

No. 41403-1-II
Cowlitz Co. Cause No. 09-1-00796-6

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

STATE OF WASHINGTON,

Respondent,

v.

ADALBERTO JIMINEZ MACIAS,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. Where the trial court gave an inappropriate, but constitutionally sufficient, the conviction should not be reversed.
2. Trial counsel was not ineffective for failing to object to the reasonable doubt instruction.
3. The search warrant was based on probable cause and this court should defer to the magistrate's original finding.
4. The State presented sufficient evidence to prove beyond a reasonable doubt the charges alleged in Count VI and VII.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts and relies on the search warrant affidavit for the question of probable cause.

III. ARGUMENT

A. THE REASONABLE DOUBT INSTRUCTION WAS CONSTITUTIONALLY SUFFICIENT AND ANY ERROR FROM ITS USE WAS HARMLESS

1. THE APPELLANT WAIVED THIS ISSUE BY FAILING TO OBJECT TO THE JURY INSTRUCTION

The court's failure to give the WPIC 4.01 instruction was an error that was waived by the appellant's failure to object. RAP 2.5(a) precludes review of any claim of error which was not raised at the trial court level. A claim of error may be reviewed, even if waived, if it was a manifest error that affected a constitutional right. *Id.* However, there is no constitutional right affected by the claimed error in this case. The jury instruction at issue was found to be constitutionally sufficient and the Washington State Supreme court has already upheld convictions where

this specific instruction was used. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). This court should deny review on this claimed error.

2. THE JURY INSTRUCTION WAS CONSTITUTIONALLY APPROPRIATE AND ANY ERROR FROM ITS USE WAS HARMLESS

The Respondent acknowledges that the trial court erred in giving the reasonable doubt instruction, but such error was harmless. The Supreme Court ordered trial courts to use only WPIC 4.01 in *State v. Bennett*, 161 Wn.2d at 318, 165 P.3d 1241. This court has held that a violation of the *Bennett* directive is not structural error and is subject to a harmless error analysis. *State v. Lundy*, 162 Wn.App. 865, 872, 256 P.3d 466 (2011). Such an error is harmless if the court is satisfied “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010), quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The instruction at issue in this case was found to be constitutionally sufficient. *Bennett*, 161 Wn.2d at 318, 165 P.3d 1241. The State was not relieved of its burden to prove every element beyond a reasonable doubt. *Id.* The Washington State Supreme Court upheld *Bennett*'s conviction based on this same instruction. *Id.* Indeed, as the *Lundy* court noted, “even misleading instructions do not require reversal unless the complaining party can show prejudice.” 162 Wn.App. at 872, 165 P.3d 1241, citing *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669

(2010). This instruction was not misleading and the appellant simply cannot show there was prejudice. This court should be satisfied that the result would have been the same, beyond a reasonable doubt, absent the error.

3. THIS COURT SHOULD APPLY THE *LUNDY* HARMLESS ERROR ANALYSIS

Lundy is directly on point and this court should uphold the conviction because a harmless error analysis is appropriate. The error in this case is not structural. The effect of the error is easy to quantify because it is zero. The instruction is constitutional appropriate. There is nothing in the record to suggest that the trial court, the State, or the defense were involved in some sort of nefarious plot to subvert justice by concocting new instructions. The absence of any discussion about the issue suggests that it most likely a simply mistake. Indeed, the fact that the instruction is exactly the same instruction as in *Bennett*, suggests that this was simply a case where an old jury instruction was mistakenly used, rather than experimentation on the part of the State or the court. In either event, because the Supreme Court has upheld a conviction where this specific instruction was used, there is simply no way the error was structural or affected a constitutional right. The court should apply a harmless error analysis.

4. DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT, BUT THERE WAS NO PREJUDICE

The respondent concedes that the failure to object to this instruction was deficient performance, but there was no prejudice to the defendant from the deficiency. As a threshold matter, this issue is only relevant if the court finds that the appellant waived the issue by failing to object to the instruction at trial. To show ineffective assistance of counsel, the appellant must be able to show prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, the appellant must show that “but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different.” *In re Detention of Moore*, 167 Wn.2d 113, 122, 21 P.3d 1015 (2009), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The appellant can show no prejudice and thus cannot show his trial counsel was constitutionally ineffective.

The jury instruction at issue here was found to be constitutionally sound. *Bennett*, 161 Wn.2d at 318, 165 P.3d 1241. The defense was able to argue their theory of the case and made several different arguments about the reasonable doubt burden. RP 471-474. If the content of these instructions were sufficient to change the outcome of a trial, the Supreme Court would have vacated *Bennett*'s conviction, but instead they found that the instruction, while far from ideal, was sufficient, held the State to its burden, and did not require a new trial. *Id.* Given those findings, there is simply no way to show actual prejudice. The court should affirm the appellant's conviction.

**B. THERE WAS PROBABLE CAUSE TO SHOW THAT
DRUG-RELATED EVIDENCE WOULD BE FOUND IN
APARTMENT J4**

The search warrant served on 3903 Ocean Beach Highway, #J4 was lawful and the magistrate did not abuse its discretion in issuing that warrant. The search warrant was the culmination of a six-month investigation of a local drug trafficking organization (“DTO”) involving at least seven identified individuals. The investigation, lead by the Cowlitz Wahkiakum Narcotics Task Force (“CWNTF”), involved agencies from local law enforcement, the Drug Enforcement Administration (“DEA”), Immigrations and Customs Enforcement (“ICE”), and the Washington Department of Corrections (“DOC”). The search warrant was lawfully issued and the evidence should not be suppressed.

The general requirements for search warrants are well settled. A search warrant may only issue on a determination of probable cause. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007). The affidavit must set forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). The magistrate is entitled to make reasonable inferences from the facts and circumstances as set out in the affidavit. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). The magistrate’s decision to issue a warrant is reviewed for abuse of discretion and “great deference” is given to that original decision.

Vickers, 148 Wn.2d at 108, 59 P.3d 58. Affidavits for search warrants are evaluated using common sense and are not subject to a hyper-technical analysis. *Id.* All doubts are resolved in favor of the warrant. *Maddox*, 152 Wn.2d at 509, 98 P.3d 1199. Review is based on the four-corners of the warrant.

The search warrant in this case was specifically written to target a Drug Trafficking Organization (“DTO”). A DTO is an organization that engages in the importation, production, transportation, distribution, trafficking, and money laundering activities in relation to narcotics. A DTO involves a distinct hierarchy, infrastructure, and is generally a continuing enterprise. The evidence sought when investigating such an organization is fundamentally different than the evidence sought when investigating a lone “drug dealer.” The evidence sought is of a large-scale, ongoing criminal organization, “not evidence relating to a completed criminal act.” *United States v. Foster*, 711 F.2d 871, 878 (9th Cir. 1983), *United States v. Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert denied*, 451 U.S. 975 (1981).

The appellant attacks the search warrant on two general points. First, the appellant contends that there was no probable cause because there was no nexus established between the residence and the drug-related activity, or that such nexus was established only with innocuous facts. Second, the appellant contends that information contained in the affidavit was too stale.

1. There was a sufficient nexus between the drug-related activity and J4

There was a nexus between the drug-related activity detailed in the search warrant and apartment J4; the search warrant was based in probable cause. Search warrants must show a nexus between the criminal activity and the item to be seized, and also a nexus with the item and the search target. *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999).

Probable cause for that nexus requires only a showing of probable criminal activity, not a prima facie showing of criminal activity. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). As in *Thein*, it is the relationship of the evidence sought to the target location that is at issue in this case. There is a sufficient nexus between the evidence sought and the search target.

Thein is the bellwether case when discussing the nexus issue. The court found that the “facts” used to justify the warrant in *Thein* amounted to “broad generalizations that do not alone establish probable cause.” *Id.* at 149, 977 P.2d 582. The court ultimately concluded that the officer’s general statements regarding the “common habits of drug dealers were not alone sufficient to establish probable cause.” *Id.* at 151, 977 P.2d 582. As the court observed in *State v. Cowin*, apart from general statements about drug dealer habits in *Thein*, there was no incriminating evidence linking drug activity to the home that was searched. 116 Wn.App. 752, 758-59, 67 P.3d 1108 (2003), citing *State v. Thein*, 138 Wn.2d at 150, 977

P.2d 582. However, there is substantially more in this case than was presented to the issuing judge in *Thein*.

The affidavit in no way relies on the sort of blanket assertions the court analyzed with disdain in *Thein*. CI1 met appellant while doing one of three controlled buys from Ricardo Carbaja-Santiago. CI1 then conducted three controlled buys from Jimenez-Macias. Jimenez-Macias was seen J4 with a key on July 8th, 2009. His Chevy Tahoe was seen parked at the residence frequently. Another vehicle, a Silver Honda that the appellant drove during one of the controlled buys, was frequently seen at the address and recently registered to Luis Ramirez, who is also seen entering 3903 Ocean Beach Highway #J4 with a key on the same day. Ramirez is seen by a different CI (CI2) purchasing methamphetamine from Juan Angel Orozco a week before. That same CI reports that they observed four ounces of cocaine at the residence with 48 hours of July 2nd, 2009. CI1 also identifies Ramirez as a passenger in the vehicle Jimenez-Macias was using during the final controlled buy.

CI2 identifies Jimenez-Macias as a dealer that provides drugs to a number of other drug dealers. Specifically, he is identified as the source of supply of Alex Mejia-Rojas. The CWNTF references eight controlled buys from Rojas in the search warrant. Both CI1 and CI2 independently identify a third person, Ignacio Tovar-Arechiga, as the source of supply for Jimenez-Macias. CI2 told the CWNTF about a planned purchase of 1/2 a kilogram of cocaine by Jimenez-Macias from Tovar-Arechiga that

was to be delivered by Carbajal-Santiago.

Putting the pieces together, the magistrate can reasonably infer that Jimenez-Macias is engaged in an on-going criminal enterprise dealing illicit drugs. Different CIs identify him and his network. He is involved in a controlled buy with a third individual (Ricardo), named as a source of supply for other dealers, and referenced as a customer for yet another dealer. Add to that the fact that a substantial quantity of cocaine (4 ounces) was observed by a CI in the residence and that another individual believed to be living in the residence was seen purchasing drugs from yet another dealer and that same person, Ramirez, had then registered and was driving a vehicle previously driven by Jimenez-Macias during controlled buys. The appellant frequented the residence, had a key to the residence, cocaine was seen in the residence, at least one other drug dealer in the network was known to have a key to the residence, and several cars that had been used by drug dealers during controlled buy operations were seen at the residence. Putting the pieces together, a nexus appears.

This case is very similar to *Maddox*, which dealt with a situation where the warrant authorized a search for evidence of methamphetamine dealing, as well as methamphetamine. The court upheld the search warrant in that case because even though a reasonable person could infer that there were no drugs in the house, the facts did suggest that other evidence of drug trafficking would still be found. *Maddox*, 152 Wn.2d at 512, 98 P.3d 1199. Two crucial points emerge from the *Maddox* analysis.

First, even though there were no specific facts alleging the existence of scales, baggies, or other paraphernalia, the magistrate may infer the existence of such evidence from the facts and circumstances of the affidavit. *Id.* Second, the experience and expertise of the officer can be considered in determining probable cause. *Id.* Indeed, in cases like these, where complex drug trafficking operations are involved, the training and experience of the officer is crucial to helping the magistrate understand the specific facts in the affidavit.

The key component of the ruling as it applies to this case is that even if there is no likelihood of drugs being found, probable cause still existed as to the paraphernalia and currency as authorized by the search warrant. *Id.* at 513, 98 P.3d 1199. So, even if this court is inclined to find that there is no nexus between the presence of narcotics and 3903 Ocean Beach Highway #J4 due to the possible staleness of the information about the presence of drugs, this court can and should still find that there was a nexus for finding evidence of paraphernalia, currency, and the other byproducts of an on-going drug-dealing enterprise. The magistrate was able to infer from the facts these items were likely to be present, even if the drug inventory was not.

The appellant relies heavily on *State v. Goble*, but this reliance is misplaced. 88 Wn.App. 503, 513, 945 P.2d 263 (1997). *Goble* dealt with an anticipatory warrant based on the expectation that the suspect in that case would ultimately take a package of drugs to the target location. *Id.*

at 503, 945 P.2d 263. The court based its decision on the lack of information to suggest that the drugs would ultimately end up in the target location. *Id.* at 513, 945 P.2d 263. This is fundamentally different than the search warrant at issue here, which was concerned with both the presence of narcotics and the presence of evidence consistent with narcotics trafficking. The warrant in *Goble* was speculative and so turned on what the suspect was likely to do, while the search warrant in this case was based on what the suspects had done with the target residence.

Nor does the innocuous nature of some of the activities affect the validity of the warrant. There can certainly be more to innocuous activities than meets the eye. Courts have long recognized that “special training and experience may enable [law enforcement] to reasonably suspect that criminal activity is afoot from observing what might appear innocuous to the uninitiated.” *United States v. Landis*, 726 F.2d 540, 543 (9th Cir. 1984) quoting *United States v. Woods*, 720 F.2d 1022, 1027 (9th Cir. 1983). While the appearance of much of this activity could seem innocuous, such as cars belonging to known drug dealers outside of 3903 Ocean Beach #J4, the magistrate was able to rely on the training and experience of the affiant to raise such behavior to probable cause. The affidavit goes in to significant detail about the various aspects of DTOs and this DTO in particular. The magistrate was entitled to rely on such behavior to establish a nexus between the evidence sought and the target location, in this case 3903 Ocean Beach Highway #J4. All of this, of

course, is aside from the fact that a confidential informant observed cocaine in the residence, giving concrete truth to the criminal suspicions behind the “innocuous activity.”

There was sufficient evidence in this case to provide a nexus between the items to be seized and the property to be searched. As noted previously, the court evaluates the magistrate’s issuance of the warrant in a common sense manner, avoiding a hyper-technical analysis. Considerable deference is given to the initial finding of probable cause and there has not been enough presented for the court to disturb that initial finding. A reasonable analysis of the affidavit, along with any number of reasonable inferences which could be drawn from the affidavit, provided the magistrate with an ample basis to find probable cause for the issuance of the warrant and a nexus between the property to be searched and the evidence sought. It was not an abuse of discretion for the magistrate to find that the warrant was supported by probable cause and that a sufficient nexus existed between the evidence to be sought and the residence at 3903 Ocean Beach Highway #J4. The magistrate’s determination should not be disturbed.

2. The information contained in the warrant regarding the cocaine observed at the residence was not stale

On-going narcotics investigations present a fundamentally different analysis in terms of staleness. The evidence sought was largely for evidence of the enterprise. As mentioned in the discussion of DTOs, it is expected that drugs move from one individual to another within the

organization. The logical inference is that evidence of such movement, in the form of paraphernalia, documents, photos, or ledgers, would still be around long after the drugs have departed. Even if the court finds that the fact that the observation of drugs by CI2 was too remote in the past to suggest that drugs would be present at the target location, the lack of drugs at the target location does not negate the probable cause that other evidence of drug trafficking activity can be found. *Maddox*, 152 Wn.2d. at 513, 98 P.3d 1199.

The test for staleness of information in a search warrant affidavit is one of common sense. *State v. Petty*, 48 Wn.App. 615, 740 P.2d 879 (1987), citing *State v. Riley*, 34 Wn.App. 529, 534, 663 P.2d 145 (1983). The amount of time between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances, including the nature and scope of the suspected criminal activity. *State v. Petty*, 48 Wn.App. at 621, 740 P.2d 879, citing *State v. Higby*, 26 Wn.App. 457, 460, 613 P.2d 1192 (1980). The “mere lapse of substantial amounts of time is not controlling in a question of staleness.” *United States v. Pitts*, 6 F.3d 1366, 1369, (9th cir. 1993) quoting *United States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988), cert denied, 488 U.S. 927 (1988). Moreover, a “magistrate is entitled to draw reasonable inferences from the facts and circumstances set forth in the affidavit.” *State v. Petty*, 48 Wn.App. at 622, 740 P.2d 879, citing *State v. Chasengou*, 43 Wn.App. 379, 385, 717 P.2d 288 (1986).

The continuing nature of drug trafficking organizations allows for the search for evidence of trafficking, in addition to drugs, which also affects the timeline. *United States v. Foster*, 711 F.2d 871, 879 (9th Cir. 1983). Because of the ongoing nature of drug trafficking enterprises, courts have relaxed staleness requirements. *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (“with respect to drug trafficking, probable cause may continue for weeks, if not months, of the last reported instance of suspect activity.”)(quoting *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986)), *United States v. Foster*, 711 F.2d 871, 878 (9th Cir. 1983) (heroin sale linking the accused three months before warrant execution acceptable), *United States v. Landis*, 726 F.2d 540, 542 (9th Cir), *cert denied*, 467 U.S. 1230 (1984). *Petty*, for instance, involved a 2 week lapse between the observation of the informant and the request for a warrant. 48 Wn.App. at 621, 740 P.2d 879. While the court noted that 2 weeks was too long for the sale of small amounts of marijuana, it is sufficient where the informant observes an “extensive growing operation.” *Id.* at 622, 740 P.2d 879, quoting *State v. Smith*, 39 Wn.App. 642, 651, 694 P.2d 660 (1984). Ostensibly, this is because evidence of a grow operation is much less likely to evaporate quickly, or because drug stock is likely to return quickly.

Similarly, when dealing with an established DTO, evidence of the ongoing enterprise is still likely to be found. As in this case, CI2 told the affiant that Jimenez-Macias was a mid-level methamphetamine dealer,

sold to other verified drug dealers, and was observed by law enforcement at a house they knew to be involved with one of those same drug dealers. It is reasonable to conclude that J4 was involved in the continuing enterprise. In particular, appellant was known to be selling to another dealer who was the subject of **eight** controlled buy operations of the task force, all of which are included in the affidavit. It was reasonable for the magistrate to conclude that an on-going enterprise existed.

Pitts is an interesting example where the court noted, *supra*, that probable cause may last for weeks or even months when the subject involves DTOs. The affidavit in question in that case provided that the suspect had been involved in a crack sale in May of 1991, that he was more than “a one-time drug seller,” and a regular supplier for a known drug dealer. *Pitts*, 6 F.3d at 1370 The warrant was not served until 121 days later. *Id.* at 1369. The court found that on those facts, there was probable cause to believe that there would be paraphernalia at the residence and the information was not considered stale. *Id.* at 1370. This presents a **very** similar situation to the case at the bar, where a CI had identified Jimenez-Macias as a dealer that sells to other dealers, a number of controlled buys were conducted with Jimenez-Macias and individuals that CIs said were supplied by Jimenez-Macias, the CI observed a significant amount of cocaine inside the residence, and detectives observed Jimenez-Macias, as well as Luis Ramirez, another individual that was observed engaging in drug transactions, entering the apartment with a

key. Where the delay is three weeks, it is entirely likely to be able to find evidence of the on-going enterprise within the residence, even if actual narcotics would not necessarily be present.

Should the court find CI2's observation of drugs at 3903 Ocean Beach Highway #J4 was stale, the warrant still has life. Even where the informant's tip was stale standing alone, it may still provide probable cause if it is confirmed by other more recent information. *State v. Petty*, 48 Wn.App. at 621, 740 P.2d 879, citing *State v. Hashman*, 46 Wn.App. 211, 217, 729 P.2d 651 (1986). CWNTF detectives observed the vehicles belonging to Jimenez-Macias and Ramirez at the residence frequently after the initial observation of the drugs. These observations would support an inference by the magistrate that the narcotics trafficking activity continued, even if the initial observation of narcotics had grown stale.

C. THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND THE APPELLANT GUILTY ON COUNTS VI AND VII

There was sufficient evidence of constructive possession for the jury to find the appellant guilty of Counts VI and VII. The test for sufficiency of the evidence is whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. George*, 146 Wn.App. 906, 919, 193 P.2d 693 (2008); citing *State v.*

Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). As this court noted in *State v. Summers*, “in determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” 107 Wn.App. 373, 28 P.3d 780 (2002). The question becomes, drawing all rational inferences in favor of the State and against the defendant, whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt and whether such a finding would be supported by substantial evidence. The answer is yes.

A rational trier of fact could find the appellant constructively possessed the narcotics found in bedroom #1 based on the significant number of personal effects that belonged either to the appellant or his wife. Specifically, detectives found, in a dresser in bedroom #1, the appellant’s social security card, a phone bill in his name, a title to a vehicle he had used on a controlled buy (also in his name), a necklace belonging to his wife, a video game belonging to his daughter, and clothing belonging to his children. RP 132-40, 167-70, 216-18, 410-13; Exhibits 20, 21, 25, 27. Detectives had also observed him enter the apartment with a key on a previous occasion, which a rational trier of fact could take as evidence of the appellant’s apparent dominion over the apartment. The numerous personal effects found in bedroom #1 suggest that the appellant had dominion and control of that room. Moreover, the evidence in this case consisted of significantly more than an old receipt

and a traffic ticket, the evidence contemplated in *State v. Knapstad*. 107 Wn.2d 346, 729 P.2d 48 (1986).

The evidence found during the search warrant execution at Apartment J4 was sufficient to show dominion and control over the narcotics. The appellant fails to discuss the most important piece of evidence, which were the wire transfers admitted as exhibits 16A, 16B, 16C. RP 170. Exhibits 16A and 16B were both in the appellant's name, but listed his address as 221 Carolina Street, Longview, Washington. RP 170. They were found in a linen closet in the hallway at Apartment J4. RP 170. These receipts are a very important piece of a puzzle that, once assembled, shows dominion and control over the residence and bedroom 1 in particular.

It is certainly possible that each piece of evidence represents innocuous behavior. The international wire receipts listing a third address for the appellant showing that he sent money to Mexico could certainly have been left behind after some visit, and the money sent to Mexico does not necessarily represent profits from an on-going drug trafficking enterprise. The fact that the appellant was seen entering the apartment with a key could have a similarly innocent explanation. It is certainly possible that the appellant's wife's necklace was there because someone had stolen it, or that the appellant's child's clothing and video game were also stolen, or accidentally left at the residence and the stored in the same bedroom as a ½ kilogram of cocaine. It's possible that the cable bill had

been left there, or even stolen by the occupants of apartment J4 to use in an identity theft scheme. Putting all of those pieces of evidence together yields a much clearer picture; a picture of an on-going drug trafficking organization with ties to Mexico.

It is irrelevant that there are many innocuous explanations for the evidence. The question is whether any rational trier of fact, viewing all of the facts and possible inferences in the light most favorable to the State, could reasonably have found the appellant guilty. The answer is; yes, a rational trier of fact could easily infer based on the presence of personal possessions, the detectives observations, and wire transfers, that the appellant had dominion and control over the narcotics found in that room. The State met its burden and the verdict should not be disturbed.

IV. CONCLUSION

The appellant waived the ability to challenge the *Castle* instruction by failing to object at trial. Further, even though the trial court's use of the *Castle* instruction was inappropriate, there was no harm. The instruction has been found to be constitutionally sufficient, so while its use was regrettable, there was no due process violation and it accurately stated the law. There was no harm from its use and the court should not reverse the conviction.

Trial counsel for the appellant was deficient in allowing the use of the *Castle* instruction, but there was no prejudice that resulted. The appellant met the heavy burden of *Strickland* in showing prejudice from

the use of the *Castle* instruction. In fact, specific prejudice is almost impossible to find where the error was from the use of a constitutionally sound jury instruction that did not relieve the State of its evidentiary burden and the defense was able to adequately argue its theory of the case. The likely outcome of the trial was not affected and the court should not reverse the conviction.

There was probable cause to search Apartment J4. There was a specific nexus to J4 based on the observation of probable criminal activity and the observation of cocaine several weeks before execution of the warrant. This observation was not stale because the purpose of the search warrant was to seize items that showed the on-going criminal enterprise and illustrating the network of dealers and sub-dealers, including documents, paraphernalia, and other records. These pieces of evidence would likely remain at the house, even if the narcotics had been sold. There was probable cause to believe that the evidence sought would be found.

Finally, there was sufficient evidence for a rational trier of fact to find the appellant guilty of possession with intent to distribute and simple possession in counts VI and VII. There was a considerable amount of personal property, including property belonging to the appellant's family, as well as international wire receipts showing that he had shipped money to Mexico. The appellant had also been observed entering the residence with a key. All of the evidence, taken together, would permit a rational

trier of fact to find the appellant had dominion and control over the premises, and thus constructive possession over the narcotics. The jury's verdict should not be reversed.

Respectfully submitted this 29th day of November, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By:

A handwritten signature in black ink, appearing to read 'D. Phelan', is written over a horizontal line. The signature is stylized and extends to the right of the line.

DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX

Rules Of Appellate Procedure, RAP 2.5

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court

even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

WPIC 4.01 Burden of Proof—Presumption of Innocence—Reasonable Doubt

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

COWLITZ COUNTY PROSECUTOR

November 30, 2011 - 10:00 AM

Transmittal Letter

Document Uploaded: 414031-Respondent's Brief.pdf

Case Name: State of Washington vs. Adalberto Jiminez Macias

Court of Appeals Case Number: 41403-1

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

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