IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID L. WALDECK, Appellant.	No. 41129-6-II UNPUBLISHED OPINION

Van Deren, J. —David L. Waldeck appeals his conviction for unlawful possession of a controlled substance (heroin), contrary to RCW 69.50.4013, asserting that: (1) the trial court erred by refusing to compel the State to disclose a confidential informant's identity; (2) the search warrant affidavit contained material misrepresentations and intentional omissions of material fact; (3) the trial court erred by denying his motion to suppress evidence seized from his car under a search warrant;and (4) the trial court erred by failing to give Waldeck's proposed unwitting possession jury instruction. Finding no error, we affirm.

FACTS

On February 18, 2010, Wahkiakum County Detective Michael Balch was on patrol when he saw a white passenger car traveling above the speed limit on State Route 4. Balch turned his patrol car around, activated his emergency lights, and signaled the vehicle to pull over. As Balch

approached the vehicle, he observed two occupants; the driver, Waldeck, and a front seat passenger, Joseph Loudin. Balch spoke with Waldeck and asked for his license, registration, and proof of insurance. As Waldeck rolled his window down, Balch "noticed the obvious odor of green or grown marijuana." Report of Proceedings (RP) (Aug. 16, 2010) at 10. Waldeck gave Balch his license, insurance card, and an Affidavit in Lieu of Title.

As Balch was speaking with Waldeck, a Wahkiakum County resident and former police officer, Michael Savant, came to the scene. Savant told Balch that "they had tossed items out of the vehicle back down the road to the west." RP (Aug. 16, 2010) at 48. Balch called for another officer to escort Savant to the location where he had seen items tossed from Waldeck's vehicle.

Wahkiakum County Deputy Sheriff Gary Howell went with Savant to retrieve the discarded items. Howell found an "eight inch by eight inch square silver and black metal case and . . . what appeared to be a Red Bull can." RP (Aug. 16, 2010) at 68. Inside the metal case, Howell found digital scales with brown residue on them, a spoon with residue on it, "small plastic baggies with white crystal residue," and syringes. RP (Aug. 16, 2010) at 72. Howell also discovered that the Red Bull can was actually a storage device with a screw top and a hidden compartment; Howell found plastic packaging material containing residue inside the can.

After Howell showed Balch the items tossed from Waldeck's vehicle, the officers searched and arrested both Waldeck and Loudin. The officers recovered drug paraphernalia from Loudin's person and recovered a syringe and $1,822 from Waldeck's person.

Balch had Waldeck's vehicle sealed and towed to a local impound lot before applying for a warrant to search the vehicle. Balch's affidavit in support a search warrant stated in part:

> On 2/18/2010 at approximately [5:20 p.m.], I was traveling westbound on State Route[ ]#4 (SR4) near mile post 41 when I observed 2 vehicles coming towards

> me on SR4. The first vehicle was traveling at 56 [miles per hour (mph)] according to my speed measuring device in a posted 55 mph zone. The second vehicle, a white passenger car, caught my attention when it came quickly up to the rear of the first vehicle and had to brake in an erratic fashion to avoid the first vehicle. My speed measuring device captured the speed of the second vehicle slowing down from 68 mph[ ] to 66 mph as it went by me. As I was at the [mile post] 41 . . . marker there was room to immediately turn around to pursue the second vehicle for a speeding violation. I then turned around and caught up to the white passenger car just before mile post 42 and stopped the vehicle using my emergency lights on my patrol car. The vehicle tried to stop immediately but had no[]where to pull over, and it moved to the on-coming lane and pulled over on the westbound side of SR4. I got out and contacted the driver, David L. Waldeck. Waldeck showed me his Washington Driver's license and proof of insurance and a signed document from [the Washington State Department of Licensing] labeled "Affidavit in Lieu of Title."
>
> . . . As Waldeck opened his window to talk with me I could smell the obvious strong odor of growing and/or green Marijuana coming from the vehicle. . . . [A] local resident, and former law enforcement officer I know and used to work with, drove up to my location and told me that he had seen the people throw out something from the passenger side of this car, (meaning the car I had pulled over) just before I pulled them over. The reason I have not included the name of the concerned citizen is because he has expressed fear of retaliation on himself or his family if his identity became known. Because I could not check out the items thrown out and stay with the car at the same time I called for assistance from Deputy Gary Howell who was also working at this time. Deputy Howell came to my location. I asked the concerned citizen if he could show Deputy Howell where he saw the items thrown out at. He said he could. I know this subject to be of good character and [he] has no known criminal history. He took Howell to the location where items were thrown out. Deputy Howell came back and showed me the items found thrown out of the car. The items included a small silver case with scales and a disguised container which had baggies of drug residue in them. The residue field tested positive for Heroin and Methamphetamine. The amount of residue was more than is normal for a simple drug user.
>
> Deputy Howell and I went back up to the suspect vehicle and because the items were described as being thrown out from the passenger side of the vehicle Deputy Howell asked to see identification from the passenger. The passenger handed Howell a Washington State driver's license that identified him as being Joseph E. Loudin. Howell confronted the passenger with the information we had been given and Loudin denied any knowledge of this. Howell placed Loudin under arrest and I read him his [*Miranda*[1]] rights. He told me he understood his rights. Loudin was patted down and a drug pipe with residue was found along-with other items in his pockets. I ran both subjects through the law-enforcement criminal history data

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> base and discovered that both Waldeck and Loudin have extensive felony criminal histor[ie]s including felony drug convictions for both. Deputy Howell told me that he has interacted with David Waldeck in the past and knows that he has been a Heroin user and has been at Waldeck's residence when he has overdosed on drugs. I then assisted Deputy Howell in re[]contacting David Waldeck and asked him to step out from the vehicle. Deputy Howell patted Waldeck down and handcuffed him. During the pat down Deputy Howell located what appeared to be a used syringe in his pants pocket along[ ]with over $1,800.00 in cash. Deputy Howell advised Waldeck of his [*Miranda*] [r]ights at this time. He was placed in the rear of my patrol car as we called Wahkiakum Tow for an impound preparing to apply for a search warrant. The vehicle was sealed and placed in in-door storage. As we were preparing the vehicle for tow, Waldeck asked several times for us to "not tow the car." He seemed to be very upset at this fact and asked Deputy Howell if there was any way to avoid the car being towed.
> Based upon the above information I believe that there is still evidence of on[]going criminal drug activity in the vehicle.

Ex. A, at 2-4.

Based on Balch's affidavit, the Wahkiakum County District Court issued a warrant allowing a search of Waldeck's vehicle. Balch searched Waldeck's vehicle and found the following items in the vehicle's trunk: a storage container made to look like a can of Red Bull, a storage container made to look like a can of Coca Cola, and a 14 to 16 inch by 14 to 16 inch black and silver box similar in design to the box thrown from Waldeck's car. The black and silver box found in Waldeck's trunk contained scales with heroin residue, a glass pipe, cell phones, and a pair of safe-deposit box keys. The sheriff's office returned the safe-deposit box keys to Waldeck, along with other personal property items, after he signed for them as the owner. The State charged Waldeck with unlawful possession of a controlled substance based on the heroin residue found on the scales in his vehicle's trunk.

Waldeck moved to suppress the evidence seized from the trunk of his car. At the suppression hearing, Waldeck's defense counsel asked Balch to identify the confidential informant

described in the search warrant affidavit, later identified as Savant. The State objected and the following discussion took place:

> [THE State]: Your Honor, that witness has requested non-disclosure as a witness citizen providing information that led to probable cause and at this time we have withheld his identity and if we are—if Counsel wishes to ask that information, then we should have a hearing to—
>
> [THE court]: Have a what?
>
> [THE State]: Have a hearing to discuss whether or not we are compelled to disclose the identity.
>
> [THE court]: [Defense counsel], your response.
>
> [Defense counsel]: Well, it makes it impossible for us to, one, verify Detective Balch's statements as to what he was advised by this third party, but also for us to independently evaluate the credibility of this third party. Mr.—or Detective Balch includes in his report that this person is, you know, a known person of a certain character worthy of believability but it's kind of self-serving when you're drafting a Warrant to say that about an individual. It would be nice if we could verify that this person even exists.
>
> [THE court]: Well, I'll allow you to ask some more general questions. . . . [A]s far as the—specifically the name, I'm going to sustain the objection at this time.

RP (June 7, 2010) at 17-18.

Later in the suppression hearing, Waldeck's defense counsel also asked Howell to reveal the informant's identity. The State again objected and the trial court sustained the State's objection.

Although the State refused to identify Savant at Waldeck's June 7, 2010 suppression hearing, it named Savant as a potential State's witness on July 30, 2010. On August 23, 2010, the trial court entered its findings of fact and conclusions of law denying Waldeck's motion to suppress evidence recovered from the vehicle's trunk.[2] The findings and conclusions state:

> 2.1 While on patrol in Wahkiakum County, Washington, Detective Balch of the Wahkiakum County Sheriff's Office turned on a white BMW sedan for

[2] The trial court's findings and conclusions include Savant's name, even though he had not been identified at the June 7 hearing but Savant had been identified before the findings and conclusions were entered.

speeding near milepost 41 on State Route 4. Detective Balch smelled marijuana coming from the motor vehicle while contacting the driver.

2.2 A citizen, Mike Savant, observed an object being thrown from the passenger side of the BMW just before the stop and notified Detective Balch of that act.

2.3 Detective Balch called Deputy Howell for backup and to assist Mr. Savant in locating the tossed object. Deputy Howell and Mr. Savant returned to the area of the toss-out and recovered a small case and a disguised container (hide-a-can) which contained plastic wrap with drug residue in it. The residue field tested positive for heroin and methamphetamines.

2.4 Deputy Howell returned to the stop and identified Joe Loudin as the passenger since the item had come out of the passenger side. Since Mr. Loudin denied any knowledge about the tossed item, Mr. Loudin was arrested.

2.5 The driver of the BMW, Mr. Waldeck, was asked to step out and was arrested and searched. A used syringe was found in his pants pocket along with over $ 1,800.00 in cash. The driver produced proof of insurance and an Affidavit in Lieu of Title.

2.6 The vehicle was impounded and a search warrant was issued to search the vehicle. A case was found in the trunk of the BMW and it contained a scale with heroin residue.

III. Conclusions of Law

3.1 The officers had probable cause to arrest Mr. Waldeck.

3.2 The search of Mr. Waldeck's person incident to arrest was legally authorized.

3.3 The search of the BMW's trunk pursuant to the Search Warrant after the vehicle was impounded was proper.

Clerk's Papers (CP) at 97-98 (boldface and underline omitted) (citations omitted).

The State called Savant as a witness at trial. Savant testified consistent with Balch's description of what occurred after he stopped Waldeck.

Waldeck proposed an unwitting possession jury instruction that stated:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP at 48.

The trial court agreed to instruct the jury on the affirmative defense of unwitting possession but struck the words "or did not know the nature of the substance" from Waldeck's proposed instruction. CP at 83. The jury entered a verdict finding Waldeck guilty of unlawful possession of a controlled substance. Waldeck appeals.

ANALYSIS

I. Confidential Informant's Identity

Waldeck first argues that the trial court erred by denying his request to compel the State to disclose Savant's identity at the suppression hearing.[3] Because Waldeck failed to cast doubt on the truthfulness of Balch's and Savant's statements supporting the search warrant, we disagree.

We review a trial court's denial of a motion to disclose a confidential informant's identity for abuse of discretion. *State v. Petrina*, 73 Wn. App. 779, 782, 871 P.2d 637 (1994). "A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable." *Petrina*, 73 Wn. App. at 783.

In general, the State is not required to disclose the identity of individuals who report criminal activity to the police. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *State v. Thetford*, 109 Wn.2d 392, 395-96, 745 P.2d 496 (1987). RCW 5.60.060(5) states that "[a] public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure."

[3] On appeal, for the first time Waldeck argues that the trial court erred in failing to hold an in camera review of Savant's statements to Balch. But absent doubt regarding the truthfulness of the affiant's statements supporting issuance of the search warrant, the trial court need not order an in camera review of the officer's or the informant's statements. *State v. Casal*, 103 Wn.2d 812, 820-21, 699 P.2d 1234 (1985).

Additionally, CrR 4.7(f)(2) provides:

> *Informants*. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

The purpose of the privilege allowing protection of an informant's identity is to serve the public's interest in effective law enforcement. *Roviaro*, 353 U.S. at 59. This privilege, however, is not absolute and "fundamental requirements of fairness" require that the informant's privilege give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro*, 353 U.S. at 60-61. In determining whether to require disclosure of a informant's identity, the trial court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense" based on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62.

The preferred method for determining whether disclosure of a informant's identity is relevant or helpful to the defense is for the trial court to hold an in camera hearing at which the trial court hears the informant's testimony and applies the *Roviaro* standards. *State v. Harris*, 91 Wn.2d 145, 150, 588 P.2d 720 (1978). The defendant has the burden to show that an in camera hearing is necessary and that disclosure of the informant's identity is warranted to ensure a fair trial. *Vazquez*, 66 Wn. App. at 581.

In *State v. Casal*, 103 Wn.2d 812, 813, 699 P.2d 1234 (1985), our Supreme Court

addressed "the circumstances under which a defendant is entitled to an in camera hearing on a search warrant affiant's veracity regarding statements allegedly made by a secret informant." The *Casal* court held:

> [W]here a defendant presents information which casts a reasonable doubt on the veracity of material representations made by a search warrant affiant, and the challenged statements are the *sole* basis for probable cause to issue the search warrant, the trial court should exercise its discretion to conduct an in camera examination of the affiant and/or secret informant on the veracity issue.

103 Wn.2d at 813.

Here, Waldeck challenged the search of the trunk of his car based on Balch's affidavit that included Savant's statements to him about what he had observed. At the suppression hearing, Waldeck did not articulate how Savant's identity was "relevant and helpful" to his defense or "essential to a fair determination" of the case, *Rovario*, 353 U.S. at 60-61, or how it advanced his suppression motion arguments. Moreover, Waldeck did not make a showing at his suppression hearing of reasonable doubt about Balch's veracity regarding what Savant said. In fact, Waldeck admits that he "did not provide an affidavit putting [Balch]'s statements in the [search warrant] affidavit in question," which supporting information is required before a trial court is required to order an in camera hearing on the issue of an affiant's veracity. Br. of Appellant at 19; *see, e.g.*, *Casal*, 103 Wn.2d at 820 ("[A] trial court [is required] to exercise its discretion to order an in camera hearing where the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant."). Accordingly, Waldeck did not meet his burden to show that an in camera hearing on Savant's identity was required, and the trial court did not err by refusing to compel the State to reveal Savant's identity at the suppression hearing.

II. Challenge to Affidavit in Support of Search Warrant

Next, Waldeck asserts for the first time on appeal that the affidavit in support of the search warrant was defective because it contained material misrepresentations and intentional omissions of material facts. Again, we disagree.

Here, Waldeck did not challenge the search warrant affidavit before the trial court or before trial. His challenge on appeal appears to be a belated request for a remand for a *Franks*[4] hearing or for our review of the affidavit following trial, where all the State's evidence was subjected to cross examination by the defense. The search warrant itself was not evidence at trial. We cannot provide relief under these circumstances by ordering a *Franks* hearing, nor will we review challenges to the affidavit when the trial court was not given a chance to address any issue of probable cause for its issuance.[5] Waldeck's failure to challenge the search warrant affidavit before trial precludes his raising this issue on appeal for the first time since it does not meet any of the criteria allowing a party to raise an issue for the first time on appeal under RAP 2.5.[6]

---

[4] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[5] When a defendant "makes a substantial preliminary showing" that the affiant included a "false statement knowingly and intentionally, or with reckless disregard for the truth" in the search warrant affidavit, the trial court must hold a *Franks* hearing "if the allegedly false statement is necessary to the finding of probable cause." 438 U.S. at 155-56. "The *Franks* test for material misrepresentations applies to allegations of material *omissions*." *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). The defendant must allege that the search warrant affidavit contains a deliberate falsehood or reckless disregard for the truth. *Garrison*, 118 Wn.2d at 872. There must be an offer of proof for this assertion; allegations of negligence or innocent mistake are insufficient. *Vickers*, 148 Wn.2d . Then, a defendant must show that the false representation was necessary to a finding of probable cause, and only if these steps are met will a *Franks* hearing be required. *Garrison*, 118 Wn.2d at 873. Waldeck did none of these things at the trial court.

[6] Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The exception is when a claim of error, raised for the first time on appeal is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 925. "The defendant must identify a constitutional error and

III. Suppression Motion

Next, Waldeck asserts that the trial court erred by failing to suppress evidence seized from his vehicle pursuant to a search warrant. Again, we disagree.

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of our state constitution require that a trial court issue a search warrant on a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause exists where the search warrant affidavit sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

Two different standards apply to our review of a probable cause determination. *State v. Emery*, 161 Wn. App. 172, 201, 253 P.3d 413, *review granted*, 172 Wn.2d 1014 (2011). The first standard applies to "'historical facts' in the case, i.e., the events 'leading up to the stop or

---

show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *Kirkman*, 159 Wn.2d at 926-27 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Waldeck contends that the affidavit in support of a search warrant was defective because it omitted the fact that Waldeck possessed a Washington State medical marijuana card. But there was no evidence presented at the suppression hearing or at trial that Waldeck actually had authorization to possess medical marijuana. And even if there were evidence that Waldeck could validly possess medical marijuana, the fact of such authorization does not negate probable cause. *Fry*, 168 Wn.2d at 10.

Waldeck also contends that the affidavit was defective for misrepresenting Savant's statements to Balch concerning the items tossed from Waldeck's vehicle. But as we have already determined above, Waldeck misperceives Savant's testimony, which was consistent with Balch's statements in the affidavit. Waldeck thus fails to show actual prejudice affecting his constitutional rights. Therefore, he alleges no manifest error allowing appellate review where he did not preserve the alleged error by identifying to the trial court the alleged omissions and misrepresentations contained in the search warrant affidavit, and did not request a *Franks* hearing for a determination on that issue. Moreover, even had Waldeck preserved this claim, it fails.

search.'" *In re Det. of Petersen*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). We apply an abuse of discretion standard to our review of a trial court or magistrate's finding that information from an unnamed informant has enough reliability and credibility to qualify as historical fact. *Emery*, 161 Wn. App. at 201-202. And we review de novo the legal conclusion that "'the qualifying information as a whole amounts to probable cause.'" *Emery*, 161 Wn. App. at 202 (quoting *Petersen*, 145 Wn.2d at 800).

Waldeck asserts that the trial court erred by failing to suppress evidence because the search warrant affidavit did not support a probable cause determination. Specifically, Waldeck argues that the smell of marijuana from inside his car did not establish probable cause to search his vehicle because he had a Washington State medical marijuana authorization card. But contrary to Waldeck's assertion, there was no evidence presented at either the suppression hearing or trial that he actually possessed a valid medical marijuana authorization card. Rather, Howell testified at the suppression hearing that he believed Waldeck "very possibly" had a medical marijuana authorization card based on a previous conversation, unrelated to this case, between Howell and Waldeck. RP (June 7, 2010) at 36. More importantly, even if there were evidence that Waldeck was authorized to possess medical marijuana, such authorization does not negate probable cause to conduct a search for evidence of a crime in the searched area.

In *State v. Fry,* 168 Wn.2d 1, 7-8, 228 P.3d 1 (2010), our Supreme Court held that authorization to use medical marijuana is merely an affirmative defense to an unlawful possession of marijuana charge, and as such, does not negate elements of the charged crime. In so holding, the *Fry* court reasoned:

> As an affirmative defense, the compassionate use defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act; e.g., the amounts may be excessive. An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.

168 Wn.2d at 10.

Waldeck also argues that the suspected drugs discarded from his car did not establish probable cause to search his car because "the conclusion to be drawn from this information is that the only drugs present in the car were those drugs in the passenger's possession, and that [the passenger] had abandoned those drugs by dropping the containers out of the open door to the car." Br. of Appellant at 23.

With regard to this latter argument, Waldeck contends that the affidavit was defective for misrepresenting Savant's statements to Balch concerning the items tossed from Waldeck's vehicle. This contention is not supported by the record. Waldeck argues that the affidavit should have stated that Savant told Balch that he saw the *passenger* toss items from the car rather than stating that Savant told Balch that "he had seen the people throw out something from the passenger side of this car." Ex. A, at 3. The search warrant affidavit clearly states that the items were described as being "throw[n] out . . . from the passenger side" of the vehicle. Ex. A, at 3. At trial Savant testified that he saw "the passenger door [of Waldeck's vehicle] come open" and that "some articles were tossed out of the vehicle" and that he told Balch that "*they* had tossed items out of the vehicle back down the road." RP at 47-48 (emphasis added). Thus, contrary to Waldeck's assertion, Savant did not state or testify that he saw *the passenger* toss items from Waldeck's car.

Because the smell of marijuana emanating from inside Waldeck's car was sufficient to establish probable cause to issue a warrant authorizing a search of his car for evidence of marijuana possession, regardless of whether Waldeck was authorized to possess marijuana for medical purposes, and because there was more than the smell of marijuana coming from Waldeck's vehicle, i.e., the digital scales with brown residue, a spoon with residue, small plastic baggies with white crystal residue, syringes, the Red Bull can that was actually a storage device with a screw top and a hidden compartment with plastic packaging material containing residue inside the can, the drug paraphernalia from Loudin's person, and the recovered syringe and the $1,822 from Waldeck's person, there was an adequate basis for a determination of probable cause to search Waldeck's vehicle for evidence that a crime had been committed.[7] The trial court did not err by refusing to suppress evidence obtained in a search of Waldeck's car.

IV. Unwitting Possession Jury Instruction

Finally, Waldeck asserts that the trial court erred by refusing to give the entirety of his proposed unwitting possession jury instruction. Again, we disagree.

We review de novo a trial court's refusal to give a proposed jury instruction based on a legal issue. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007). And we review for an abuse of discretion a trial court's refusal to give a proposed jury instruction based on a factual issue. *White*, 137 Wn. App. at 230. A defendant in a criminal case is "entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

[7] In stating this conclusion, we dispose of Waldeck's claim that the items thrown from the car do not establish probable cause to search his vehicle.

"Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute." *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998). "To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting." *Balzer*, 91 Wn. App. at 67.

Waldeck appears to have proposed his unwitting possession jury instruction based on 11 *Washington Pattern Jury Instructions: Criminal* 52.01, at 1007 (3d edition 2008) (WPIC), which states:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his] [her] possession] [or] [did not know the nature of the substance].
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

(Boldface omitted) (brackets in original).

WPIC 52.01, note on use at 1007 states:

> Use this instruction in any case of possession of a controlled substance when there is evidence to support it. Use bracketed material as applicable. Appropriate instructions may have to be drafted for the particular case to present the issue of lack of knowledge of the nature of the substance involved.

After an extensive discussion with the State and defense counsel, the trial court agreed to instruct the jury on Waldeck's unwitting possession affirmative defense but struck the phrase "or did not know the nature of the substance" from the proposed instruction, indicating that the evidence presented at trial did not support giving that portion of the instruction. CP at 48.

To be entitled to an unwitting possession jury instruction based on not knowing the nature

of the substance, there must have been some evidence presented at trial that Waldeck knew he possessed the residue found on the scale in his vehicle's trunk, but that he was not aware that the residue contained heroin. Because no such evidence was presented, the trial court properly struck that portion of Waldeck's proposed unwitting possession jury instruction.[8] Accordingly, we hold that the trial court did not abuse its discretion in refusing to give the "nature of the substance" portion of the proposed unwitting possession jury instruction.

Finding no merit to Waldeck's challenges to his conviction, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Worwick, A.C.J.

Johanson, J

[8] Waldeck argues that he was entitled to the portion of the unwitting possession instruction regarding knowledge of the nature of the substance because "the amount of heroin on the scales was residue only, thus not necessarily identifiable as a controlled substance." Br. of Appellant at 28. Waldeck cites no legal authority for his argument that a criminal defendant is entitled to a "nature of the substance" unwitting possession instruction based solely on the amount of controlled substances the defendant possessed. And his argument fails because, as addressed above, there was no evidence presented that Waldeck knew he possessed the residue contained on the scales but did not know the nature of the residue. Further, the trial court's unwitting possession instruction allowed him to argue that he did not know that he possessed heroin based on the fact that officers found only a residual amount of heroin on the scales.