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FILED

JAN 15 2008

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON, Respondent,

v.

ADRIAN IBARRA-RAYA,  
and  
GILBERTO IBARRA-CISNEROS, Appellants.

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BRIEF OF RESPONDENT

---

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**A. ASSIGNMENT OF ERROR**

1. Is there substantial evidence to support the trial court's findings where it applied a "community caretaking function" or "exigent circumstances" exception to the warrant requirement when police investigated a "noise complaint" by a neighbor during the midnight hours? (Appellants' Assignment of Error Nos. 1-6)

2. Alternatively, assuming the police were not conducting their "community caretaking function" when entering Appellant Ibarra-Raya's home, nor that "exigent circumstances" existed during that entry, was there still sufficient evidence in the affidavit to support a finding of probable cause for issuance of the warrant? (Appellants' Assignment of Error Nos. 1-6)

3. Did the trial court commit cumulative errors during the trial proceedings against Appellant Ibarra-Raya? (Appellant's Assignment of Error No. 7)

4. Was the trial evidence against Appellant Ibarra-Cisneros insufficient to prove constructive possession beyond a reasonable doubt.

**B. COUNTERSTATEMENT OF ISSUES**

1. The trial court did not err in applying a "community caretaking function" or "exigent circumstances" exception to the warrant requirement when police investigated a "noise complaint" by a neighbor during the midnight hours. (Assignments of Error 1-6)

2. Assuming that the officers were not conducting a "safety assessment" of the house when making entry, or that "exigent circumstances" existed during that entry, there still was sufficient evidence in the affidavit to support a finding of probable cause for issuance of the search warrant. (Assignment of Error 1-6)

3. The trial court did not commit cumulative errors during the trial proceeding against Appellant Ibarra-Raya. (Assignment of Error 7)

4. The evidence was sufficient to prove the charges against Appellant Ibarra-Cisneros. (Assignment of Error 8)

**C. STATEMENT OF FACTS**

A jury convicted Adrian Ibarra-Raya (hereinafter "Raya") on November 14, 2006, of Possession with Intent to Deliver Marijuana and Possession of Cocaine. CP 260. He was sentenced to a standard range sentence of 6 months on December 4, 2006. CP 291-305.

A jury convicted Gilberto Ibarra-Cisneros (hereinafter "Cisneros") on November 22, 2006, of Possession of Cocaine. RP G.I.C. 352. He was sentenced to a standard range sentence of 143 days jail. RP G.I.C. 360-361. This consolidated appeal by both defendants follows.

The jury learned that Mr. Raya was using a house in Walla Walla, at 1035 St. John Street. RP 201-02. At around 2:27 a.m. on July 14, 2006, a neighbor called in a noise complaint to dispatch, which was communicated to officers in the field as "noises coming from a vacant house." RP 84-86. Two officers responded within minutes. RP 84.

Upon the officers' arrival, they saw lights on in the house and noise coming from it. RP 86. Before contacting whoever was in the house, they decided to check the registration of a vehicle which was parked on the side of the house to see

if new people had moved in that the caller with the noise complaint did not know about. RP 21-22, 86-87. Because there were no license plates on the vehicle, Off. Morford obtained the vehicle identification number ("VIN") of the vehicle by looking through its window, and relaying that information to dispatch. RP 87. Dispatch reported back that the vehicle came back as "stolen out of California." RP 87.

As a result of that information, coupled with the initial report of unusual noises from what was thought to be a vacant house, Off. Morford requested a third officer before they tried to make contact with whoever was in the house. RP 88,139. Upon the arrival of that third officer, one went towards the rear of the house, a second officer went to the front, while the third stepped to the side of the house to watch the windows. RP 88,128, 151-52, 156.

The officer at the front then knocked on the front door, immediately noticing that the lights in the front room went off after he knocked. CP 136, 145. Off. Morford, who was watching the rear of the house, then saw two males inside go

from the front room into a room in the hallway in the middle of the house, and then come out and go to the rear of the house and open the back door, whereupon he ordered them to stay inside and go back towards the front where they had come from. RP 88-90, 142, 155. Off. Morford then followed the males inside the house to the front room where they were first seen, where he also found two minor females. RP 91-92. He then instructed one of the males to open the front door for the other two officers. RP 92.

Once the officers and the subjects were all in the front room, Off. Morford conducted a protective sweep to make sure there were no other people in the house. RP 93. No others were found, but Off. Morford saw bundled cash in one of the rooms and some marijuana in plain view on the kitchen counter. RP 94. Based on what he saw in the house, with the added information that this was reportedly a vacant house with a then reportedly stolen vehicle, Off. Morford consulted with his supervisor. RP 95. A decision was made to seek a search warrant, which was subsequently obtained. RP 97, 195-96. The execution of that

search warrant resulted in finding a bindle of cocaine in the front room, over \$400,000.00 in bills packaged in vacuum sealed bags throughout the house, marijuana in the kitchen, and other items such as a hidden storage compartment in a vehicle in the garage. RP 97-98, 196-204, 266.

One of the items found and seized at the house where Appellant Raya was found was a cellphone. RP G.I.C. 137, 153. Later that day, that cellphone began ringing in the police department, whereupon Agent Palacios, who was working with the local Walla Walla Police Department (hereinafter "WWPD"), answered it. RP G.I.C. 137-139. A result of the communication between the agent and the caller was that the caller agreed to meet the agent at the Super 1 Food store in Walla Walla. RP 139.

Undercover Officer Harris was detailed to go to the store to see if the caller showed up. RP G.I.C. 139, 153-54. The police wanted to make contact with this caller for purposes of the investigation they had started earlier in the day at the house where the cellphone was found. RP G.I.C. 147, 149-150.

It turned out the caller was Appellant Cisneros, who was a passenger in a vehicle seen driving slowly in the Super 1 Food parking lot appearing to look for someone, which vehicle was eventually followed and contacted by police at another parking lot, where Agent Palacios had the opportunity to hear and recognize Mr. Cisneros' voice. RP C.I.G. 141-143. The police were able to link the call they had received on the seized cellphone to a cellphone found in the vehicle with Mr. Cisneros. RP C.I.G. 227-229.

Once contact was made with Mr. Cisneros and the vehicle he was in, the vehicle was already parked, and the driver had been seen entering the store. RP G.I.C. 163. Sgt. Alessio and Det. Reyna were still travelling in their undercover vehicle, and saw that Mr. Cisneros had exited the passenger side of his vehicle and was standing by the front bumper looking towards the officers. RP G.I.C. 163. As Sgt. Alessio continued to drive around to park behind Mr. Cisneros' vehicle, Mr. Cisneros was seen watching their movement and walking towards the back of his vehicle as well. RP G.I.C. 163-164. As Sgt. Alessio parked

several rows behind where Mr. Cisneros was, Mr. Cisneros continued to stare at them, while remaining by the passenger side of the box of the pickup truck. RP G.I.C. 164.

The officers eventually made contact with him, as well as the driver who had come out of the store at about that time to return to the vehicle. RP G.I.C. 164-166. Once contact was made, Det. Reyna saw a small bundle on the pavement where Mr. Cisneros had been standing by the side of the pickup. RP G.I.C. 167. This bundle was found adjacent to the white parking stall strip on which Mr. Cisneros' vehicle was parked on, and was fresh looking without even dust on it. RP G.I.C. 183-184, 190.

After Mr. Cisneros had been arrested for possession of the bundle, and had heard the officers comment on the bundle, he stated "If you saw me drop it, then I'll admit it's mine. But if you didn't see me drop it then you can't charge me with it." RP G.I.C. 210-11.

**D. ARGUMENT**

1. **The Trial Court did not Err in Applying a "Community Caretaking Function" or "Exigent**

**Circumstances" Exception to the  
Warrant Requirement when Police  
Investigated a "Noise Complaint"  
by a Neighbor During the Midnight  
Hours.**

A search and seizure without a warrant is per se unreasonable unless it falls within an established exception to the rule. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971). The "community caretaking function" and exigent circumstances operate as such exceptions to the search warrant. Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000); State v. Downey, 53 Wn.App. 543, 768 P.2d 502 (1989).

In Kinzy, officers contacted a minor female on a public sidewalk in a high drug trafficking area late on a school night because they were concerned about her health and safety. The police then held her arm to restrain her from leaving during their contact with her. The Supreme Court held that an officer's performance of his community caretaking function depends upon a balancing of an individual's interest in freedom from police interference against the

public's interest in having the officer perform the community caretaking function. In Kinzy, they found that the police were justified in the initial contact under the community caretaking function, but that the subsequent bodily restraint constituted an illegal seizure since there was no reasonable articulable suspicion that the minor was then engaged in criminal activity. Kinzy, supra at 385-393.

In the instant case, as noted from the facts stated above, officers were responding to a 911 call about suspicious noises from a then-believed vacant house. Upon arrival at the house in question, the police confirmed activity there, and decided to obtain what information they could about the occupants of the house from a vehicle parked there before attempting to make contact with the unknown person(s). The officers learned from dispatch that the vehicle was reported stolen, heightening the level of perceived suspicious activity at that house. As a result, back-up was requested, and upon arrival the three officers positioned themselves in a way to minimize the risk of flight of any occupant since

there was reason to believe criminal activity was afoot (burglary/trespass, stolen vehicle).

When police contact was then attempted by knocking at the front door, with subsequent flight activity by two males inside, the officers took immediate steps to halt that activity and take control of the premises pending further investigation of what the occupants were doing there and why there was a stolen vehicle out front. This latter action took the form of entry into the house to determine the status of the known presence of at least one female inside and contain the occupants in one location during the investigation.

Appellate courts have held that initial warrantless entries by police into homes in the exercise of community caretaking are permitted if (1) the officer subjectively believes that someone likely needs assistance for health or safety reasons, (2) a reasonable person in the same circumstances would similarly believe there is a need for assistance, and (3) there is a reasonable basis to associate the need for assistance with the place searched. State v.

Johnson, 104 Wn.App. 409, 16 P.3d 680 (2001);  
State v. Gocken, 71 Wn.App. 267, 857 P.2d 1074  
(1993).

Police have also been permitted to enter private property for the purpose of protecting the property of the owner, occupant, or other person. One example is where the police reasonably believe that the premises is being burglarized, so as to apprehend the perpetrator inside. See U.S. v. Dart, 747 F.2d 263 (4th Cir.1984). Exigent circumstances must exist for such warrantless entry by police. A case articulating factors bearing on whether exigent circumstances exist is Dorman v. U.S., 435 F.2d 385 (D.C.Cir.1970); see also State v. Cardenas, 146 Wn.2d 400, 47 P.3d 127, 57 P.3d 1156 (2002). The Dorman Court stated:

Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as 'unreasonable.' While the numerous and varied street fact situations do not permit a

comprehensive catalog of the cases covered by these terms, it may be useful to refer to a number of considerations that are material, and have particular pertinence in the case at bar.

First, that a grave offense is involved, particularly one that is a crime of violence . . . Contrariwise, the restrictive requirement for a warrant is more likely to be retained, and the need for proceeding without a warrant found lacking, when the offense is what has been sometimes referred to as one of the 'complacent' crimes, like gambling.

Second, and obviously interrelated, that the suspect is reasonably believed to be armed. Delay in arrest of an armed felon may well increase danger to the community meanwhile, or to the officers at time of arrest. This consideration bears materially on the justification for a warrantless entry.

Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including 'reasonably trustworthy information,' to believe that the suspect committed the crime involved.

Fourth, strong reason to believe that the suspect is in the premises being entered.

Fifth, a likelihood that the suspect will escape if not swiftly apprehended.

Sixth, the circumstances that the

entry, though consented, is made peaceably. Forcible entry may in some instances be justified. But the fact that entry was not forcible aids in showing reasonableness of police attitude and conduct. The police, by identifying their mission, give the person an opportunity to surrender himself without a struggle and thus to avoid the invasion of privacy involved in entry into the home.

Another factor to be taken into account, though it works in more than one direction, relates to time of entry - whether it is made at night.

On the one hand, . . . the late hour may underscore the delay (and perhaps impracticability of) obtaining a warrant, and hence serve to justify proceeding without one. On the other hand, the fact that an entry is made at night raises particular concern over its reasonableness, . . . and may elevate the degree of probable cause required, both as implicating the suspect, and as showing that he is in the place entered. . .

Dorman, supra at 392-93.

The trial court considered these factors and found that exigent circumstances justified the officers' entry. The appellants do not assign error to the trial court's factual findings, so they must be considered verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Addressing the first factor, although the crime in the instant case was not one of violence, it also was not one of a "complacent" nature. Further, at the time of the contact, the police only knew that: the house was apparently supposed to be vacant; a vehicle parked in its driveway was reported to be stolen from out of state with only a temporary 'plate' on it (although it turned out later that the vehicle itself was not stolen, the plates had been); when officers were trying to make contact at the front door, two male occupants at the front of the house were seen moving to the back of the house and opening the back door for no apparent reason other than an attempt to flee; it was the middle of the night (2:27 a.m.); and Officer Morford had earlier heard a female voice whose presence he was concerned about in light of the male suspects' apparent attempt to flee the scene.

As to the second factor, although none of the occupants turned out to be armed, the police knew nothing about them and were operating under the possibility that a burglary was occurring in the middle of the night, given that the neighbors

were concerned about noise coming from a house they thought was vacant and dispatch reporting that the vehicle in its driveway was stolen.

Addressing the third and fourth factors, the police had confirmed that the subject house had occupants inside what was believed to be a vacant house after receiving information of activity there at about 2:30 a.m. from an identified citizen neighbor. Upon police response in this instance, they had acquired probable cause that one or more of the occupants in the house were tied to what was reported to be a stolen vehicle in its driveway.

Regarding the fifth factor, the police did not enter the house until after the two male suspects had tried to flee out the back door when police were attempting contact at the front of the house. The police already had probable cause suspicion of criminal activity afoot (burglary/trespass, stolen vehicle in driveway), which was heightened by the perceived attempt by the two males to flee law enforcement in the dark (middle of the night; upon attempted police contact at the front door, the lights go off and

males attempt to exit back door in residential neighborhood).

As to the sixth factor, although entry was not consensual, it was without violence. The command to the subjects to return to the front room of the house by a uniformed officer was not unreasonable given the circumstances; and the police did not have to force their way in, damage any of the property, or engage in a struggle when entering. Further, the police entry was not made for purposes of searching for evidence, but to secure the premises and ascertain the presence and location of any other occupants (Off. Morford had heard at least one other voice - female, and had seen the males enter and then exit a room before going to the back door) who might pose a security threat to the police, community, or possibly the female that Officer Morford had heard earlier, so they could investigate the status of this "vacant" house and reported stolen vehicle since the situation continued to present itself as that of a house occupied by occupants that did not belong there. A possible threat to the community reasonably existed since the

attempted flight by the two males occurred in a residential neighborhood in the dark; and upon getting the male suspects in the front room and joining them with the two females there, none could provide any proof of legitimate business in the home, thus continuing to provide probable cause of a burglary now halted.

Mr. Raya argues that the police should have asked them what they were doing in the house when he and his male companion went to the rear of the house and opened the back door. However, it bears repeating that at that point, the officer who instructed them to go back to the front of the house knew that the two males had ignored the attempted police contact at the front, and that coupled with lights in the house going off at that time and the males going to the back when nobody had attempted contact back there led him to reasonably believe there was no other reason for them to be back there but to try to slip out unnoticed and flee. To a reasonable observer, Mr. Raya and his male companion were acting like burglars or trespassers, instead of like honest

law-abiding citizens who would have otherwise answered the front door.

Then, when the police did question them as to who resided there, nobody could provide proof of residing there. It turned out that the reason Mr. Raya could not provide proof of residency in the home was because he was an illegal tenant. The named renter, J. Ornelas, had entered into a rental agreement to reside at 1035 St. John Street, with the proviso that she could not sublet the house to another, and that any adults not already named in the rental agreement were to be approved in writing by the landlord. CP 147-61. Although this was not admitted as evidence at trial as it was not relevant to the charges, it was part of the evidence presented for the suppression hearing, and something that the trial court relied on in making a factual determination and oral ruling that the police did not know at the time who lived at this residence and that they were trying to investigate that situation that night as well as afterwards. RP 37-38.

Finally, as to the last stated factor, the entry in the instant case was made at night, but

only because of the time of the report by the citizen neighbor; and based on the information given to the police being that of noise coming from what was told them was a vacant house that turned out to have a reported stolen vehicle from California in its driveway. Once the police saw evidence in plain view of a nature distinct from what they were there for, they then sought a search warrant to investigate further.

To summarize, the initial police contact at 1035 St. John Street was pursuant to a "community caretaking function" in response to a noise complaint at a house believed to be vacant. The police attempted to gather what information they could in a non-intrusive manner regarding the occupants of the house since they did not know what to expect at that hour of the night. In fact they anticipated that information from the vehicle in the driveway would legitimately connect it to persons who had recently moved into that house.

Once they learned of a stolen vehicle on the premises, they still intended to keep it low key with officer contact at the front door. Only

when it was clear that the occupants were not going to cooperate, and in fact appeared to be taking evasive action, did the officers resort to taking action to control the environment until they were able to determine (1) whether the occupants were intruders, (2) what the status was of a known female in the house, and (3) why there was a stolen vehicle in the driveway. Thus, the police action that began as a "community caretaking function," eventually became a Terry investigation based on reasonable suspicion of criminal activity afoot at that location only after the males' attempted flight.

2. **There was Sufficient Evidence in the Affidavit to Support a Finding of Probable Cause for issuance of the Warrant, Assuming that the "Community Caretaking Function" or "Exigent Circumstances" did not Apply to the Officers' Entry Into Appellant Ibarra-Raya's Home.**

Assuming there was insufficient evidence to support the warrantless entry into the house at 1035 St. John Street where Appellant Raya was found, there was still enough evidence free of any purported taint from that entry to support a

finding of probable cause for issuance of the warrant which followed.

Information gathered by violating the constitution cannot be considered in determining whether the affidavit establishes probable cause. State v. Ross, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000); State v. Johnson, 75 Wn.App. 692, 709-10, 879 P.2d 984 (1994), rev. denied, 126 Wn.2d 1004, 891 P.2d 38 (1995). The proper procedure for a reviewing court when police have used unconstitutional means to gather some of the information in the affidavit is to determine whether the remaining untainted facts provide probable cause to issue the warrant. Ross, supra at 314-15; Johnson, supra at 709-710; State v. Hall, 53 Wn.App. 296, 766 P.2d 512 (1989). To establish probable cause, the evidence presented must lead a reasonable person to believe (1) there was criminal activity afoot at the location, and (2) that evidence connected to the criminal activity would be found in that location. The application for a search warrant must be judged in the light of common sense, with

doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

After excising potential tainted facts from the search warrant affidavit, it still contains ample information supporting probable cause for a search of the premises, including: (1) there were people inside the house which was supposed to be vacant, suggesting a burglary in progress or at least a trespass; (2) there was a vehicle in the home's driveway that dispatch reported to be stolen from California, which although erroneous information, was not corrected until **after** the police entry; and (3) apparent attempted flight of several subjects from the back of the house upon police knocking at the front door to make contact. CP 57-64.

The reason for the warrantless entry of the house by police, as stated above, was because of the lateness of the hour and the exigent circumstances presented by the attempted flight of the subjects. Had there been time to seek a search warrant prior to entry, it would have been based on the above three factors to investigate the crimes of burglary/trespass and the reported

stolen vehicle. By the time the officers had the situation under control after entering the home, and before they applied for the search warrant, they had learned that the vehicle in the driveway was not actually stolen but only its plates. The officers had also been informed by then that one of the subjects purportedly lived at the house, although they were not able to verify that at that time and were still investigating that issue days later according to the suppression hearing subsequently held, as noted in Argument 1 above. RP 36-37; CP 147-160.

Although caselaw has ruled that a search warrant obtained after an illegal entry by police must be supported by facts independent from what was observed during the illegal entry (independent source doctrine), a critical question addressed by the appellate court has been whether the officers would have sought the warrant in the absence of the unlawfully obtained evidence (here, marijuana seen upon entry). State v. Spring, 128 Wn.App. 398, 405, 115 P.3d 1052 (2005). That is, would the officers have sought a search warrant had they never entered

the house? The police cannot be faulted for their expanded scope upon entry, based on the marijuana found in plain view. They could no longer legitimately seek evidence about a stolen vehicle based on what they learned after entry, but it was clear they still were unsure about the lawful presence of the occupants at the house.

One of the items sought as evidence in the search warrant affidavit was documents indicating dominion and control of the premises. CP 61, 64. A purpose for seeking this evidence was to establish who lived at that residence since earlier in the affidavit the officer noted that they had no confirmation as to who lived there, especially since the neighbors and complainant were positive no one lived there, and the officers' observations of the attempted flight of the two males was not consistent with lawful occupancy. CP 59-60. If Mr. Raya and his companions would have opened the front door upon the attempted contact by the officers, but subsequently not cooperated in providing information about their presence therein or the status of the vehicle in the driveway, it is

reasonable to believe the police would have secured the premises and applied for a warrant based on the information they then had to determine the occupants' lawful presence there and the status of the reported stolen vehicle.

This issue was not brought before the trial court, so it did not address it, although its rulings on the suppression motion indicate it would have found probable cause for the issuance of the warrant based on the facts presented to it. The appellate courts have remanded back to the trial court to make findings on suppression issues not previously addressed. See State v. Spring, supra at 406; State v. Leffler, 140 Wn.App. 223 (2007). The State respectfully requests this case be remanded back for the trial court to determine the facts on this issue if this Court rules that the "community caretaking function" or "exigent circumstances" do not apply in this case.

**3. The Trial Court did not Commit Cumulative Errors During Appellant Ibarra-Raya's Trial.**

First, in none of Appellant Raya's allegations on this issue is there any citation

to authority of law in his Brief of Appellant to support his position or request for relief. As such, this argument of "cumulative errors" need not be considered. State v. Peerson, 62 Wn.App. 755, 767, 816 P.2d 43 (1991); State v. Hartley, 51 Wn.App. 442, 449, 754 P.2d 131 (1988). However, the State will address the argument of "cumulative errors" as follows, in the event this Court considers them.

First, in reference to the claim that the trial court erred in refusing to grant Mr. Raya a continuance to permit his counsel to file a motion for reconsideration, trial counsel never filed a motion for continuance. Also, trial counsel never moved for a continuance on the record. Counsel posits that the trial court's denial of its purported "off the record" request for a continuance was so the court would "avoid having to revisit the fact that it had extended the application of a good-faith exception to this State in contravention of governing precedent." Appellant's Brief, at p. 57. However, the trial court never did make a ruling applying the

"good-faith" exception despite counsel's repeated assertions.

Nevertheless, when a defendant has failed to raise an issue to the trial court in a manner in which it can respond and rule on, he waives the right to raise it on appeal, unless it is a manifest error affecting a constitutional right. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Warren, 134 Wn.App. 44, 56-57, 138 P.3d 1081 (2006); RAP 2.5(a). This is to give the trial court an opportunity to obviate error and prevent prejudice to the defendant. City of Seattle v. Heatley, 70 Wn.App. 573, 584-85, 854 P.2d 658 (1993). There is no record for this Court to determine whether the trial court erred or abused its discretion in purportedly denying a defense motion for continuance.

Second, in reference to the claim that the trial court erroneously allowed the State to introduce evidence in violation of a defense motion in limine to which the State had earlier stipulated to, the trial court heard argument on this issue and ruled that the defense had opened

the door to the State introducing the objected to evidence. RP 180-84, 187-90.

A trial court's ruling on admissibility of evidence will not be overturned absent an abuse of discretion. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The trial court clearly on the record considered the prejudicial effect of the evidence against the relevance, and found the relevance outweighed its prejudice, as well as finding that the defense had opened the door to the introduction of the evidence based on its cross examination of the State's witnesses. Mr. Raya notes in Appellant's Brief that the evidence in question involved cocaine and methamphetamine; however, the State agreed that it would omit any reference to methamphetamine since Mr. Raya was not charged with any crime involving that drug. RP 189.

Third, Mr. Raya claims the trial court erred in denying his motion to admit proposed Exhibit 92 having to do with an earlier forfeiture hearing between the City and Mr. Raya regarding the monies found in the house. RP 224- 227, 328-331. Again, as noted above, a trial court's

ruling on admissibility of evidence will not be overturned absent an abuse of discretion. State v. Lane, supra at 831. Here, the trial court did allow trial counsel to inquire of the State's witnesses about the monies found, including the relationship between drug possession versus drug deliveries as they relate to potential forfeiture of monies found. RP 221-24, 230-31, 301-02, 316. The trial court also advised trial counsel she could argue her position during closing. RP 331. Counsel has not stated how the case would have turned out any different had the proposed exhibit been admitted.

Finally, Mr. Raya claims the trial court's refusal to use his proposed jury instruction on constructive possession was error. RP 331-32; CP 222-25. However, a trial court has considerable discretion in the wording of a jury instruction so long as the instruction correctly states the law and allows each party to argue its theory of the case. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997), cert.denied, 523 U.S. 1007 (1998); State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980); State v. Portrey, 102 Wn.App.

898, 902, 10 P.3d 481 (Div.III, 2000). A specific instruction is not necessary when a more general instruction adequately explains the law. Brown, supra at 605.

At the trial level, Mr. Raya relied on State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002), and State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004), as support for his proposed instruction regarding constructive possession. However, neither of those cases involved the giving of a particular instruction.

Jones dealt with search and seizure of a firearm, and its statement that "dominion and control means that the object may be reduced to actual possession immediately" referred to a deadly weapon sentence enhancement case from which it cited. In a different firearm possession case, the appellate court noted that a constructive possession of a deadly weapon for sentence enhancement purposes requires the additional proof that the dominion and control "may be immediately exercised." State v. Howell, 119 Wn.App. 644, 649, 79 P.3d 451 (2003). Thus, in Howell, the appellate court held that since

the issue there involved whether the defendant merely had constructive possession of a firearm, the additional language of "may be immediately exercised" was inappropriate and unnecessary. Howell, at 649-50. The instant case obviously involves possession of drugs rather than of weapons, much less for sentence enhancement purposes, so the additional language is both inappropriate and unnecessary.

In Cote, the defendant was convicted of the crime of possession of pseudoephedrine with intent to manufacture, and appealed on the issue of insufficiency of the evidence. The Cote Court addressed the issue of whether constructive possession or dominion and control was met in the case without mentioning the term of whether it "includes the ability to take the item immediately into actual possession." In Cote, the defendant was a visitor on the premises and was found to not have dominion and control over the item in question.

In the instant case, Mr. Raya admitted having dominion and control of the house where the drugs were found. The trial court, although

rejecting Mr. Raya's proposed jury instruction, did not prohibit him from arguing his theory of the case, that although he had dominion and control of the house, he was not seen possessing the drugs, was not near it upon contact by police, and there was no fingerprint evidence showing he had touched it. Further, as the trial court noted, the jury instruction it used in place of Mr. Raya's proposed instruction was an accurate statement of the law, and a standard instruction approved by the State appellate courts. WPIC 50.03.

In summary, Mr. Raya has not met the burden of showing that a cumulative effect of errors affected the outcome of his trial, as the above alleged errors were not actually errors. See State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994). His claim on this issue must fail.

**4. The Evidence Presented at Mr. Cisnero's Trial was Sufficient to Sustain His Conviction.**

The test for sufficiency of the evidence is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find the essential elements of

the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 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. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Finally, a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, supra at 201 (citing State v. Thereoff, 25 Wn.App. 590, 593, 608 P.2d 1254 (1980)).

Based on all of the testimony, the jury could reasonably find that the State proved the elements of Possession of Cocaine. The elements for possession of cocaine are:

- (1) the defendant possessed cocaine on July 14, 2006; and
- (2) the act occurred in Walla Walla County.

The definition of possession of a substance includes constructive possession. WPIC 50.03. The jury was instructed therein that constructive

possession "occurs when there is no actual physical custody but there is dominion and control over the substance, and that dominion and control need not be exclusive to establish constructive possession. CP 139.

During the trial, the jury heard that Mr. Cisneros had attempted telephone contact with a person whose telephone had been seized earlier that day for drug related charges. The facts included a perceived attempted threat by Mr. Cisneros towards the callee (officer), and a verbal agreement between the two to meet in person. The officers' testimony portrayed suspicious movement by Mr. Cisneros up through actual contact by police with him.

The jurors were left with a vivid depiction of Mr. Cisneros practically standing on a bindle of cocaine without any marks being found on the bindle, whether of being run over by a vehicle, stepped on, or accumulating any dust, dirt or debris from the surrounding environment there in the parking lot. This, coupled with his unusual statement to the officer, essentially, that "I will admit it is mine if you saw me drop it,

otherwise I won't admit it is mine," certainly allowed the jury to make the apparent obvious conclusion that it belonged to him.

There was not only very close proximity to the substance, but also a perceived admission of ownership and circumstantial evidence of the substance not having been there for any length of time prior to its discovery. Our appellate courts have ruled that although proximity alone is insufficient to establish constructive possession, proximity coupled with other circumstances from which the trier of fact can infer dominion and control is sufficient to show constructive possession. Partin, supra at 906.

Based on the above, there was more than sufficient evidence for the jury to base their guilty verdict.

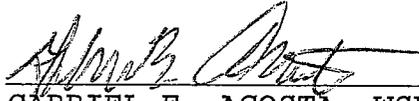
#### **E. CONCLUSION**

For the reasons set forth above, Mr. Raya's and Mr. Cisneros' Judgment and Sentences should be affirmed on the basis that the trial court did not commit the above claimed errors; nor was there insufficient evidence to support the charges as to Mr. Cisneros.

DATED this 14<sup>th</sup> day of January, 2008.

Respectfully Submitted,

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