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King County Prosecutor
Appellate Unit

NO. 66376-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RASHID HASSAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Rashid Ali Hassan's motion to suppress evidence discovered during a search incident to arrest.

2. The trial court erred by admitting evidence of marijuana possession because it was not relevant to the charge of possessing cocaine with intent to deliver.

3. The trial court erred by later acknowledging it had erred by admitting the marijuana evidence, but concluding the admission was harmless.

4. The trial court violated CrR 3.6(b) by failing to enter written Findings of Fact and Conclusions of Law in support of its denial of Hassan's motion to suppress evidence.

Issues Pertaining to Assignments of Error

1. Two Seattle police officers arrested Hassan during a "see-pop" operation after being advised by a colleague stationed atop a hotel to arrest Hassan because he had probable cause to support an arrest for drug traffic loitering, a gross misdemeanor set forth in the Seattle Municipal Code.¹ The arresting officers saw nothing, and the observing officer did not participate in the arrest. Was the arrest therefore unlawful under RCW

¹ SMC 12A.20.050 (attached as appendix).

10.31.100, which generally prohibits warrantless arrests for misdemeanors not committing in the presence of the arresting officer?

2. Did the trial court err by admitting evidence Hassan possessed marijuana, in addition to rock cocaine, at the time of his arrest because the marijuana evidence was not relevant to the charge of possession of cocaine with intent to deliver?

3. After agreeing it had erred by admitting the marijuana evidence, did the trial court err by finding the admission harmless?

4. Must Hassan's case be remanded for entry of written Findings of Fact and Conclusions of Law in support of its denial of Hassan's motion to suppress evidence, as required by CrR 3.6(b)?

B. STATEMENT OF THE CASE

1. The incident

While observing an intersection in the Belltown neighborhood that was well-known to the police for street-level drug trafficking, primarily of crack cocaine and some marijuana, Seattle Police Officer Mark Hazard saw a group of people gathered around Rashid Ali Hassan in front of a tavern. 2RP 8-9, 19-24.² Hazard was the observer in a "see-pop"

² Hassan cites to the six-volume verbatim report of proceedings as follows: 1RP – 7/6/-7/8/2010; 2RP – 7/12-7/13/2010; 3RP – 8/3/2010; 4RP – 10/20/2010; 5RP – 12/7/2010.

operation, a procedure used by police to ferret out street drug sales. 1RP 109-10, 2RP 12, 19. Officers David Blackmer and Martin Harris served as the arrest team. 1RP 109-11.

Hazard saw Hassan reach into his left shirt pocket as if to retrieve something, then gestured as if to hand small, unknown items to three of the people who were surrounding him. 2RP 24-25, 28. The second and third recipients appeared to examine whatever Hassan gave them and toss the items into their mouths. 2RP 24-25. According to Hazard, it was common for both street-level users and dealers to carry certain drugs, particularly crack cocaine, in their mouths. Hazard said this was a method by which the carrier could determine whether the item was in fact cocaine, and also to immediately swallow it if stopped by a police officer. 2RP 25-26.

After this occurred, Hazard saw the group disperse and Hassan enter the tavern. 2RP 26. After waiting to see whether Hassan would emerge, Hazard contacted Blackmer and Harris, described Hassan, and directed them to go into the tavern and arrest him. 1RP 109-10, 2RP 14, 27. Blackmer and Harris quickly found Hassan, escorted him from the tavern without incident, and arrested him. 1RP 110-11, 2RP 28.

Blackmer searched Hassan incident to the arrest and found what was later determined to be crack cocaine in his left shirt pocket. 1RP 101-04, 111.

The state charged Hassan with possession of cocaine with intent to deliver. CP 1. Hassan filed a motion to suppress evidence, contending there was insufficient evidence to establish probable cause to believe he was committing drug traffic loitering, as prohibited by Seattle Municipal Code (SMC) 12A.20.050. CP 18-35.

2. Pretrial CrR 3.6 hearing

The testimony, which came from officers Hazard and Blackmer, was substantially the same as that heard by the jury as set forth above. From his post atop a Belltown hotel, Hazard observed a group of about six people surrounding Hassan. 1RP 25-27. Hassan reached into his shirt pocket and appeared to hand something to three of the six people. Two of the six seemed to inspect what they were handed before motioning as if to pop something in their mouths. 1RP 27-28. Hazard testified that in his experience, crack cocaine was the drug most commonly carried in one's mouth because it did not dissolve, could be easily swallowed upon police detection, and resulted in slight numbness to the tongue. 1RP 29-32. Hazard did not see any of the three individuals appear to hand anything to

Hassan. 1RP 39. The six people left after the contact with Hassan. 1RP 41.

Concluding there was probable cause to arrest Hassan for drug traffic loitering, Hazard contacted colleagues Blackmer and Harris to arrest Hassan. 1RP 28-29, 46. Blackmer testified he arrested Hassan without incident. 1RP 46-48. He searched Hassan's shirt pocket incident to arrest and found suspected crack cocaine. Blackmer also found suspected marijuana in a pants pocket. 1RP 48.

Defense counsel questioned Hazard about the drug traffic loitering ordinance, specifically about SMC 12.A.20.050(C), which lists several nonexclusive circumstances that may be considered in determining whether the actor intends prohibited conduct. CP 29-30; 1RP 32-35. Hazard admitted Hassan engaged in none of the specified suspicious conduct. 1RP 32-35. Counsel also questioned Hazard about that section of the Seattle Police Department Policy and Procedure Manual, Section 15.150(V) that sets forth guidelines for enforcing the drug traffic loitering ordinance. CP 33-35; 1RP 35-38.

Counsel contended there the state presented insufficient evidence to support a finding of probable cause to arrest Hassan for drug traffic loitering. CP 18-35. Counsel argued the testimony failed to establish the

arrest was supported by any of the circumstances set forth in SMC 12A.20.050(C). Counsel also maintained Hazard did not follow the guidelines set forth in his department's manual. 1RP 51-55, 63-65.

The trial court denied the motion to suppress. The court found (1) Hassan remained in a public place, in an area known for drug activity, for a substantial time period; (2) Hassan handed something to three individuals, two of whom appeared to place the item received in their mouths; and (3) Hazard had special expertise with drug trafficking, and testified it was common for buyers and sellers to keep crack cocaine in their mouths. 1RP 66-67. The court concluded the officers had probable cause to arrest Hassan for drug traffic loitering. 1RP 67.³

3. The outcome

Although jurors were also instructed on the lesser offense of possession of cocaine, the jury found Hassan guilty as charged. CP 69, 85-87. With an offender score of 6, Hassan's standard range was 60 months to 120 months. CP 106; 4RP 9-10. The trial court imposed a prison-based Drug Offender Sentencing Alternative (DOSA), ordering Hassan to serve

³ As of the date of preparation of this brief, the trial court has not filed written findings of fact and conclusions of law as required by CrR 3.6(b).

45 months in prison, followed by 45 months community custody. CP 108; 5RP 10-12.

C. ARGUMENT

1. THE SEARCH INCIDENT TO HASSAN'S WARRANTLESS ARREST WAS INVALID BECAUSE THE SUSPECTED MISDEMEANOR ON WHICH IT WAS BASED IS NOT ONE OF THOSE OFFENSES THE LEGISLATURE HAS SPECIFICALLY EXCEPTED FROM THE WARRANT REQUIREMENT.

a. General legal principles for searches incident to arrest

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. State v. Einfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). Warrantless searches and seizures are per se unreasonable. Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

Article I, section 7 of the Washington Constitution, in contrast, requires a warrant before any search, reasonable or not. Einfeldt, 163 Wn.2d at 635. Absent a valid warrant, a search is made without authority of law unless it is established the search fell within one of the narrowly drawn exceptions to the warrant requirement. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010). The State always carries the "heavy

burden" of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

A search incident to a valid arrest is one such exception. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A warrantless arrest, however, must be supported by probable cause for the exception to apply. Moore, 161 Wn.2d at 885. Probable cause to arrest exists only where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed and that the arrestee committed the arrest. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

b. Warrantless arrest for misdemeanor violation

The authority to arrest for a suspected violation of a misdemeanor requires more than probable cause. Instead, "[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except [as otherwise provided]." RCW 10.31.100.⁴

⁴ The statute "has been amended at least 20 times since then and has been expanded to include 24 exceptions." State v. Ortega, 159 Wn. App. 889, 895, 248 P.3d 1062 (2011), petition for review pending. The

The "in the presence" requirement stems from longstanding common law principles. State v. Walker, 157 Wn.2d 307, 315-16, 138 P.3d 113 (2006). Only the Legislature may limit the scope of this rule. Walker, 157 Wn.2d at 318-19. See Staats v. Brown, 139 Wn.2d 757, 768, 991 P.2d 615 (2000) (given existence of specified exceptions, doctrine of *expressio unius est exclusio alterius* dictates that enumerated exceptions to warrant requirement are exclusive, "rendering the statutory subject of this citation [not within exceptions] nonarrestable if committed outside the officer's presence."); State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 38, 593 P.2d 546 (1979) ("It is for the legislature to extend the authority of law enforcement officers to arrest for misdemeanors not committed in their presence.").

Hassan was arrested for drug traffic loitering. 1RP 28-29. Drug traffic loitering is a gross misdemeanor. SMC 12A.20.050(E). Because the offense falls within none of the exceptions set forth in RCW

exceptions include misdemeanors involving physical harm or threats of harm to persons or property, the unlawful taking of property, the use or possession of cannabis, underage drinking, criminal trespass, violation of a domestic violence protection order, certain traffic offenses, traffic infractions committed in the presence of an officer who requests arrest of the driver, indecent exposure, harassment, or possessing a firearm or other dangerous weapon on school premises. None of the exceptions applies to drug traffic loitering.

10.31.100, it had to have been committed "in the presence of" the arresting officer – in this case, Blackmer.

That did not happen here; Blackmer testified he did not see Hassan until he arrested him inside the tavern at Hazard's request. 1RP 49. Blackmer therefore had no authority to arrest Hassan, rendering the search incident to that arrest invalid.

This Court addressed the same situation in Ortega. An officer surveilling a Belltown street from the second floor of a business observed what he suspected were three narcotics transactions involving Ortega and a companion, Cuevas. The officer could not, however, confirm that the items exchanged were controlled substances. The observer officer radioed two colleagues, informing them probable cause existed to arrest Ortega and Cuevas for drug traffic loitering. Responding immediately, the officers arrested and searched Ortega, finding small rocks of cocaine and \$780 in cash. The observer officer maintained visual contact with the suspects up to the time of the arrest. He then left his observation post, met with his colleagues at the arrest scene, and confirmed the detained suspects were the individuals he had observed. Ortega, 159 Wn. App. at 893.

The issue was whether the arrest was unlawful under RCW 10.31.100 because the suspected crime did not occur in the presence of the

arresting officer. Ortega, 159 Wn. App. at 895-96. This Court rejected the state's argument the "fellow officer rule" should be extended to apply to arrests for misdemeanors. 159 Wn. App. at 898. It nevertheless found the arrest lawful because the observer officer maintained continuous contact with his arresting colleagues and with the process of arrest:

The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, *and proceeded immediately to the location of the arrest* to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega, McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

Ortega, 159 Wn. App. at 898 (emphasis added).

Unlike the officer in Ortega, Hazard did not "participate" in Hassan's arrest in the Ortega sense because he did not leave his post and meet his colleagues and Hassan at the scene of arrest. The record indicates Hazard had nothing to do with the arrest other than to direct the otherwise unknowing Blackmer and Harris to arrest Hassan. Expanding the definition of "in the presence of" beyond the facts of Ortega would effectively usurp the Legislature's exclusive authority to limit the warrant requirement for misdemeanor arrests.

This Court should thus find the arrest unlawful here. An unlawful arrest may not serve as the basis for a search incident to arrest. State v. Allen, 138 Wn. App. 463, 472, 157 P.3d 893 (2007). Blackmer's search of Hassan was therefore invalid. The fruits of that search – the cocaine and marijuana – must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Allen, 138 Wn. App. at 472. Without the cocaine evidence, the state has no case. This Court should therefore reverse Hassan's conviction and remand for dismissal.

- c. The Ortega Court's analysis contravened the rules of statutory construction and should not be relied on in Hassan's case.

This Court reviews questions of statutory construction de novo. State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). Several well-established rules govern a court's construction of a statute. First, when statutory language is unambiguous, the statute's meaning must be derived from its plain wording. Post v. City of Tacoma, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Second, statutes in derogation of the common law are strictly construed. State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

Because RCW 10.31.100 is in derogation of the common law, it must be strictly construed. McDonald, 92 Wn.2d at 37. "Strict

construction of a penal statute means that the punitive sanctions must be confined to such matters as are clearly and manifestly within the statutory terms and purposes." State v. Rinkes, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). See State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986) ("fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.").⁵

This Court's opinion in Ortega runs afoul of these principles. Instead of reading the plain, unambiguous, language of RCW 10.31.100 narrowly, this Court stretched its scope beyond its intended meaning. By finding the arrest did not violate the warrant requirement, the Court necessarily found the observer officer "arrested" Ortega even though he clearly did not detain him, handcuff him, search him incident to arrest, or

⁵ In other words, the plain language of an unambiguous statute must be strictly construed. See Miller v. Treat, 57 Wn.2d 524, 531-32, 358 P.2d 143 (1960):

The host-guest statute is in derogation of the common law and, therefore, must be strictly construed. The statute is clear and unambiguous. It specifically states the evidence must be independent of, or in addition to that of the parties to the action. Griffith was not a party to the action in the instant case. He was a former party. Under the statute, therefore, his testimony constituted evidence in addition to that of the parties to the action. To hold otherwise would require reading into the statute language which is not there.

otherwise restrain his freedom. In fact, the Court held the observer "was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team." Ortega, 159 Wn. App. at 898.

While it is true the observing officer supervised and observed the actual arrest of Ortega, he was not an arresting officer "in the sense" of a strict and narrow view of the term "arrest." Rather, a person is under arrest "when, by a show of authority, his freedom of movement is restrained." State v. Holeman, 103 Wn.2d 426, 428, 693 P.2d 89 (1985). Ortega had long since been restrained -- and searched incident thereto -- by the time the observer officer arrived at the arrest scene.

Second, the Court must have found Ortega was in the "presence" of the observer officer, because the arrest team officers saw Ortega do nothing at all. The Legislature has not defined what it meant by "presence" in this context. In such circumstances, a court may ascertain the plain meaning of unambiguous terms by looking to a common dictionary definition. Lindeman v. Kelso School Dist. No. 458, 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

The dictionary provides several definitions of "presence," including the following: "the fact or condition of being present[;]" [""]the state of

being in one place and not elsewhere[;"] ["]the condition of being within sight or call, at hand, or in a place being thought of[;"] the fact of being in company, attendance, or association[.] Webster's Third New International Dictionary 1793 (1993). If necessary, it is also proper to consult a thesaurus when interpreting statutes. State v. Kintz, 169 Wn.2d 537, 547-48, 238 P.3d 470 (2010). For "presence," the thesaurus entries are: "being, nearness, praeensia, proximity, sojournment, visitation." William C. Burton, Legal Thesaurus, 420 (3d ed. 1999).

In Ortega, the suspected drug traffic loitering occurred at street level. The observer officer, meanwhile, was on the second floor of a nearby business. Although the Ortega Court did not mention whether the officer needed a visual aid to see from his distance away, it did note the officer "packed up his surveillance gear" before meeting his colleagues below. Ortega, 159 Wn. App. at 893.

Under a reasonable interpretation, this Court's conclusion that Ortega's activity occurred "in the presence of" the observer officer does not comport with the required strict and narrow construction of RCW 10.31.100. Ortega was plainly not "near" the officer in common parlance.

This is even more evident when considering the hypothetical presented by the Ortega Court to illustrate its reasoning:

If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.

Ortega, 159 Wn. App. at 899. This clearly shows the Court did not equate "in the presence of" with "within sight of," as suggested by its ultimate conclusion, because Officer B saw nothing. Rather – because the fellow officer rule would not apply to authorize Officer B's arrest – "in the presence of" must mean "near" the observing officer and the offense (assuming Officer A, while driving, would not be able to see the commission of a suspected misdemeanor that did not occur nearby in the normal sense of the word).

In Ortega, the observing officer made himself "near" the incident, but only long after the arrest. This Court in Ortega therefore failed to restrict its holding as required when considering statutes in derogation of the common law. For these reasons, this Court should not apply Ortega in Hassan's case.

Moreover, given that "presence" apparently means physical distance in this context, Hassan's case is distinguishable from Ortega. Officer Hazard observed the incident from the roof of the Belltown Inn, five floors above the ground. 1RP 25, 38. Hazard testified he was about

80 feet to 100 feet away from the corner in front of the tavern. 1RP 37-38. Importantly, nothing in the record indicates Hazard descended from his post and met with Blackmer, Harris, and Hassan at all during the arrest. Therefore, to the extent this Court found such behavior noteworthy enough to include in Ortega, that behavior did not occur here. For this reason as well, Hassan asks this Court not to apply Ortega to his appeal.

Finally, "the rule of statutory construction that trumps every other rule" cannot be overlooked: a court should not interpret statutory language in a manner that results in absurd or strained consequences. Davis v. State ex rel. Department of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999). Hassan respectfully submits an absurdity would result if this Court finds the warrantless arrest permissible under RCW 10.31.100 here.

In summary, Officer Hazard did not "arrest" Hassan for suspicion of a misdemeanor committed in his "presence." The trial Court therefore erred by denying the motion to suppress evidence.

- d. Hassan may make this argument for the first time on appeal.

Hassan's trial counsel challenged the grounds for the arrest, but not because it constituted a warrantless arrest for a suspected crime outside the presence of officers Blackmer and Hazard. Although counsel did not specifically rely on RCW 10.31.030, she did assert there was insufficient

probable cause to support the arrest. Probable cause, the objective standard for determining the reasonableness of an arrest, "is limited by RCW 10.31.100." Ortega, 159 Wn. App. at 894. Further, counsel noted Hassan was arrested for drug traffic loitering, not a felony VUCSA, in response to the prosecutor's argument that there was probable cause to arrest Hassan for delivery or possession with intent to deliver cocaine. 1RP 55-58, 62-63. The warrantless arrest argument was therefore implicitly implicated.

In any event, RAP 2.5(a)(3) permits an appellant to raise a manifest constitutional error for the first time on appeal. Erroneous suppression rulings have been found to constitute such error. See, e.g., State v. Littlefair, 129 Wn. App. 330, 339, 119 P.3d 359 (2005) (A trial court's failure to suppress evidence seized as the result of an unlawful search affects a constitutional right and may thus be raised for the first time on appeal.).

In addition, Hassan asks this Court to answer a purely legal question; because he moved to suppress the evidence, the trial court held a hearing and all pertinent facts are of record. Cf. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual

prejudice is shown and the error is not manifest.”); see State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (rejecting narrow reading of McFarland, court holds that "when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal."); see also State v. Snapp, 153 Wn. App. 485, 494-95, 219 P.3d 971 (2009) ("In contrast, Snapp challenged the scope of the vehicle search incident to arrest below. While he did not, and could not, have raised his challenge under Gant,⁶ which was not yet decided, he sufficiently challenged the scope of the search incident to his arrest. Thus, Snapp preserved this issue for appeal."), review granted, 169 Wn.2d 1026 (2010).

This Court should therefore reject any assertion that RAP 2.5(a) precludes this Court from reviewing the merits of the above arguments.

- e. Hazard lacked probable cause to suspect Hassan was committing a felony.

Officer Hazard did not see Hassan or anyone else in the group surrounding him display drugs or exchange cash. Hassan nevertheless

⁶ Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

anticipates the state may assert there was probable cause to arrest Hassan for selling drugs or possessing drugs with intent to deliver.

In discussing whether the "fellow officer" rule applied to misdemeanor arrests, the Ortega Court cited, *inter alia*, State v. White⁷ for the proposition the rule applies to arrests for the felony of possessing drugs with intent to deliver. In White, Seattle police were employing the same type of surveillance for drug activity as in Hassan's case. 76 Wn. App. at 803-04. The police in White did not see actual drugs exchanged when watching the interactions of three people. 76 Wn. App. at 803.

But unlike in Hassan's case, the police saw one participant (the "buyer") count and deliver money to another participant (the "seller"). The police saw the "seller" drop a small object to the ground, which the buyer immediately picked up and looked at and momentarily put into his mouth before handing money to the "seller." 76 Wn. App. at 803. Furthermore, an individual who appeared to act as a "look out" accompanied the "seller." 76 Wn. App. at 804. This Court held these observations gave the surveilling officer probable cause to believe he had witnessed a drug transaction. And under the fellow officer rule, the arrest

⁷ Ortega, 159 Wn. App. at 896 (citing White, 76 Wn. App. 801, 805, 888 P.2d 169 (1995), aff'd. on other grounds, 129 Wn.2d 105 (1995)).

team officer who actually made the arrest thus also had probable cause. 76 Wn. App. at 805.

In both Hassan's case and in White, the officer could not tell whether the exchanged item was a narcotic. But the additional indicia in White -- exchanging money for a small object and employing a "lookout" - - are not present in Hassan's case. White is therefore distinguishable and not helpful to the state's anticipated argument.

Neither is State v. Fore, 56 Wn. App. 339, 343-44, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). There an officer observed three transactions in which the defendant and his companion exchanged small plastic bags containing brownish or greenish matter with passing motorists for what appeared to be folded currency. The defendant then retrieved a larger plastic bag from underneath the dashboard of a nearby vehicle and removed smaller plastic packets containing green matter. This Court held these observations were sufficient to establish probable cause to believe the officer witnessed drug transactions:

[A]bsolute certainty by an experienced officer as to the identity of a substance is unnecessary to establish probable cause. . . . Here, the suspicious circumstances surrounding the exchanges, not the officer's ability to identify the substance, constituted the primary basis for the probable cause determination.

Fore, 56 Wn. App. at 345. See also State v. Rodriguez-Torres, 77 Wn. App. 687, 694, 893 P.2d 650 (1995) (officer had probable cause to arrest defendant based on following observations: Rodriguez-Torres' companion gave him money; Rodriguez-Torres showed companion object that he kept cupped in his hand; transaction occurred in area well-known for narcotics sales; someone yelled "police" when the officer approached, prompting Rodriguez-Torres and companion to quickly leave scene.).

Again, the only commonality between Hassan's case and these cases is the officers' inability to identify the items exchanged. Importantly, Hazard saw no money change hands. Nor did he see Hassan appear to retrieve more packaged-for-sale suspected drugs from a larger stockpile. Again, these differences highlight the lack of probable cause to support a felony arrest of Hassan.

Additionally, Hazard had no prior knowledge of Hassan. 1RP 33, 39-40. Nor does the record indicate Hazard recognized any of the individuals surrounding Hassan from previous drug transactions or drug-related incidents.

For these reasons, Hazard did not have probable cause to believe he witnessed Hassan commit a felony drug offense. This Court should therefore reject any anticipated state's claim to the contrary.

2. ERRONEOUS ADMISSION OF "OTHER DRUGS"
EVIDENCE DEPRIVED HASSAN OF A FAIR TRIAL.

The state charged Hassan with possession of cocaine with intent to deliver, based on the theory Hassan displayed the intent to deliver the cocaine found in his pocket during the suspected exchanges that gave rise to his arrest. The state did not rely on the existence of marijuana in Hassan's pocket to support its theory. Yet the trial court overruled Hassan's objection to the marijuana evidence during Blackmer's testimony. Although the court admitted its ruling was in error, it found the error harmless. To the contrary, the error was not harmless and this Court should reverse Hassan's conviction.

a. Pertinent facts

During the state's case-in-chief, the prosecutor questioned officer Blackmer about his search incident to Hassan's arrest:

Q: What did you find?

A: I found two crack cocaine rocks in his upper left breast pocket of his shirt. And then in his right front pant pocket was –

[DEFENSE COUNSEL]: Objection, Your Honor. Relevancy.

THE COURT: Overruled.

A: In his right front pants pocket was .8 grams of marijuana.

Q: And did you – what did you do with what you found in the upper left breast pocket?

A: The crack cocaine rocks I went and field tested. It came back positive for cocaine. I packaged those up along with the marijuana.

1RP 111-12.

A defense-requested sidebar followed the close of direct examination. 1RP 112. After a short cross examination of Blackmer, and no redirect, the trial court recessed and placed the sidebar on the record. 1RP 113. The court explained defense counsel expressed concern that the evidence of marijuana possession may have been the subject of a pretrial ruling to exclude. The parties confirmed the pretrial ruling at issue did not address the admissibility of the marijuana, but rather excluded only the testimony about the field test. 1RP 113-14. The court and parties then discussed the remedy for the field test violation, which was set over for a later time. 1RP 114-15. The prosecutor admitted he failed to inform Blackmer of the pretrial ruling. 1RP 114-15.⁸

When trial resumed the following day, the court announced it had received Hassan's motion to dismiss pursuant to CrR 8.3(b), or alternatively for a mistrial. CP 65-68; 2RP 4. In the motion, defense

⁸ Before trial, the prosecutor stated the State would not be offering the field test evidence in his case-in-chief. 1RP 14.

counsel recounted the above-quoted colloquy, including her relevancy objection to the marijuana testimony. CP 66. Counsel focused on the field test evidence, maintaining the prosecutor committed simple mismanagement when he violated the trial court's pretrial order excluding the evidence. CP 67.⁹ Counsel contended admission of the evidence prejudiced Hassan's right to a fair trial because it resulted in ineffective assistance of counsel and infringement of Hassan's right to confrontation because counsel relied on the pretrial ruling and was thus unprepared to cross-examine Blackmer about the field test. CP 67; 2RP 45-46.

The trial court acknowledged it erred by not sustaining counsel's objection to the question about marijuana because the charge was delivery of cocaine. The court nevertheless found the evidence was not so prejudicial as to warrant a dismissal or declaration of mistrial. 2RP 50. The court made the same ruling with respect to the field test evidence,

⁹ CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

noting that during direct examination, Hassan admitted possessing the cocaine in his pocket. 2RP 50-51.

The trial court correctly concluded the marijuana evidence was not relevant and that it had erred by overruling defense counsel's objection. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence must be both material and probative. State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). "Evidence which is not relevant is not admissible." ER 402. This Court reviews a trial court's evidentiary decision for an abuse of discretion. Harris, 97 Wn. App. at 868.

Here the evidence was neither material nor probative, and the state made no attempt to show it was. The charge was possession of cocaine with intent to deliver. To establish it was cocaine Hazard observed Hassan hand to the three unknown individuals near the intersection, the state presented testimony to show cocaine was the only drug users and dealers commonly stored in their mouths. 1RP 104, 2RP 9-12, 24-26. Officers Harris and Hazard also testified the area was well known for selling and buying primarily crack cocaine. 2RP 8, 18.

One factor courts have found that tends to establish the identity of an exchanged item is the particular area where the transaction occurred. In State v. Hernandez,¹⁰ the court found sufficient evidence to establish the substance as cocaine in part based on testimony from experienced police officers that the transaction took place in an area known for the availability of cocaine. Another is the behavior characteristic of a drug sale. United States v. Dominguez, 992 F.2d 678, 681, cert. denied, 510 U.S. 891 (7th Cir. 1993). Therefore, the state's evidence regarding the significance of the mouth storage and the location of the transactions tended to show the items exchanged contained cocaine.

Intent to deliver cocaine, another element at issue in Hassan's case, is typically shown by circumstantial evidence. State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). Testimony that a defendant appeared to be selling cocaine in separate transactions shortly before arrest is relevant to show what a defendant intended to do with the cocaine he continued to possess when he was arrested. State v. Thomas, 68 Wn. App. 268, 273, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028, 877 P.2d 694 (1994). Therefore, combined with the evidence indicating the

¹⁰ 85 Wn. App. 672, 680, 935 P.2d 623 (1997).

item was cocaine, the evidence of the other transactions tended to show Hassan's intent to deliver the remaining cocaine in his pocket.

In contrast, the record is devoid of any evidence tending to show the relevance of .8 of a gram of marijuana Hassan had in his pocket. The trial court found no relevance to the evidence after giving counsel's objection further consideration. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). Under this standard, a trial court's evidentiary ruling not be disturbed unless a reviewing court finds the ruling is based on untenable grounds or was made for untenable reasons. State v. Cronin, 142 Wn.2d 568, 585, 14 P.3d 752 (2000). The trial court had tenable grounds for excluding the marijuana evidence because it was not relevant to the charged of cocaine possession with intent to deliver. This Court therefore should not disturb this ruling.

The remaining issue is whether the trial court erred by finding the erroneous admission of the marijuana evidence harmless. An evidentiary error is not harmless if it is reasonably probable that, absent the error, the outcome of the trial would have been materially affected. In re Detention of Post, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010).

Marijuana possession is itself a crime. RCW 69.50.101(q) and .4014. It is well established that a defendant must be tried only for the offense charged. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). Evidence of misconduct other than that charged is generally inadmissible because it portrays the defendant as a “criminal type” and therefore more likely to have committed the crime for which he is presently charged. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In other words, evidence of other bad acts is inherently prejudicial. State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007), review denied, 163 Wn.2d 1014 (2008).

Although irrelevant, the marijuana could have prejudiced jurors against Hassan. Jurors might have believed Hassan was getting away with something because he was not facing a possession of marijuana charge. The jury may therefore have been more swayed to find Hassan guilty of the more serious offense rather than the lesser charge of possession of cocaine. Evidence that portrayed Hassan as a "criminal type" probably had the same effect.

Furthermore, Hazard told jurors the area of the incident was "known very well for . . . street-level narcotics trafficking, primarily of "crack cocaine *and some marijuana*." 2RP 18. Those were the exact

drugs Hassan possessed. It is reasonably probable that a juror exposed to this evidence could conclude Hassan had gone to that particular area knowing he would find that segment of Seattle's drug-using clientele that was looking for the two drugs he had to offer. This conclusion would be supported by the officers' testimony that in contrast to the crack cocaine and marijuana customers, those interested in heroin went to a different area than Belltown that was known for that drug. 2RP 8. Jurors may also have believed Hassan was a more attractive seller in that area than someone trying to sell only cocaine.

For these reasons, it is reasonably probable that had jurors not heard Hassan had marijuana, they would have found him not guilty at all or at least not guilty of possession of the cocaine with the intent to deliver it. The trial court erred by concluding otherwise. This Court should reverse Hassan's conviction and remand for a new trial.

- 4
3. REMAND IS NECESSARY BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6(b).

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

The purpose of CrR 3.6(b) is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993). When the trial court fails to enter findings and conclusions as required by CrR 3.6, “there will be a strong presumption that dismissal is the appropriate remedy.” State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court’s failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions).

This Court should remand for entry of complete and thorough findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (if trial court fails to enter a finding as to an element of the crime charged, the appropriate remedy is to vacate and remand for appropriate findings).

D. CONCLUSION

For the foregoing reasons, Hassan respectfully requests this Court to reverse his conviction and dismiss with prejudice or, in the alternative remand for a new trial.

DATED this 21 day of June, 2011.

Respectfully submitted,

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APPENDIX



City of Seattle Legislative Information Service

Seattle Municipal Code

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Title 12A - CRIMINAL CODE

Subtitle I Criminal Code

Chapter 12A.20 - Controlled Substances

SMC 12A.20.050 Drug-traffic loitering.¹

A. As used in this section:

1. "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW, or the equivalent provisions of any federal statute, state statute or ordinance of any political subdivision of this state, and includes a verdict of guilty, a finding of guilty and an acceptance of a plea of guilty.

2. "Drug paraphernalia" means drug paraphernalia as the term is defined in the Uniform Controlled Substance Act, RCW 69.50.102, excluding, however, items obtained from or exchanged at any needle exchange program sponsored by the Seattle-King County Health Department, and hypodermic syringes or needles in the possession of a confirmed diabetic or a person directed by his or her physician to use such items.

3. "Illegal drug activity" means unlawful conduct contrary to any provision of RCW Chapter 69.41, 69.50 or 69.52, or the equivalent federal statute, state statute, or ordinance of any political subdivision of this state.

4. "Known drug trafficker" means a person who has, within the knowledge of the arresting officer, been convicted within the last two years in any court of any felony illegal drug activity.

5. "Public place" is an area generally visible to public view and includes, but is not limited to, streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, transit stations, shelters and tunnels, automobiles visible to public view (whether moving or not), and buildings, including those which serve food or drink, or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.

B. A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington.

C. The following circumstances do not by themselves constitute the crime of drug-traffic loitering. Among the circumstances which may be considered in determining whether the actor intends such prohibited conduct are that he or she:

1. Is seen by the officer to be in possession of drug paraphernalia; or

2. Is a known drug trafficker (provided, however, that being a known drug trafficker, by itself, does not constitute the crime of drug-traffic loitering); or
3. Repeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation; or
4. Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture; or
5. Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to stop pedestrians; or
6. Is the subject of any court order, which directs the person to stay out of any specified area as a condition of release from custody, a condition of probation or parole or other supervision or any court order, in a criminal or civil case involving illegal drug activity; or
7. Has been evicted as the result of his or her illegal drug activity and ordered to stay out of a specified area affected by drug-related activity.

D. No person may be arrested for drug-traffic loitering unless probable cause exists to believe that he or she has remained in a public place and has intentionally solicited, induced, enticed or procured another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52 Revised Code of Washington.

E. A person convicted of drug-traffic loitering shall be guilty of a gross misdemeanor and punished in accordance with SMC Chapter 12A.02.

F. During each of the two (2) years following enactment of the ordinance codified in this section², the Mayor of Seattle and the Chief of Police, jointly, shall conduct at least one (1) public hearing a year to ascertain the effectiveness of said ordinance in reducing drug trafficking and its attendant criminal behavior and to assure that this section is being enforced without regard to race, color, ancestry, national origin, sex, sexual orientation or disability. Within one (1) month after each hearing the Mayor and the Chief of Police shall issue a report to the City Council summarizing the testimony at the hearing. In their report, the Mayor and Chief of Police shall also inform the Council of any changes they deem advisable.

(Ord. 116307 Sections 1, 2, 1992)

1. Editor's Note: Section 1 of Ord. 116242, passed by the City Council on June 29, 1992, concerning prosecutions under Ord. 115171, reads as follows: The expiration or repeal of Ordinance 115171 shall not affect the validity of any prosecution under that ordinance for unlawful conduct committed prior to the date of the expiration or repeal of that ordinance, and such prosecution may proceed as though Ordinance 115171 had remained in effect. Ordinance 115171 expired August 5, 1992.

2. Editor's Note: Ordinance 116307 was passed by the Council on August 17, 1992 and signed by the Mayor on August 21, 1992.

Search for ordinances passed since the last SMC update (ordinances effective through February 18th, 2011, Ordinance 123538 except 123495) that refer to and that may amend Section 12A.20.050 . *(Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances.)*

See also Recent Legislation and Council Bills and Ordinances.

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, clerk@seattle.gov.

For interpretation or explanation of a particular SMC section, please contact the relevant City department.



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No. 66376-3-I

Certificate of Service by Mail

On June 21, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Rashid Hassan 725705
Monroe Corrections Center
P.O Box 777
Monroe, WA 98272

Containing a copy of the opening brief, re Rashid Hassan
Cause No. 66376-3-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

6-21-11

Date
Done in Seattle, Washington