencing starts at RP 132.

Hathaway was taken to the jail and booked. RP 48. She was charged by information and tried by jury on a single count of unlawful possession of a controlled substance, methamphetamine. CP 1-2; RP 32.

The court gave the following instructions that are pertinent to the issues on appeal:

Evidence may be direct or circumstantial. ... The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other. Instr. No. 4, CP 44.

Possession means having a substance in one's custody or control. ... Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. ... Instr. No. 7, CP 47.

To convict the defendant of the crime of possession of a controlled substance, each of the following elements must be proved beyond a reasonable doubt. (1) That ... the defendant unlawfully possessed a controlled substance. ... Instr. No. 9, CP 49.

The jury found Hathaway guilty. CP 51. She received a standard range sentence and legal financial obligations were imposed. CP 54, 56. Hathaway appeals her judgment and sentence. CP 60.

IV. ARGUMENT

1. ROUTINELY INVESTIGATING THE DRIVER'S LICENSE STATUS OF JAIL VISITORS VIOLATES THE PERSONAL PRIVACY PROTECTIONS OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT.

Const. art. 1, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art.1, § 7 provides greater protection to individual privacy interests than does the Fourth Amendment. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Article 1, section 7 protects against all warrantless searches and seizures, with no express limitations. *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). Specifically, Wash. Const. art 1, § 7 prohibits agents of the government from routinely invading the privacy of Washington citizens without probable cause. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988).

In *Mesiani*, our Supreme Court rejected the City's defense of sobriety checkpoints. Seattle alleged the state's interest in ensuring the legal operation of automobiles defeated any privacy interests. *Mesiani*, 110 Wn.2d at 456. In reversing, the Court held that individuals operating automobiles do not "lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation."

Mesiani, 110 Wn.2d at 457. Even where the government has a strong interest in regulation, the state must still consider the privacy rights of citizens and seek a reasonable balance. *Mesiani* at 459.

Article 1, section 7 differs from any provision in the federal constitution in that it explicitly protects the privacy rights of Washington citizens. *Mesiani*, at 457, citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In Washington, our privacy rights include the freedom from warrantless searches absent special circumstances. Warrantless searches are valid only if there is “authority of law.” *Id.*, citing *Stroud*, 106 Wn.2d at 148.

“Authority of law” has two components: (1) a warrant and (2) probable cause. *State v. Chenoweth*, 160 Wn.2d 454, 466, 158 P.3d 595 (2007). Circumstances may justify relaxing the warrant requirement, but only where probable cause is shown. *State v. Olivas*, 122 Wn.2d 73, 88, 856 P.2d 1076 (1993); *Carroll v. United States*, 267 U.S. 132, 155-56, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

Exceptions to the warrant requirement include consent, exigent circumstances, a search incident to a valid arrest, an inventory search, items in plain view, and the *Terry*² investigative stop. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). These exceptions are carefully

² *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

drawn and jealously guarded. *State v. Hendrickson*, 129 Wn.2d 61, 72, 71, 917 P.2d 563 (1996); *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). No recognized exception applies here and no conceivable probable cause exists for checking the status of a pedestrian's license to drive.

To survive constitutional scrutiny, a warrantless intrusion must be reasonable. *State v. McAlpin*, 36 Wn. App. 707, 716, 677 P.2d 185 (1984), citing *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). Reasonableness depends on the circumstances of each case, "balancing the gravity of the intrusion of one's personal security against the public's interest in law enforcement." *McAlpin*, 36 Wn. App. at 716. The absence of any basis for suspecting criminal activity tips the balance between the public interest in law enforcement and the right to privacy in favor of the latter. *State v. Hobart*, 94 Wn.2d 437, 444, 617 P.2d 429 (1980).

Assuming that effective jail administration requires visitors to identify themselves (to give inmates the opportunity to decline a visit), their driver's license status is simply not relevant. Such searches presumptively violate Wash. Const. art 1, § 7, because their purpose is to discover evidence of crimes and such searches are more intrusive and 'hostile' than other administrative searches. *Mesiani*, 110 Wn.2d at 458.

Moreover, even administrative searches violate the Fourth Amendment if they are undertaken without probable cause. *Id.*, citing *Camara v. Municipal Court*, 387 U.S. 523, 530, 87 S. Ct. 1727, 1731, 18 L. Ed. 2d 930 (1967).

Since jail visits do not include driving, no articulable government interest justifies this intrusion. Washington citizens do not abandon all reasonable expectation of privacy simply by entering an environment that is subject to government regulation, such as visiting someone they know in the City jail. Arguably, the State can justify asking visitors for identification, searching them for weapons and contraband, and videotaping and recording their interactions with their loved ones. No conceivable justification suggests itself, however, for inquiring into the status of a visitor's license to drive.

Subjecting those visiting loved ones in jail to a gratuitous investigation of the status of their driver's license violates the right not to be disturbed in one's private affairs guaranteed by article 1, section 7 and the fourth amendment to the United States Constitution. Accordingly, because Hathaway was subjected to warrantless seizure, arrest and incident search based on the violation of her privacy rights at the jail, the resulting evidence was inadmissible in any Washington court for any purpose. *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110-12;

Wong Sun v. United States, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

A warrantless government intrusion upon individual privacy in violation of the state and federal constitutions is a manifest error that can be raised for the first time on appeal. RAP 2.5(a)(3). In general, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). But “there is a narrow exception for constitutional questions that meet the criteria of “manifest error affecting a constitutional right.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988); *McFarland*, 127 Wn.2d at 333; RAP 2.5(a)(3). An error is of constitutional magnitude if it involves the lawfulness of a search and seizure under the Fourth Amendment. *State v. Busig*, 119 Wn. App. 381, 391, 81 P.3d 143 (2003).

In addition to identifying a constitutional error, the defendant must show how, in the context of the trial, the error actually affected her rights; it is this showing of actual prejudice that makes the error ‘manifest.’ *McFarland*, 127 Wn.2d at 333. The facts necessary to adjudicate the claimed error must be in the record on appeal; otherwise, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333.

The prejudice here is manifest. But for this search, Anderson would not have lain in wait for Hathaway outside the jail or subsequently seized her. Accordingly, her arrest was unlawful and any evidence obtained during the incident search was obtained in violation of Const. art. 1, § 7.

The record on appeal contains all the facts necessary for this Court to adjudicate this issue. The testimony shows that the Sheriff's department routinely investigates the driver's license status of every person visiting the Port Angeles jail without an iota of probable cause. The jail authorities were operating the equivalent of a sobriety checkpoint by routinely invading the privacy of innocent citizens visiting the jail. These privacy invasions are conducted without the slightest suspicion of illegal activity. Driver's license status cannot conceivably have the slightest effect on the government's legitimate interest in ensuring the safe operation of a jail.

Ms. Hathaway was subjected to such a search. Deputy Anderson followed Hathaway and stopped her based solely on information derived from a warrantless "checkpoint-style" search to which every visitor to the Port Angeles jail is routinely subjected. According to Anderson, routine jail protocol calls for routine warrantless searches that invariably include checking the status of visitors' driver's licenses. The record does not

show that Hathaway received notice of the search or that she consented to it. And probable cause was still required, even if Hathaway did consent.

The remedy is to reverse Hathaway's conviction and vacate the judgment and sentence.

Alternatively, if the Court deems the issue was not preserved for appeal, it should reverse based on ineffective assistance of counsel.

This court employs the familiar standard for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to determine (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. *McFarland*, 127 Wn.2d at 335.

Respect for the trial court compels us to assume the court would have correctly applied the law if given an opportunity to do so. Thus, a motion by Hathaway's counsel to suppress the vial of alleged methamphetamine likely would have succeeded. Likewise, Hathaway was clearly prejudiced. Hathaway would not have been convicted if counsel had moved to suppress the physical evidence. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *Hendrickson*, 129 Wn.2d at 80; *McFarland*, 127 Wn.2d at 336-37.

The Court should reverse the conviction.

2. THE COURT REFUSED TO GIVE A “MERE PROXIMITY” INSTRUCTION THAT WAS SUPPORTED BY THE EVIDENCE.

A claim that the jury instructions “relieved the State of its burden of proof” may be raised for the first time on appeal. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). This Court applies the de novo review standard to a trial court’s decision to give an instruction based on a ruling of law and an abuse of discretion standard to a decision based on a factual dispute. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). The decision not to give the proximity instruction here was one of law based on undisputed facts. Review is, therefore, de novo.

Generally, jury instructions are sufficient only if they allow both sides to argue their theory of the case. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). When read as a whole, the instructions must properly inform the trier of fact of the applicable law. *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). As a matter of due process, criminal defendants are entitled to have jury instructions that accommodate the defense theory of the case, so long as some evidence supports that theory. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). In evaluating whether the evidence supports a requested instruction, the trial court must interpret the evidence most strongly in the defendant’s favor. The judge does not weigh the proof,

because that is an exclusive function of the jury. *State v. Williams*, 93 Wn. App. 340, 348, 969 P.2d 106 (1998), *review denied*, 138 Wn.2d 1002 (1999). Failing to adequately instruct the jury on the applicable law is reversible error unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, Deputy Anderson testified that he heard a slight sound, possibly a “ping”, which he associated with his noticing a tiny plastic vial on the ground. Defense counsel argued that Anderson did not see Hathaway in actual possession of this vial and did not see her touch it or drop it. It just appeared. RP 114. Because the State did not allege actual possession, the court instructed the jury on constructive possession. Instr. 7, CP 47. But when defense counsel asked for the corollary instruction that “mere proximity” to a controlled substance is not sufficient to prove constructive possession, the court inexplicably refused. RP 80. This was error.

The only evidence of possession was a “ping” — that could have been a button or buckle touching the side of the patrol car — and the proximity of the vial.

The defense argued that the constructive possession instruction needed to be supplemented with an instruction that mere proximity was

not enough. RP 81-82. Without an instruction that mere proximity does not prove possession, the jury could have presumed Hathaway was guilty from the mere fact the vial was next to her foot. It was error to refuse this instruction, and reversal is required.

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE SIMPLE POSSESSION.

The evidence is sufficient to support a conviction if any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences to be drawn from it. *Thomas*, 150 Wn.2d at 874. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Here, viewed most favorably for the State, the evidence shows that a "tink" sound occurred while Anderson was searching Hathaway, and that a small plastic vial was found on the ground at the location of the search.

Given that Hathaway is entitled to the same presumption of innocence as is the Deputy (especially since she was stopped for driving with a suspended license, not a drug offense) this evidence is not sufficient to prove beyond a reasonable doubt that Hathaway dropped the vial. The evidence is equally consistent with either Anderson having dropped the vial — and even with a stranger having dropped it at some time in the past. In fact, since Anderson had just seen Hathaway’s hands and she was handcuffed, the scenario implicating her is the least likely.

A properly instructed jury could not reasonable have inferred from the evidence presented that Hathaway had anything to do with the vial Anderson found.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The Court should reverse Hathaway’s conviction and dismiss with prejudice.

4. THE INFORMATION AND THE TO-CONVICT INSTRUCTION INCLUDE THE EXTRANEOUS ELEMENT THAT POSSESSION OF THE VIAL WAS “UNLAWFUL”.

Fundamental due process requires the State to prove every element of the charged crime beyond a reasonable doubt.” *State v. Smith*, 155

Wn.2d 496, 502, 120 P.3d 559 (2005); *State v. Keend*, 140 Wn. App. 858, 870, 166 P.3d 1268 (2007). Even if the evidence supported a jury finding that Hathaway was in possession of the vial, the State failed to prove the possession was unlawful.

As a general rule, possession of a controlled substance is a strict liability crime, in the sense that the defendant has the burden to prove a claim the possession was unwitting, unintentional, or otherwise not unlawful. The controlled substances act requires proof only of possession. RCW 69.50.4013.³ However, an element need not be listed in the statute defining the crime to be considered essential. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992), citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991 (1983). Essential to the proof of any unlawful act are the implied elements of knowledge and intent. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). A culpable state of mind is an essential component of any unlawful act. *Utter*, 4 Wn. App. at 139.

Here, the Information and the to-convict instruction required the jury to find that Hathaway's possession of the methamphetamine vial was

³ It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. RCW 69.50.4013(1).

“unlawful.” When the judge inquired about objections to this instruction, the prosecutor responded unequivocally that the State did not object to including “unlawfully” in the instruction. RP 80-81. It was defense counsel who argued that “unlawfully” was extraneous. RP 73, 80.

This invokes the doctrine that “jury instructions not objected to become the law of the case.” *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). That is, the State must prove extraneous elements not objected to in the to-convict instruction. *Id.*, citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). A defendant may challenge the sufficiency of the evidence to prove the added element under the doctrine of the law of the case. *Id.*

Here, the State failed to prove the possession was knowing and intentional. Therefore, it did not prove the possession was “unlawful” .

5. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE LAW-OF-THE-CASE ELEMENT OF UNLAWFUL POSSESSION.

Sufficiency of the evidence is a question of constitutional magnitude that can be raised for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

Evidence is sufficient to support a conviction only if a rational fact finder, viewing the evidence in the light most favorable to the State, could

find the essential elements of the crime beyond a reasonable doubt.

Thomas, 150 Wn.2d at 874. A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it.

Thomas, 150 Wn.2d at 874. The State must present substantial evidence proving every fact that a rational fact finder, applying the reasonable doubt standard, would need in order to find the essential elements and convict.

Id. Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Guilt cannot be based upon guess, speculation, or conjecture. *Id.*

Insufficient evidence generally requires dismissal with prejudice. *Stanton*, 68 Wn. App. at 867. Specifically, the remedy for failure to prove an extraneous to-convict element is to reverse. *Hickman*, 135 Wn.2d at 103.

Here, the State had to prove the additional element that Hathaway possessed the vial of methamphetamine unlawfully. Conduct is unlawful only if it comprises two components — an actus reus and a mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which the act was performed; a culpable state of mind is an essential component of any unlawful act. *Utter*, 4 Wn. App. at 139.

Here, the extraneous element in both the Information and the to-convict instruction required the State to prove that Hathaway possessed the vial of meth unlawfully, i.e. knowingly and intentionally. But the State presented no evidence on this element. The sum total of the evidence was that a tiny vial was on the ground where Hathaway was stopped — in a neighborhood near the jail where methamphetamine was prevalent, and the arresting officer heard a slight “ping” just before he noticed the vial.

Accepting the State’s evidence as true and giving them the benefit of all logical inferences, this evidence does not provide a logical basis to find knowledge and intent. The evidence is equally consistent with (a) the vial having been dropped by an unknown person totally unrelated to Hathaway; (b) the vial having adhered to Hathaway’s clothing at the jail; (c) the vial having fallen from the clothing of Deputy Anderson.

Moreover, the circumstantial evidence does not support a finding that Hathaway knew about the vial and dropped it herself. Anderson surely would have noticed something in Hathaway’s hand when he handcuffed her; the handcuffs would have prevented her from removing a tiny object from her clothing; and Anderson would have been alert to any attempt to do so out of concern for officer safety.

The absence of any evidence proving the state of mind element defeats the conviction. The remedy is to reverse and dismiss.

6. THE JURY FEE EXCEEDED THE COURT'S STATUTORY AUTHORITY.

The court imposed a jury fee of \$1,604.53. CP 56; RP 133. The maximum allowed by statute is \$250.00.

The allowance and recovery of costs was unknown at common law and therefore is entirely statutory. *State v. Smits*, 152 Wn. App. 514, ___, 216 P.3d 1097, 1099 (2009). The legislature enacted RCW 10.01.160 in 1975. This statute allows the court to require an indigent defendant convicted of a felony to pay court costs. RCW 10.73.160(1). However, the costs are limited to “expenses specialy incurred” by the state in prosecuting the defendant or in administering special programs. RCW 10.01.160(2) (emphasis added). By the plain language of the statute, costs cannot include expenses inherent in providing a constitutionally guaranteed jury trial. RCW 10.01.160(2). The legislature does allow a limited statutory jury fee. RCW 36.18.016(b); 13B WAPRAC § 3612. That fee is currently two hundred fifty dollars for a jury of twelve. RCW 36.18.016(b).

The Court should remand to reduce the court costs to conform to statute.

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V. CONCLUSION

For the forgoing reasons, the Court should reverse Ms. Hathaway's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 18th day of May, 2010.



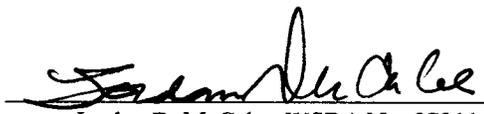
Jordan B. McCabe, WSBA No. 27211
Counsel for Jennifer J. Hathaway

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of the foregoing Appellant's Brief to:

Juelanne B. Dalzell, Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368-0920

Jennifer J. Hathaway
220 South Oak Street #1
Port Angeles, WA 98362



Date: May 18 2010
Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington