

71191-1

71191-1

No. 71191-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CORNELIUS RITCHIE,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

**1. This Court should reverse and dismiss all counts because there was insufficient evidence of possession and intent to deliver in violation of Mr. Ritchie's due process rights.**

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). As discussed below, there was insufficient evidence to prove the elements of possession with intent to deliver, requiring reversal and dismissal of these convictions.

- a. Where the prosecutor's closing argument explicitly told the jury that the State was alleging actual possession and not constructive possession, the State should not be permitted to now argue that Mr. Ritchie's convictions should be affirmed based on sufficient evidence of constructive possession.

In its response brief, the State "agrees no drugs were found on Ritchie's person," but asserts that there was sufficient circumstantial evidence to support a finding that Mr. Ritchie had constructive possession of the controlled substances in the bushes. Br. of Resp't at 9. This assertion directly contradicts the prosecutor's closing argument at trial:

There is [sic] two different kinds of possession; one is actual possession and the other is constructive possession. What we are alleging is the defendant

actually possessed these drugs, not constructively possessed these drugs. He was not seen with these drugs, but just prior to seeing him our belief is that the defendant was possessing them. That would be actual possession, okay.

3 RP 397.

The State's new reliance on constructive possession rests upon an act that is different than the act elected by the prosecutor at trial. Moreover, Mr. Ritchie relied on the State's prior assertions to his detriment by not addressing constructive possession in his closing argument after the State conceded it was only asking the jury to convict based on actual possession. This Court should reject the State's constructive possession sufficiency argument on appeal because the jury was unambiguously told that were not being asked to find that Mr. Ritchie constructively possessed the controlled substances.

- i. *The State elected the alleged act of Mr. Ritchie actually possessing the drugs prior to placing them in the bushes and cannot now argue that a different act supports his convictions on appeal.*

A defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)).

“Where the State charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act.” *State v. Love*, 80 Wn. App. 357, 360-61, 908 P.2d 395 (1996).

When the prosecutor presents evidence of several acts that could form the basis of one count charged, the State must either tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), *overruled on other grounds as recognized in State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007).

“The rationale for *Petrich*’s protections in multiple act cases stems from possible confusion as to which of the acts a jury has used to determine a defendant’s guilt, where the evidence tends to show two separate commissions of a crime.” *King*, 75 Wn. App. at 902.

In *State v. King*, the defendant was a passenger in a vehicle stopped by police. *Id.* at 901. At his trial for a single count of possession, evidence was presented that cocaine was located between the seats in the vehicle and in King’s fanny pack. *Id.* In closing, the State argued the cocaine located in the vehicle and in the fanny pack

both supported conviction. *Id.* at 903. The trial court failed to give a unanimity instruction and this Court reversed, concluding that the failure to follow *Petrich's* protections was constitutional error. *Id.* The Court pointed out that one alleged possession was constructive and the other was actual. *Id.*

Similarly, there were two separate acts for which the State presented evidence at Mr. Ritchie's trial. The first act was Mr. Ritchie's alleged actual possession of the controlled substances prior to approaching the bushes. The State elected this act in its closing argument. The second act was Mr. Ritchie's observed behavior by the bushes that the State now contends establishes constructive possession. The trial prosecutor, however, expressly instructed the jury not to rely on this second act. Because the State elected the first act (i.e., actual possession prior to approaching the bushes), the second act cannot support Mr. Ritchie's convictions on appeal.

ii. *The State's argument that Mr. Ritchie's conviction should be affirmed on a factual basis different than that argued to the jury violates the doctrine of equitable estoppel.*

The elements of equitable estoppel are: (1) an act or admission by the first party that is inconsistent with a later assertion; (2) an act by

another party in reliance upon the first party's act or admission; and (3) an injury that would result to the relying party if the first party were not estopped from repudiating the original act or admission. *Kramarevcky v. Dept. of Social and Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

The State argued in closing that the jury should convict Mr. Ritchie because he actually possessed the drugs and specifically told the jury not to consider constructive possession. 3 RP 397. The State now argues that while there was insufficient evidence of actual possession, this Court should affirm Mr. Ritchie's convictions based on constructive possession. Br. of Resp't at 9. These assertions are inconsistent and therefore the first element of equitable estoppel is satisfied.

Mr. Ritchie's trial counsel unequivocally relied on the State's election of actual possession during its closing argument. His counsel stated during his closing remarks:

Instruction No. 20 is the definition of possession. It means having a substance in one's custody or control either actual or constructive. "Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there's no actual physical possession there is dominion and control over the substance. Proximity

alone without proof of dominion and control is insufficient to establish constructive possession.” And I would say proximity alone is all that really has been established on the issues of possession. The State said they are telling you the evidence shows you beyond a reasonable doubt that he actually possessed it, okay. And from the arguments it sounds like the State’s submitting that Mr. Cornelius Ritchie actually possessed this prior to him being at the Mobile Music building. I submit to you that there are a number of problems with that theory.

3 RP 404-05. Mr. Ritchie’s counsel did not mention the terms “dominion and control” or “constructive possession” again throughout his closing argument. *See* 3 RP 404-22. His counsel did not present any argument about why the facts did not establish constructive possession beyond a reasonable doubt, which markedly demonstrates his reliance the State’s assertion of actual possession. The second element of equitable estoppel is therefore satisfied.

The last element is “an injury to the relying party if the first party is not equitably estopped from repudiating the original act or admission.” *Kramarevcky*, 122 Wn.2d at 743. “To establish an ‘injury’ for equitable estoppel purposes, a party must establish he or she justifiably relied to his or her detriment on the words or conduct of another.” *Id.* at 747. Mr. Ritchie’s reliance on the State’s election during closing resulted in defense counsel neither discussing

constructive possession nor explaining to the jury why the facts did not support a jury finding of constructive possession beyond a reasonable doubt. Mr. Ritchie would undoubtedly be “injured” if this Court were to affirm his convictions based on constructive possession after he relied on the State’s closing argument. Consequently, all three necessary elements for equitable estoppel are satisfied.

However, because equitable estoppel against the government is not favored, two additional requirements apply: (1) the doctrine is necessary to prevent a manifest injustice; and (2) the exercise of governmental functions will not be impaired if estoppel is employed. *In re Lopez*, 126 Wn. App. 891, 895, 110 P.3d 764 (2005). Affirming Mr. Ritchie’s based on a factual theory that the State specifically rejected at trial would result in a manifest injustice. Holding the State to its initial assertions will not impair the exercise of governmental functions. The State should be equitably estopped from arguing that

Mr. Ritchie's sufficiency of evidence challenge should be rejected based on evidence of constructive possession.<sup>1</sup>

- b. There was insufficient evidence that Mr. Ritchie had dominion and control over the items found in the bushes.

The State argues that there is sufficient evidence of constructive possession "based on Ritchie's observed behavior combined with his admissions linking him directly to the pills and items found with the pills hidden in the brush." Br. of Resp't at 9. The State contends that even though the drugs were in a public place, Mr. Ritchie knew where they were hidden and could convert them to his actual possession. *Id.*

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<sup>1</sup> The State's shift also implicates due process and may be analogized to the prohibition on arguing different theories for co-defendants. It violates the principles of due process for the prosecution to present contradictory theories in trial for different co-defendants. *State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000); *Smith v. Goose*, 205 F.3d 1045, 1052 (8th Cir. 2000). When the prosecution's cases against two co-defendants are inconsistent, the inconsistency undermines the verdict. *Smith*, 205 F.2d at 1052.

The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth. ... [T]he prosecutor changed his theory of what happened to suit the state. This distortion rendered [the] trial fundamentally unfair.

*Thompson v. Calderon*, 120 F.3d 1045, 1059 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

At trial, CCO Schultz testified that Mr. Ritchie “said that the girl that he was walking with had told him to look there in the bushes, that he looked and that he had covered up what was down there, then he had walked away.” 2 RP 186. CCO Schultz reported that when she asked Mr. Ritchie about the pills, “he said he had no idea where they were from.” *Id.* Mr. Ritchie was polite and answered her questions, but also expressed disbelief that he was being taken into custody for “seeing him in the bushes and then saying that the contents of the bushes were his[.]” 2 RP 188. Both CCOs testified they saw Mr. Ritchie crouch down by the bushes, but were unable to see his hands or discern what he was doing. 2 RP 151, 182.

The State analogizes these facts to those in *State v. Hults*, 9 Wn. App. 297, 513 P.2d 89 (1973). Br. of Resp’t at 11. In *Hults*, the court held there was sufficient evidence of constructive possession of marijuana where: (1) the defendant was observed coming and going from the residence for three days prior to the execution of the search warrant; (2) the defendant’s car, motorcycle and musical instrument were on the premises; (3) many items of personal correspondence belonging to the defendant were found in a chest of drawers in an upstairs bedroom; (4) marijuana was found in that same chest of

drawers; (5) a handbook on marijuana was found in that same upstairs bedroom; (6) there were items of correspondence addressed to the defendant in the dining room of the residence; (7) a large amount of cash was on the defendant's person; and (8) the defendant's fingerprints were found on the packaging of marijuana located in other parts of the house. 9 Wn. App. at 301-02.

The court concluded that “[v]iewing this evidence in a light most favorable to the state, there is clearly substantial evidence from which the jury could reasonably conclude that at some time recently prior to the search, the defendant held out the ... house as his residence and had formed a more or less permanent attachment to it.” *Id.* at 302. “The fact that we may conclude the evidence in some respects is unconvincing to establish dominion and control, or hard to reconcile with other conflicting evidence, does not detract from the fact that a jury question is nonetheless presented.” *Id.*

The facts in *Hults* are markedly different from Mr. Ritchie's momentary proximity to bushes in a public place. None of Mr. Ritchie's personal items or correspondence were located in the bushes. He was not observed frequenting the bushes in the days prior to the CCOs locating the controlled substances. There was no evidence that

his fingerprints were on any of the items. Additionally, the premises at issue in *Hults* was a residence. The controlled substances for which Mr. Ritchie was convicted of possessing were located in a public place.

The State also compares Mr. Ritchie's facts to those in *State v. Portrey*, 102 Wn. App. 898, 10 P.3d 481 (2000). Br. of Resp't at 12. In *Portrey*, the court held that there was sufficient evidence to establish constructive possession where: (1) the defendant was present near one of the clusters of marijuana that were growing near a creek; (2) he tried to conceal himself and one of the plants from detection by an aerial spotter; (3) he was wearing a camouflage jacket on a warm day; (4) his residence was 200 yards away from the clusters of marijuana; (5) there were trails leading from the defendant's residence to the clusters of marijuana; and (6) law enforcement located black tubing in the defendant's residence that was the same as that used around the bases of the marijuana plants. 102 Wn. App. at 901, 904.

The facts in *Portrey* presented sufficient indicia of control, whereas Mr. Ritchie was briefly observed only in proximity to the drugs at issue here. "The rule is that 'where the evidence is insufficient to establish dominion and control of the premises, mere proximity to drugs and evidence of momentary handling is not enough to support a

finding of constructive possession.”” *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) (quoting *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990)).

Mr. Ritchie’s global positioning system (GPS) did not ever place him in that particular area in the days prior to his arrest. 2 RP 200-01. There was no evidence that he ever touched the items. There was no evidence establishing who placed those items in the bushes or when they were placed there. At most, the evidence established that Mr. Ritchie was in mere proximity to the contraband when he crouched down near the bushes. No rational juror could find that the totality of these circumstances establish Mr. Ritchie’s dominion and control over the drugs found in the eyeglasses case in the bushes.

c. There was insufficient evidence that Mr. Ritchie intended to deliver the controlled substances found in the bushes.

None of Mr. Ritchie’s actions observed by the CCOs suggested that Mr. Ritchie intended to deliver *any* controlled substances, let alone those found in the eyeglasses case. The CCOs searched Mr. Ritchie’s person, his duffel bag, and his residence and found no evidence indicative of drug dealing or an intent to deliver. 2 RP 200. There was

no evidence of cash, scales, packaging, paraphernalia, weapons, or ledgers.

The State solely relies on the text messages<sup>2</sup> and other information obtained from Mr. Ritchie's cell phone to argue that there was sufficient evidence of intent to deliver. Br. of Resp't at 14.<sup>3</sup> However, these text messages suggested drug dealing on previous occasions as opposed to an intent to deliver the pills located in the eyeglasses case. One of the text messages referred to ecstasy, which was not one of the controlled substances located in the bushes and was sent five days before Mr. Ritchie's arrest. 2 RP 212; 3 RP 276.

While these text messages informed the jury that Mr. Ritchie had engaged in conversations regarding unrelated controlled substances

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<sup>2</sup> In the opening brief, Appellant argued that a text message addressed in motion in limine 5(j) was deemed inadmissible by the trial court, but still presented to the jury. Appellant's Opening Br. at 33. In its response brief, the State correctly points out that the trial court reconsidered this ruling and ultimately determined that the text message could be admitted. Br. of Resp't at 27. After reviewing the record again, Appellant acknowledges that while the trial court initially ruled that the text message was inadmissible, the next day it reversed its decision. 2 RP 74-75. Appellant regrets this oversight and withdraws any portion of its opening brief that asserts the text message addressed in motion in limine 5(j) was ruled inadmissible by the trial court.

<sup>3</sup> As discussed in Appellant's Opening Brief and below, Mr. Ritchie challenges the constitutionality of the search of the cell phone that produced this evidence. Appellant's Opening Brief at 19-28. This evidence was also admitted in violation of ER 401, 402, 403, and 404(b). *Id.* at 31-45.

prior to his arrest, they are insufficient for a rational trier of fact to conclude that Mr. Ritchie intended to deliver the controlled substances to which he was observed in brief proximity in a public place.

**2. The warrantless search of Mr. Ritchie's phone violated his privacy rights under the Fourth Amendment and article I, section 7.**

- a. The warrantless search of Mr. Ritchie's phone may be challenged for the first time on appeal.

Under RAP 2.5(a)(3), an appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The alleged error must suggest a constitutional issue and the error must be manifest (i.e., have practical and identifiable consequences in the trial of the case). *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Because an issue involving an unlawful search is one of manifest constitutional error, it may be addressed for the first time on review. *See, e.g., State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010) (defendant's failure to file motion to suppress before trial did not waive issue of whether his constitutional rights were violated under intervening decision); *State v. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005) (appellant did not waive error based on bad search

warrant because it involved constitutional issue); *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (appellate court can review suppression issue where adequate record exists, even in the absence of motion and trial court ruling).

The State asserts that “the record in this case is wholly insufficiently complete to review this new issue where, appropriately so, Ritchie’s CCO did not testify as to why Ritchie was in prison, what the terms of his release were or what concerns arising from the previous evening prompted CCO Schultz’s request to bring Ritchie in.” Br. of Resp’t at 22. However, Mr. Ritchie’s underlying offense is not pertinent to whether CCO Schultz unlawfully searched his cell phone.

The record is sufficient to establish the circumstances of the unlawful search. CCO Schultz testified that she seized Mr. Ritchie’s cell phone and searched it entirely. 2 RP 191. The cell phone was on and was not password protected, which enabled CCO Schultz to search its contents. *Id.* CCO Schultz took Mr. Ritchie’s cell phone with her when she went to search his residence. 2 RP 194. CCO Schultz searched the content of the phone while CCO Bajema drove them to the residence. *Id.* CCO Schultz took photographs of the screen of the cell phone, which were admitted into evidence at trial. 2 RP 192. No

search warrant was obtained until after this unlawful search. 2 RP 208. CCO Schultz's purpose was clear: she was searching the cell phone because they had found controlled substances in the bushes.

In addition to review under RAP 2.5(a)(3), Mr. Ritchie satisfies the requirements for an exception to the principle of issue preservation. The principle of issue preservation does not apply if the following conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case; (2) that interpretation overrules an existing controlling interpretation; (3) the new interpretation applies retroactively to the defendant; and (4) the defendant's trial was completed prior to the new interpretation. *State v. Robinson*, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). Because the United States Supreme Court issued its decision in *Riley v. California* after Mr. Ritchie's case had concluded, he satisfies the criteria for an exception to the principle of issue preservation. \_\_\_ U.S. \_\_\_, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

- b. Even though as a "probationer" Mr. Ritchie had a diminished expectation of privacy, the warrantless search of his cell phone was unconstitutional.

While probationers have a diminished expectation of privacy, "this diminished expectation of privacy is constitutionally permissible

only to the extent necessitated by the legitimate demands of the operation of the parole process.” *State v. Jardinez*, \_\_\_ Wn. App. \_\_\_, 338 P.3d 292, 294 (Nov. 18, 2014) (citing *State v. Parris*, 163 Wn. App. 110, 118, 259 P.3d 331 (2011); *State v. Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973)). The search and seizure authorized should “relate to the violation which the Community Corrections Officer believes to have occurred.” *Id.* at 295.

In *Jardinez*, the court held that even though the defendant was on community custody, his admission to his CCO that he recently used marijuana did not justify searching an iPod that was in Jardinez’s possession. *Id.* at 297-98. Suppression of the evidence obtained from the iPod was necessary because the CCO did not have a “reasonable suspicion based on articulated facts that the device contained evidence of past, present, or future criminal conduct or violations of the defendant’s conditions of community custody.” *Id.* at 294. Similarly, CCO Schultz did not have reasonable suspicion based on articulable facts that Mr. Ritchie’s cell phone contained evidence of criminal conduct. As such, the search was unauthorized by RCW 9.94A.631 and unconstitutional.

**3. The admission of the text messages violated ER 404(b) because they were used to show propensity.**

The State now argues on appeal that the text messages on Mr. Ritchie's cell phone were properly admitted as res gestae evidence.<sup>4</sup> Br. of Resp't at 27. Under the res gestae or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in both time and place to the charged crime. *State v. Warren*, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006); *State v. Lilliard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

Evidence of other activity constituting an unbroken sequence of events leading to the crime charged is admissible if it is necessary to provide the jury with the entire story of what transpired. *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1982). Each crime must be a link in the chain and each must be like "a piece in a mosaic," which is necessarily admitted in order that a complete picture be depicted for the jury. *Id.* Like other ER 404(b) evidence, res gestae evidence must be

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<sup>4</sup> During trial, the State argued that these text messages were admissible as "common scheme or plan" evidence. 1 RP 43. As discussed in Appellant's Opening Brief, the trial court did not articulate the ER 404(b) analysis regarding admissibility of these text messages on the record. Appellant's Opening Br. at 37-39; 1 RP 55-56.

relevant for a purpose other than showing propensity and must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

Mr. Ritchie's text messages relating to the sale of other controlled substances and sent days before his arrest are not a necessary "piece in a mosaic" that is required for a complete picture to be depicted for the jury. The State made clear on multiple occasions during trial that it intended to use the text messages to establish that Mr. Ritchie was a drug dealer and therefore had the intent to deliver the drugs found in the bushes. 1 RP 32, 35. "[E]ssentially we are calling the defendant a drug dealer." 1 RP 32. This evidence was not part of the *res gestae* of the crime, but was in fact evidence of separate crimes unrelated in time and place. The text message evidence was improperly admitted and used for purposes of propensity in violation of ER 404(b).

D. CONCLUSION

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Ritchie respectfully requests this Court reverse his convictions.

DATED this 31st day of December, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Whitney Rivera', is written over the text 'Respectfully submitted,'.

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 71191-1-I
	)	
CORNELIUS RITCHIE,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X \_\_\_\_\_ 

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