

69629-7

69629-7

NO. 69629-7-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES L. DIXON,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

JOHN J. JUHL  
Deputy Prosecuting Attorney  
Attorney for Respondent

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

1. Was evidence that defendant possessed \$1,255 cash at the time of the offense properly admitted under the Rules of Evidence?

2. Police testified that the \$1,255 cash was not brought to court for trial because seized currency is placed in an interest bearing bank account pending determination of the rightful owner. Was the officer's use of the phrase "unlawful drug proceeds" during the explanation of why the cash was not brought to court harmless?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

On May 3, 2012, in response to complaints from the local businesses, Officers Bennett and Wantland were working undercover drug emphasis on Hewitt Avenue. At approximately 9:50 p.m., Officers Bennett and Wantland observed James Dixon, defendant, exit the Commerce Building. They called for uniformed officers to contact defendant.<sup>1</sup> Officers Drake and Jessup responded. RP 34-37, 58-63, 81-84, 90-91, 94-95.

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<sup>1</sup> Officers Bennett and Wantland recognized defendant from prior contact, they were aware that he was on community custody with a condition to Stay Out of Drug Area (SODA), and the location was in a SODA. The jury was simply told the police had a lawful reason to contact defendant. RP 3-5, 36, 60.

Defendant's behavior changed when the uniformed officers arrived on scene, he acted like he was preparing to flee. As Officer Drake approached he commanded defendant to stop, defendant turned towards Officer Drake and walked to a garbage can on the sidewalk. Defendant's hands were clinched and Officer Drake could not tell what defendant was holding. Officer Drake again commanded defendant to stop, drew his service weapon, and commanded defendant to step away from the garbage can. Officer Drake observed defendant drop a light colored object, no bigger than the palm of his hand, into the garbage can before defendant stepped away from the garbage can. Defendant was detained.<sup>2</sup> RP 37-44, 63-67, 85, 96-106, 109-113, 116-117, 119-120.

Officers checked the garbage can. Officer Wantland observed two small plastic baggies containing what appeared to be controlled substances on top of the other items in the garbage can. Officer Wantland recovered the baggies, field tested the substances and received positive results for the presence of methamphetamine and cocaine. Defendant was searched incident to arrest and a cell phone and \$1,255 cash were found in his

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<sup>2</sup> Defendant was arrested for the SODA / community custody violation. The jury was just told that defendant was handcuffed as part of general procedures. RP 47-55, 67.

possession. The baggies, cell phone and cash were booked into evidence. The two baggies were sent to the Washington State Patrol Crime Laboratory for testing. One baggie contain methamphetamine, the other contain cocaine. RP 67-76, 78-79, 85-87, 89-90, 106-107, 113-116, 121-122, 126-134.

The cell phone and baggies were admitted as exhibits. Officer Wantland testified that he retrieved the baggies and cell phone from the evidence room and brought them to court. The prosecutor asked why the money was not in the evidence room. Defense objected on grounds of relevance. Defense counsel stated that she was unaware where this was going, she was not aware that the money was not in the evidence room and thought it was going to be brought to court. The court asked for an offer of proof. The prosecutor offered the notice of seizure and intended forfeiture that had been provided in discovery. The court overruled the objection. The officer then explained the reason he was unable to bring the money to court was that the normal procedure when currency is seized, or there is a motion to seize for unlawful drug proceeds, is to put the money into a bank account to draw interest, and at the conclusion of the civil proceeding regarding the seizure, the money is awarded to the prevailing party. Defendant did not

object to the reference to “unlawful drug proceed.” RP 73-78, 132-133.

**B. PROCEDURAL HISTORY.**

Defendant was charged with Possession of a Controlled Substance. CP 63-64. Prior to trial the charge was amended to include a community custody allegation. CP 57-58. Defendant stipulated that he was under community custody on May 3, 2012. CP 50-51; RP 2-3.

Because the police contacted defendant for being in a Stay Out of Drug Area (SODA), a violation of a condition of his community custody, the State requested to be allowed to show that the officers had a lawful reason to contact defendant to give the jury a basis for the contact. Defendant asked the court to suppress all information leading up to actual contact on the date in question, including the fact that defendant was on community custody with a SODA condition, and that the officers knew defendant or had prior contact with defendant. The trial court specifically excluded mention of the reason police contacted and arrested defendant, but directed that the officers could testify that there was a lawful reason to contact defendant. RP 3-5.

The trial court granted defendant's motion in limine to exclude any evidence of other convictions, infractions or other bad acts of defendant, including reference to prior convictions and pending charges. RP 12-13.

The court denied defendant's motion in limine to prohibit testimony about the cell phone and cash found when defendant was searched incident to his arrest. The court found the evidence was more probative than prejudicial. RP 15-18.

The State requested clarification on the court's ruling that the officers could say they had a lawful reason to contact defendant, because he was actually arrested and handcuffed for the SODA violation prior to the baggies being found in the garbage can. The court permitted the officers to testify that defendant was handcuffed as part of general procedures. RP 47-55.

The case proceeded to trial and on October 24, 2012, the jury found defendant guilty as charged of the crime possession of controlled substance. Based on defendant's stipulation the court found that defendant was on community custody at the time of the offense. CP 28; RP 166-169.

Defendant's offender score was 17, with a standard sentencing range of 12 to 24 months. Defendant was sentenced to

20 months confinement, ordered to pay \$600.00 in legal financial obligations, and placed on 12 months community custody. CP 16-27; RP 172, 175-177. Defendant appealed. CP 2-15.

### **III. ARGUMENT**

#### **A. EVIDENCE THAT DEFENDANT POSSESSED \$1,255 CASH AT THE TIME OF THE OFFENSE WAS PROPERLY ADMITTED UNDER THE RULES OF EVIDENCE.**

##### **1. Evidence Rules 401, 402 And 403.**

Defendant claims that the trial court improperly admitted evidence that he possessed \$1,255 cash at the time of the offense. Defendant argues that the evidence was irrelevant to the elements of the crime charged and was therefore irrelevant at trial. Appellant's Brief at 6-11. The trial court properly determined the evidence was relevant and probative, and that its probative value outweighed its prejudicial effect.

The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913-914, 16 P.3d 626 (2001). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Id. Evidence is relevant when it 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. In addition, a fact bearing on the credibility or probative value of other evidence is relevant. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). Relevant evidence need only make the existence or nonexistence of a material fact “more or less likely.” ER 401; State v. Israel, 113 Wn. App. 243, 267, 54 P.3d 1218 (2002). Relevant evidence is generally admissible. ER 402. The trial court is generally the proper court to weigh the relevance of evidence. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007). “Once a court has determined that evidence is relevant, the court must weigh any prejudice the evidence will have against its probative effect.” ER 403; State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982); Israel, 113 Wn. App. at 268.

Here, the evidence that defendant possessed \$1,255 cash was relevant to explain the officer’s conduct and what the police found in defendant’s possession when he was arrested. Without context, failure to search defendant could be argued as evidence that the police did not do a thorough investigation, and the lack of items found in defendant’s possession could be argued as evidence that defendant was not involved in any drug activity. In fact,

defense did argue that the police did not do a thorough investigation, and that no drug paraphernalia was found. RP 158-159. Facts tending to establish a party's theory of the case are generally found to be relevant. Rice, 48 Wn. App. at 11-12. The evidence that defendant possessed \$1,255 cash is relevant because it bears on the probative value of other evidence.

Defendant further argues that the trial court's admission of the fact of his possession of \$1,255 cash was prejudicial because it "tends to show the person intended to sell the substance or is involved in drug trafficking." Appellant's Brief 8. While any evidence that tends to prove the defendant is guilty is prejudicial, defendant fails to show how the prejudice is unfair. The argument that defendant's possession of \$1,255 cash was wrongly admitted because he was only charged with possessing, not possession with intent to deliver, controlled substance, is specious. If defendant is selling drugs, it is highly probative to whether he is possessing drugs. The crimes are connected and relevant to each other. State v. Hassan, 151 Wn. App. 209, 216, n.3, 211 P.3d 441, 445 (2009) (simple possession of a controlled substance is a lesser-included offense of the crime of possession with the intent to deliver); State v. Rapp, 25 Wn. App. 63, 65, 604 P.2d 534 (1979) (the crime of

possession with intent to deliver a controlled substance is a lesser included offense of the crime of delivery of a controlled substance).

Defendant's possession of \$1,255 cash was presented as evidence relevant to drug activity connected to defendant's possessing drugs. PR 17-18. The trial court satisfied the balancing test of ER 403, weighing the probative value against the prejudice, and concluded that the fact defendant possessed \$1,255 cash was more probative than prejudicial. RP 18. The court must weigh any prejudice against probative effect of the evidence. ER 403; Saltarelli, 98 Wn.2d at 361. It is not an abuse of discretion when the trial court correctly interprets the rules of evidence. State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012); Foxhoven, 161 Wn.2d at 174. The trial court did not abuse its discretion in admitting evidence that at the time of the charged offense defendant possessed \$1,255 cash.

## **2. Evidence Rule 404(b).**

Defendant also argues the evidence that he possessed \$1,255 cash was inadmissible under ER 404(b). A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 176; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v.

McCreven, 170 Wn. App. 444, 457, 284 P.3d 793 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Powell, 126 Wn.2d at 258. The reviewing court will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. McCreven, 170 Wn. App. at 457, citing State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988).

ER 404(b)<sup>3</sup> prohibits the admission of “evidence of other crimes, wrongs, or acts” to prove the “character of a person” in order to show the person “acted in conformity therewith.” The fact that defendant possessed \$1,255 cash was not evidence of other crimes, wrongs, or acts; it did not demonstrate the character of defendant; nor did it show action in conformity therewith.

Even if defendant’s possession of \$1,255 cash is considered ER 404(b) evidence, the rule permits the admission of evidence for other purposes, such as proof of motive, plan, or identity. Foxhoven, 161 Wn.2d at 175; State v. Everybodytalksabout, 145

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<sup>3</sup> ER404(b) provides:

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.

Wn.2d 456, 466, 39 P.3d 294 (2002); McCreven, 170 Wn. App. at 458. Evidence is admissible under ER 404(b) if relevant for some purpose other than to show general character or propensity. State v. Herzog, 73 Wn. App. 34, 50, 867 P.2d 648 (1994).

**a. Res Gestae.**

Evidence is admissible under ER 404(b) if it is part of the res gestae of the offense charged. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). Res gestae evidence “complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff’d, 96 Wn.2d 591, 637 P.2d 961 (1981). Res gestae evidence is admissible in Washington “if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.” State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1997), aff’d, 120 Wn.2d 616, 845 P.2d 281 (1993); 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 404.18, at 527 (5<sup>th</sup> ed. 2007). A defendant may not force the prosecution to present a “truncated or fragmentary version” of the charged offense by arguing that evidence of other crimes is

inadmissible because it only tends to show the defendant's bad character. Lane, 125 Wn.2d at 832, citing Tharp, 27 Wn. App. at 616. There is no additional requirement that res gestae evidence be relevant for an additional purpose, such as plan, motive, or identity. Lane, 125 Wn.2d at 834.

Here, in balancing the prejudicial effect with the probative value, the trial court limited the testimony to the fact that defendant was lawfully contacted and arrested, handcuffed as part of general procedure, and searched incident to his arrest. The evidence that \$1,255 cash was found in defendant possession was part of the res gestae of the offense. There was no abuse of discretion by the trial court in admitting this evidence for the purpose of showing complete history of the charged offense.

Defendant argues here as he did below that the trial court's admission of the fact of his possession of \$1,255 cash was error under State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001). Defendant's reliance on Trickler is misplaced. Trickler was being tried for possession of a stolen credit card. In addition to the stolen credit card for which Trickler was charged, the trial court admitted evidence of additional stolen property that belonged to people other than the victim. Trickler, 106 Wn. App. at 733. On appeal, the

court found that the evidence of the other property was highly prejudicial because Trickle was not on trial for possessing any of those items. The court concluded the prejudicial effect outweighed its probative value, and reversed the conviction. Trickler, 106 Wn. App. at 733-734. Unlike the trial court in Trickler, the trial court here properly balanced the probative value and prejudicial effect of the evidence, and ruled in favor of admission. The trial court did not abuse its discretion. The admission of the evidence should be affirmed.

**b. The Evidence was admissible under ER 404(b).**

Evidence is admissible under ER 404(b), when the trial court finds by a preponderance of the evidence that the act occurred, identifies the purpose for which the evidence is being introduced, determines that the evidence is relevant, and that its relevance exceeds its prejudicial effect. Foxhoven, 161 Wn.2d at 175; State v. Baker, 89 Wn. App. 726, 731-732, 950 P.2d 486 (1997). The trial court is not required to conduct an evidentiary hearing and may assess admissibility on offer of proof to determine whether alleged acts probably occurred prior to admitting evidence under ER 404(b). State v. Kilgore, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). The prejudice ER 404(b) seeks to avoid is that the jury is

induced to believe the defendant is a bad person and to infer that he is therefore guilty. Trickler, 106 Wn. App. 735 (dissent), citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). The unfair prejudice is not that the evidence tends to prove the defendant is guilty. The trial court has discretion to balance the probative value of the evidence with its prejudicial effect. Herzog, 73 Wn. App. at 50.

Here, defendant does not dispute the accuracy of the evidence. The evidence was admitted as part of the res gestae of the offense and to show defendant's link to drug activity. Further, the court found the evidence was relevant and that its probative value outweighed its prejudicial effect. Defendant did not request a limiting instruction, nor does he argue that the trial court erred by failing to give a limiting instruction. The trial court is not required to give an ER 404(b) limiting instruction in the absence of a request for one. State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604, 607 (2011). The trial court's admission of the evidence was not an abuse of discretion.

**B. THE PHRASE “UNLAWFUL DRUG PROCEEDS” USED TO EXPLAIN THE NORMAL PROCEDURE FOR SEIZED CURRENCY WAS HARMLESS.**

Defendant argues that the trial court improperly admitted testimony labeling the money found on defendant as “unlawful drug proceeds.” Appellant’s Brief 1, 8, 11-13. The phrase “unlawful drug proceeds” was only used once during trial to explain why the cash was not brought to court.<sup>4</sup>

**1. The Money Was Not Labeled “Unlawful Drug Proceeds.”**

Four items were seized and booked in to evidence by the police; two baggies, cell phone and \$1,255 cash. The officer testified that he retrieved the baggies and cell phone from the evidence room and brought them to court. The cell phone and baggies were admitted as exhibits. Anticipating defendant’s theory that the police mismanaged the case and did not do a thorough investigation, the prosecutor asked why the money was not in the evidence room. The court overruled the defense objection on grounds of relevance and allowed the officer to answer. The officer

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<sup>4</sup> The prosecutor’s argument that “\$1,200 in cash ... [i]s a lot of money to have in your pocket,” was made in rebuttal closing in response to defense argument regarding the inadequacy of the police investigation and the evidence. RP 162-163. “In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” State v. Brown, 132 Wn.2d 529, 565, 940 P.2d 546 (1997), citing State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995); see also State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011); State v. Hoffman, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991).

then explained that he was unable to bring the money to court because the normal procedure when currency is seized, or there is a motion to seize for unlawful drug proceeds, is to put the money into a bank account to draw interest, and when the civil proceeding regarding the seizure is concluded, the money is awarded to the prevailing party. RP 73-78, 132-133. There was no testimony regarding the disposition of the money. The officer's explanation of the normal procedure of depositing seized currency in an interest bearing account until a determination regarding the disposition of the money is made did not label the \$1,255 cash defendant possessed as "unlawful drug proceeds."

Additionally, defendant did not object to the phrase "unlawful drug proceeds." An objection to the admission of evidence must generally be timely and specific to preserve the issue for appeal. ER 103(a)(1); RAP 2.5(a); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182(1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Defendant objected to the relevance of the officer's explanation. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Guloy, 104 Wn.2d at 422; State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Similarly, a party who objects to the

admissibility of evidence on one ground at trial generally may not raise a different ground on appeal. State v. Mak, 105 Wn.2d 692, 719, 718 P.2d 407 (1986), overruled on other grounds, State v. Hill, 123 Wn.2d 641, 645-647, 870 P.2d 313 (1994). Since the specific objection made at trial is not the basis of defendant's argument on appeal, he has lost the opportunity for review. Guloy, 104 Wn.2d at 422.

## **2. Defendant Has Not Shown A Manifest Constitutional Error.**

Defendant argues that "the improperly admitted 'drug proceeds' denied [him] a fair trial." Appellant's Brief 11-13. In general, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-333, 899 P.2d 1251 (1995).

RAP 2.5(a) permits a party to raise a claim of error for the first time in the appellate court only for "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333; State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988); State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278, review denied, 155 Wn.2d 1004 (2005). This does not mean that appellate courts will hear all claims of constitutional error raised for the first time on appeal.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Lynn established a four-step analysis for considering such claims.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Lynn, 67 Wn. App. at 345. Here, the alleged error concerns the admission of evidence under ER 404(b). Errors on rulings concerning admission of evidence under ER 404(b) are not of constitutional magnitude and do not result in automatic reversal. State v. Mezquia, 129 Wn. App. 118, 131, 118 P.3d 378, review denied, 163 Wn.2d 1046, 187 P.3d 751 (2005).

Second, the court must determine whether the alleged constitutional error is “manifest.” Lynn, 67 Wn. App. at 345. A “manifest” error is one that is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” Id. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Id. It is only a showing of actual prejudice that makes an alleged constitutional error “manifest.” McFarland, 127 Wn.2d at 333. “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.”

McFarland, 127 Wn.2d at 333, citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Here, there was no testimony regarding the disposition of the money. Defendant has not shown an error of constitutional magnitude.

Third, if the court finds the alleged error to be manifest, the court then addresses the merits of the constitutional issue. Lynn, 67 Wn. App. at 345. Here, a review of the entire record in the present case shows convincingly that the single uses of the phrase “unlawful drug proceeds” to explain why the cash was not brought to court did not affect the outcome of the trial.

Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. Lynn, 67 Wn. App. at 345. Here, if the admission of the phrase “unlawful drug proceeds” in the officer’s explanation of the procedure for handling seized currency was error, it was harmless.

### **3. Harmless Error And Sufficiency Of Evidence.**

Not all errors require reversal. State v. Latham, 100 Wn.2d 59, 66, 667 P.2d 56 (1983); State v. Hutchins, 73 Wn. App. 211, 215, 868 P.2d 196 (1994). Before a defendant is entitled to reversal, he must show prejudice. State v. Cunningham, 93 Wn.2d

823, 831, 613 P.2d 1139 (1980); Hutchins, 73 Wn. App. at 215. An error is not prejudicial, unless within reasonable probabilities there is a substantial likelihood the outcome of the trial would have been materially affected. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); Hutchins, 73 Wn. App. at 215.

A review of the sufficiency of the evidence supporting a jury verdict is limited to determining whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992); Hutchins, 73 Wn. App. at 215-216. The evidence is viewed in a light most favorable to the prosecution. Id.

In the present case, if the phrase “unlawful drug proceeds” and the \$1,255 cash are excluded, and the remaining evidence is viewed favorably to the prosecution the remaining facts support the conviction. The police observed defendant in an area of known drug activity at night. The undercover officers observed a change in defendant’s behavior; he acted nervous when he saw the uniformed officers. Defendant appeared to have something in his hand and the police told him to stay away from the garbage can. Defendant disregarded the police instruction and was observed dropping something into the garbage can. Two baggies containing

controlled substance were recovered from the garbage can.<sup>5</sup> This evidence is sufficient for any rational trier of fact to have found defendant guilty beyond a reasonable doubt of possession of controlled substance.

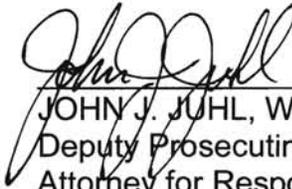
#### IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on June 27, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:



JOHN J. JUHL, WSBA #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent

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<sup>5</sup> The fact that there was a small amount of controlled substance in the baggies supports the notion that defendant was willing to take a relatively small chance by ditching the drugs in order to avoid the much greater consequence of being arrested and charged with possessing the drugs.