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Court of Appeals
Division III
State of Washington

NO. 322157

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

RESPONDENT,

V.

ROBERT GENE WATTS

APPELLANT.

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# STATE'S MOTION ON THE MERITS

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## Table of Contents


1. IDENTITY OF MOVING PARTY 1

2. RELIEF SOUGHT 1

3. ADDITIONAL FACTS RELEVANT TO MOTION 1

4. GROUNDS FOR RELIEF AND ARGUMENT 4

   A. Appellant has shown no authority to contest sufficiency of a probable cause statement filed after a warrantless arrest. 4

   B. There was no objection to, nor any error, admitting evidence at trial 7

   C. The defendant's conviction was supported by substantial evidence and was governed by well settled law 11

   D. The Appellant has shown no error, and therefore no cumulative error 13

5. CONCLUSION 13

## Table of Authorities


Cases

*State v. Ames*,
89 Wn. App. 702, 950 P.2d 514 (1998) ..... 9

State v. Bebb,
44 Wn. App. 803, 723 P.2d 512 (1986) ..... 8

*State v. Burkins*,
94 Wn. App. 677, 973 P.2d 15 (1999) ..... 8, 9

*State v. Busig*,
119 Wn. App. 381, 81 P.3d 143 (2003) ..... 5, 6

*State v. Green*,
94 Wn.2d 216, 616 P.2d 628 (1980) ..... 12

State v. Hagler,
74 Wn. App. 232, 872 P.2d 85 (1994) ..... 12

State v. Jones,
26 Wn. App. 551, 614 P.2d 190 (1980) ..... 9

State v. Pirtle,
127 Wn.2d 628, 904 P.2d 245 (1995) ..... 7

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) ..... 7

State v. Romero,
113 Wn. App. 779, 54 P.3d 1255 (2002) ..... 12

*State v. Salinas*,
119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 11, 12

State v. Theroff,
25 Wn. App. 590, 608 P.2d 1254 (1980) ..... 12

State v. Thompson,
13 Wn. App. 526, 536 P.2d 683 (1975) ..... 5

Rules

CRR 2.2(a)(2) and (c) ..... 6
CRR 2.2(b) ..... 6
CRR 3.5 ..... 3
ER 401 ..... 7, 8, 9
ER 403 ..... 10
ER 404(b) ..... 10
RAP 18.14(e) ..... 4

Other Authorities

5 Wash. Prac., Evidence Law and Practice § 401.4, at 218 ..... 8
5 Wash. Prac., Evidence Law and Practice § 401.4, at 218-20 ..... 8
5 Wash. Prac., Evidence Law and Practice § 403.1 ..... 10
5 Wash. Prac., Evidence Law and Practice § 403.2 ..... 11
5 Wash. Prac., Evidence Law and Practice § 403.3 ..... 11

## 1. IDENTITY OF MOVING PARTY

The moving party is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

## 2. RELIEF SOUGHT

The State of Washington moves the Washington State Court of Appeals, Division III to affirm the decision of the jury finding that the defendant was guilty of delivery of a controlled substance.

The State of Washington also moves for an award of costs and/or recoupment of public expenditures associated with this appeal, pursuant to RAP 14.

## 3. ADDITIONAL FACTS RELEVANT TO MOTION

The defendant was charged by information with delivery of a controlled substance, methamphetamine, on or about January 4, 2013. *CP 66-68.* The information alleged the defendant acted as a principal or accomplice. *Id.* The information also alleged the violation was committed within 1000 feet of a school bus stop. *Id.*

The charges were the result of an investigation by the North Central Washington Narcotics Task Force (hereinafter "Task Force"). The Task Force utilized a confidential informant named Lyle Long. *RP 53.* The Task Force utilized Mr. Long to begin purchasing controlled substances from a co-defendant named Lisa Mumm. *RP 57-58.* The Task Force investigation was part of a lager OCDEFT case. *RP 59.*

The first transaction on Dec. 7, 2012, occurred at a house at 95 Old Riverside Highway. The house was owned by the mother of the defendant Robert Watts, and was occupied by the defendant, his girlfriend Lisa Mumm, and a roommate Melissa Starzyk. *RP 60-61, 85, 215, 293, 331.* On Dec. 7, the defendant was at the residence when the co-defendant Mumm delivered methamphetamine to Mr. Long. *RP 215.* Ms. Mumm had obtained the drugs from "Chino" who was identified as Christian Gonzales. *RP 61, 62, 92-95, 108-113, 162-163, 215-219.*

On January 4, 2013, the defendant and co-defendant Mumm met with Gonzales to obtain drugs that were delivered to Mr. Long. The transaction began at the defendant's house at 95 Old Riverside and was ultimately completed in the parking area of Gene's Harvest Foods. *RP 62-70, 115-122, 163-172, 193-196, 202-203, 221-224.* The defendant, using his vehicle, drove the co-defendant Mumm to the location to meet with Gonzales and then to meet with the informant Long. *RP 76, 95-97, 115-122, 163-172, 208-209, 221-225, 232.* The defendant also passed the drugs from co-defendant Mumm to the informant. *RP 225.*

On February 1, 2013, another transaction was arranged, in which the co-defendant Mumm and the defendant's roommate Ms. Starzyk, utilized the defendant's vehicle to complete the delivery to Mr. Long. *RP 70-73, 98-100, 140-146, 172-174, 226-229, 297-298.* Following the transaction, Mr. Long, was found in possession of $20 of Task Force funds, and was arrested for theft. *RP 146-147, 230.*

On February 4, 2013, Task Force Commander Steve Brown met directly with the defendant and co-defendant Mumm at the defendant's house and informed the defendant of the evidence they had about his direct involvement in the January 4th delivery. The defendant agreed to sign a contract to act as an informant for the Task Force in lieu of being charged with the delivery. *RP 75-76, 100-103, 105, 147-148.* The defendant and co-defendant revealed that they knew that Mr. Long was the informant who had purchased drugs from them. *RP 77-78.*

Detectives Thomas and Bowling met with the defendant and co-defendant Mumm on February 6, 2013. During that meeting the defendant provided information about Mr. Gonzales (Chino), and other individuals the defendant believed he could buy drugs from. *RP 148-150, 178-179, 182-183, 198-199.* In another meeting with Task Force detectives on February 7, the defendant again identified people he could by drugs from. *RP 152,154.*

The defendant did not fulfill his contact, but then re-contacted the Task Force in August wanting to "make a deal" RP 79-81, 200-201. The defendant also admitted at a seizure hearing that he had driven his vehicle to Gene's at the time of the January 4th delivery, with co-defendant Mumm and they had contact with the informant Lyle Long. *RP 82-83.*[1]

The defendant stipulated to the admissibility of his statements to law enforcement and waived a CrR 3.5 hearing. *RP 5; CP 123.*

[1] At trial, the defendant also admitted driving Ms. Mumm to Gene's and a meeting with the informant, but claimed this time they were only there to buy cat food for his mother. RP 339-343.

The defendant and co-defendant Mumm had no reportable income at or around the time of the drug transactions. *RP 258-260, 261-262.* During that time drug dealing was routinely occurring at, or originating from, the defendant's house. RP 294-296. The defendant would often drive co-defendant Mumm to facilitate the drug deals. *RP 301-302.*

After the presentation of evidence and closing argument, the defendant was convicted of delivery of a controlled substance. The jury also answered the special interrogatory in the affirmative that the delivery occurred within 1000 feet of a school bus stop. *RP 441.*

## 4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 18.14(e) states as follows:

> (1) Motion to affirm. A Motion on the Merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly was in the discretion of the trial court or administrative agency.

### A. **Appellant has shown no authority to contest sufficiency of a probable cause statement filed after a warrantless arrest.**

Appellant argues he can raise a challenge to the sufficiency of the probable cause statement filed after a warrantless arrest for the first time on appeal. Appellant provides no authority for this proposition, but instead relies upon case law pertaining to challenging affidavits for the issuance of a search

warrant. Accordingly, Appellant cites only to State v. Thompson, 13 Wn. App. 526, 536 P.2d 683 (1975); a case that does not support his assertion.

*Thomson* involved a challenge to an affidavit supporting a search warrant. The defendant in Thompson, 13 Wn. App. 526 moved the trial court to suppress the evidence from the search warrant on the grounds of insufficiency of the affidavit upon which the search warrant was based. The defendant's motion was denied and the defendant then raised the issue on direct appeal after his conviction. Thompson, 13 Wn. App. at 527.

The present case does not involve a challenge to an affidavit for probable cause to issue a warrant. For argument sake, even if it did it would not be reviewable for the first time on appeal.

Generally issues raised for the first time on appeal are not subject to review. *E.g.,* State v. McFarland, 127 Wn.2d 322, 332, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995), . An exception to the general rule exists for claims of manifest error affecting a constitutional right. McFarland, 899 P.2d 1251. The asserted error must be of true constitutional magnitude and must actually prejudice the defendant. Id. For example, where the affidavit to support a search warrant was not discussed or examined at a suppression hearing, there is no determination by the trial court to review; and therefore there is no record of error, and no requisite basis to find prejudice. *See e.g. State v. Busig*, 119 Wn. App. 381, 390-91, 81 P.3d 143, 148 (2003) Where an affidavit for a search warrant is not challenged in the trial court, there is no indication whether the trial court would have granted a motion to suppress, and therefore the defendant

cannot show actual prejudice. Such a claimed error is not manifest, and the issue is not reviewable on appeal. See Busig, 119 Wn. App. at 390-91.

More importantly a probable cause statement filed in support of a defendant's warrantless arrest is *only* material to setting bail and/or conditions of release on the defendant. Such a statement or finding of probable cause after a warrantless arrest has no impact on either the admission or the exclusion of any evidence at trial.

If a defendant is arrested without an arrest warrant, CrR 3.2.1 indicates a finding of probable cause is necessary to continue the defendant's detention or set conditions of release. See CrR 3.2.1(a), (b), (d). Similarly, to issue an arrest warrant, the court must find probable cause to believe the defendant committed the crime(s) charged. See CRR 2.2(a)(2) and (c). However, no finding of probable cause is even necessary for the court to issue a summons; and a defendant is not subject to conditions of release if he or she has been served with a summons and the only obligation is to appear in court at a future date. See CrR 2.2(b) and CrR 3.2.1 (d)(1).

In the present case, there is no affidavit in support of a search warrant in question, nor is there an affidavit in support of an arrest warrant in question. Unlike a search warrant or arrest warrant, the act of a warrantless arrest does not depend on any action or review by a magistrate. Only after such an arrest occurs does the court consider probable cause for the purpose of setting bail or other conditions of release, and not for the purpose of deciding issues of admissibility or suppression of evidence.

The Appellant has provided no authority to challenge a declaration of probable cause submitted after a warrantless arrest. Even if such authority existed, the Appellant could not raise if for the first time on appeal.

The issue raised for the first time on appeal is clearly controlled by settled law and the Respondent's motion on the merits should be granted.

### B. There was no objection to, nor any error, admitting evidence at trial

Appellant claims the trial court committed error by admitting evidence of the prior drug transaction committed at the defendant's home. However, the Appellant points to no objection to the admissibility of the information at trial. Therefore, the claim now raised for the first time on appeal, is not subject to review. *E.g.,* McFarland, 899 P.2d 1251–33, 899.

Even if such an object had been made, a trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court's rulings on the admissibility of evidence will not be disturbed absent an abuse of the court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id.

There was no error in admitting testimony about the drug transaction of December 7, at the defendant's house. ER 401 defines relevant evidence broadly as "evidence having *any tendency* to make the existence of any fact ... more probable or less probable ..." (emphasis added). Minimal logical relevance

is all that is required. In his treatise, Karl Tegland dispels any misunderstandings to the contrary–

> Rule 401 rejects any notion of "legal relevance"; i.e. that the evidence must have a greater degree of probative value than people would expect in the conduct of ordinary, everyday affairs. The admissibility of evidence having only marginal relevance is governed by Rule 403, not Rule 401.
>
> The test for probative value under Rule 401 *should not be confused with the sufficiency of the evidence to take the case to the jury, nor should it be confused with the sufficiency of the evidence to satisfy the overall burden of proof. The latter two concepts relate to weight, not admissibility*, and the tests under the latter two concepts are more rigorous than the nominal "any tendency" test for relevance under Rule 401. 5 Wash. Prac., Evidence Law and Practice § 401.4, at 218(emphasis added). [2]

With reference to materiality, ER 401 defines relevant evidence as evidence that tends to prove or disprove "any fact that is *of consequence* to the determination of the action..." (emphasis added).

> Facts that are "of consequence" include facts that offer direct evidence of an element of a claim or defense; also included are facts that imply an element of a claim or defense (circumstantial evidence), as well as facts bearing on the credibility or probative value of other evidence (background information and evidence offered to impeach or to rehabilitate a witness).
>
> Or to state the same point negatively, evidence that makes no difference to the outcome of the case—evidence that cannot affect the validity of a claim or defense, even if true—is immaterial and does not meet the test of relevance under Rule 401. 5 Wash. Prac., Evidence Law and Practice § 401.4, at 218-20(emphasis added).

In *State v. Burkins*, 94 Wn. App. 677, 693, 973 P.2d 15, 25 (1999), in a prosecution for murder, a rope found at the crime scene and was offered by the

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[2] *See also* State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986) aff'd, 108 Wn.2d 515, 740 P.2d 829 (1987)(defendant's statement on a California prison form that he was involved in a possible unknown offense in Washington was admissible in murder trial where the statement had some tendency, when viewed in conjunction with other evidence, to make defendant's guilt more probable).

State on the theory that the defendant planned to use it to bind the victim's hands and that it was evidence of premeditation regardless of whether the defendant actually used the rope to bind the victim. Whether evidence actually plays a part in a crime is not the definition of relevant evidence. To be relevant, and admissible at trial, evidence need only have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable. ER 401; Burkins, 94 Wn. App. at 693. The court found the presence of the rope at the scene of the crime tended to make the State's theory that Burkins planned to bind Anderson's hands more probable and was admissible relevant evidence. Burkins, 94 Wn. App. at 693. *See also State v. Ames*, 89 Wn. App. 702, 707-08, 950 P.2d 514, 516-17 (1998) (in prosecution for assault, trial court properly allowed witness to testify about a fight he observed between two men even though witness was unable to identify the defendant, because the testimony was probative of both the nature and the degree of the crime); State v. Jones, 26 Wn. App. 551, 614 P.2d 190 (1980)(no abuse of discretion in permitting state to show that defendant's palm print had been found at the scene of the crime even though state could not prove when the print was made; defendant's alibi that he had left the print on an earlier occasion went only to the weight of the state's evidence and could be believed or disbelieved by the jury).

In the present case, the evidence of the December 7, drug transaction at the defendant's house and involving the co-defendant Mumm and Mr. Gonzales (Chino) - who also participated in the January 4 delivery with the defendant - was highly probative of the defendant's knowledge, and had bearing on the credibility

of other witnesses and evidence presented at trial. The information also corroborated the defendant's statements to Task Force officers in February regarding his knowledge of Mr. Gonzales and Mr. Gonzales being the drug source. The information was also relevant to address the defendant's claimed defense at trial that he lacked knowledge of the drug dealing, and that the informant Mr. Long was not credible and had ulterior motives.[3]

Even if an objection had been raised at trial, the evidence was not subject to exclusion under ER 403. Rule 403 authorizes the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It should be emphasized that Rule 403 is not concerned with irrelevant evidence. The rule is concerned with evidence that admittedly tends to prove or disprove a fact of consequence, but that also possesses one or more of the undesirable characteristics listed in the rule. 5 Wash. Prac., Evidence Law and Practice § 403.1.

Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term "prejudice" is used in Rule 403. Nothing in Rule 403 authorizes the exclusion of evidence merely because it is "too probative." Rule 403 is instead concerned with what is rather loosely termed

[3] Such evidence is also admissible pursuant to ER 404(b) Other Crimes, Wrongs, or Acts:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"unfair prejudice," usually meaning prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. 5 Wash. Prac., Evidence Law and Practice § 403.3.

Even in objection had been made there was no unfair prejudice in admitting the evidence. Moreover, under Rule 403, the burden is on the party seeking to exclude the evidence. The rule permits exclusion only when the probative value of the evidence is substantially outweighed by one of the factors mentioned in the rule. When the balance is even, the evidence should be admitted. 5 Wash. Prac., Evidence Law and Practice § 403.2

In the present case, there was no objection to the admission of the evidence. The complained of evidence was admissible, and the evidentiary decisions at trial were clearly within the trial court's discretion. The Respondent's motion on the merits should be granted.

### C. The defendant's conviction was supported by substantial evidence and was governed by well settled law

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *E.g., State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. A

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Salinas, 119 Wn.2d at 201.

Contrary to the apparent argument of Appellant, the role of the Court of Appeals is not to determine whether the evidence at trial established guilt beyond a reasonable doubt. E.g., *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994), (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980) aff'd and remanded, 95 Wn.2d 385, 622 P.2d 1240 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *E.g.,* State v. Romero, 113 Wn. App. 779, 798, 54 P.3d 1255 (2002).

The reviewing court considers circumstantial evidence to be as equally reliable as direct evidence. Id.

In the present case the defendant was observed by Det. Bowling and Mr. Long as the driver, who drove co-defendant Mumm to meet with Gonzales and then the informant. The informant was ultimately handed the drugs by the defendant during the transaction.

To make an argument about sufficiency, the Appellant ignores the test that requires viewing the evidence in the light most favorable to the State, and instead

tries to contest sufficiency *solely* by challenging credibility of witnesses who provided evidence that impugns the defendant's unsupported and contradictory story. The Appellant's sufficiency argument therefore fails.

Moreover, the Appellant ignores the fact that the defendant was alleged to have acted as an accomplice and the jury was instructed on accomplice liability in instruction #4 (*CP 77*). Even if we assumed for argument sake that the defendant had not handed the drugs to the informant, his act of driving the co-defendant to obtain controlled substances from Gonzales, and driving the co-defendant to re-sell controlled substance to the informant, would permit the jury to find him guilty beyond a reasonable doubt as an accomplice.

### D. The Appellant has shown no error, and therefore no cumulative error.

The Appellant argues the catchall of "cumulative error". However the Appellant has failed to show any error, and therefore cannot support a claim of cumulative error.

## 5. CONCLUSION

The State's motion the merits should be granted and the verdict of the jury finding the defendant guilty of delivery of a controlled substance should be sustained. The Appellant failed to raise the issue of probable cause or admission of evidence at the trial court level and is barred from raising them for the first time on appeal. Additionally, there is no support offered for Appellant's challenged to a probable cause statement that followed a warrantless arrest. Even if there was

authority to challenge it, there would be no remedy as the statement pertained only to the court's ability to set pre-trial bail or conditions of release.

There was substantial evidence to support the verdicts and the appellant has not substantiated any of his claimed errors.

Dated this 29 day of December, 2014.

Respectfully Submitted by:

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I, Karl F. Sloan, do hereby certify under penalty of perjury that on December 29, 2014, I provided by email service a true and correct copy of the Motion on the Merits of time to:

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