IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ADALBERTO Jimenez-MACIAS, Appellant.	No. 41403-1-II PART PUBLISHED OPINION

Van Deren, J. — Adalberto Jiminez Macias appeals from his convictions on four counts of delivery of a controlled substance, cocaine, with one count subject to a school bus route stop enhancement; one count of unlawful possession of a controlled substance, cocaine, with intent to deliver; and one count of unlawful possession of a controlled substance, methamphetamine. He argues: (1) the trial court erred in giving the *Castle*[1] reasonable doubt instruction expressly disapproved of by our Supreme Court in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), requiring reversal and remand for a new trial; (2) his counsel was ineffective because he failed to object to the *Castle* instruction; (3) probable cause did not support a search warrant, requiring suppression of evidence and reversal of two of his convictions; and (4) sufficient evidence does not support two of his convictions. We affirm.

[1] *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997).

FACTS

Probable Cause Affidavit and Search Warrant

In 2009, the Cowlitz-Wahkiakum Narcotics Task Force investigated a drug trafficking organization (DTO) responsible for cocaine and methamphetamine distribution. The investigation culminated in the execution of a search warrant and Macias's arrest and conviction. According to the affidavit supporting the search warrant, a DTO is "an organization of five or more persons that engage[s] in importation, production, transportation, distribution, trafficking[,] and money laundering activities [related to illegal drugs]." Clerk's Papers (CP) at 59. DTOs "generally involve a continuing enterprise, a core organization, [and] a specific entity with a distinct hierarchy and administrative functional structure." CP at 59.

A. DTO Members and Controlled Buys

Over the course of the investigation, the task force, with the assistance of three confidential informants (CI1, CI2, and CI3), identified several known DTO members: Ignacio Tovar-Arechiga, also known as "Nacho"; Ricardo Carbajal-Santiago, also known as "Ricardo"; Jesus Mejia-Rosas, also known as "Alex"; J. Angel Orozco; Jose Luis Ramirez; and Macias. According to CI2, who was familiar with the DTO and had gained a "position of trust" with its members, Nacho was a major dealer who supplied Macias with cocaine and methamphetamine that Ricardo sometimes delivered. CP at 60. CI2 also identified Macias as a "large quantity dealer of cocaine and methamphetamine" who supplied Alex, Ricardo, and "others" with those drugs. CP at 73. The task force used its confidential informants to conduct a series of controlled

drug purchases[2] from the DTO members.

From April through June 2009, CI3 participated in eight controlled cocaine drug buys from Alex. In all but three of the eight buys, Alex drove a silver Honda Accord then registered to him, picked up CI3, and conducted the drug transaction in the car. During one purchase, CI3 observed a white Chevrolet Tahoe registered to Macias parked at Alex's residence at 1016 S. 11th Avenue, apartment 6. During the eighth and final purchase, Alex drove a white Honda Accord to the drug transaction meeting place. Shortly after this eighth purchase, law enforcement began observing Macias driving the same silver Honda Accord that Alex had driven in five of the eight buys, and parking it at his residence, 65 Alpha Drive, apartment 24; and at another address, 3903 Ocean Beach Highway, apartment J4. Shortly after Macias began driving the silver Accord, its plates and registration were changed from Alex to Ramirez, and the registration showed the Ocean Beach Highway, apartment J4, address as Ramirez's residence.

On June 3, CI1 called Ricardo and arranged a controlled purchase of an "[eight]-ball"[3] of cocaine. CP at 68. Law enforcement observed CI1 enter Ricardo's residence. According to CI1, he gave Ricardo the prerecorded money, and Ricardo called someone and requested an eight-ball. Some minutes later, Ricardo left his apartment and Macias arrived in his maroon Honda Accord. Macias entered Ricardo's apartment and handed a baggy of cocaine to Ricardo's roommate, who gave the baggy to CI1.

On June 4, June 5, June 9, and June 19, CI1 called Macias and arranged controlled

[2] In a controlled drug purchase, law enforcement searches the confidential informant before the transaction and after the informant returns with the purchased drugs to verify the informant possesses no other drugs, money, or contraband. The informant uses prerecorded money provided by the task force to purchase the drugs.

[3] An "eight-ball" is one eighth of an ounce of cocaine. Report of Proceedings at 82.

cocaine buys; and Macias picked up CI1 in various vehicles and conducted the transactions in the vehicles. On June 4, Macias drove the maroon Accord to meet with CI1. On June 5, he drove a silver Jeep Cherokee that law enforcement officers had observed on several occasions parked at his Alpha Drive residence. He also told CI1 that he had methamphetamine for sale. On June 9, Macias drove the silver Honda Accord registered to Ramirez, which law enforcement subsequently followed to Alex's residence, where Macias's white Chevrolet Tahoe was parked. Finally, on June 19, Macias drove the silver Honda Accord registered to Ramirez with Ramirez as a passenger.

B. 3903 Ocean Beach Highway, Apartment J4

In early June 2009, CI2 overheard a conversation about Macias's plan to purchase one half kilogram of cocaine from Nacho. Ricardo later delivered the cocaine. On July 2, CI2 stated that within the past 48 hours he[4] had observed approximately four ounces of cocaine at 3903 Ocean Beach Highway, apartment J4. Also on July 2, CI2 observed Alex and Ramirez purchasing methamphetamine from Orozco at Orozco's residence; CI2 identified Orozco as a "pound level methamphetamine dealer." CP at 73. On July 8, law enforcement officers observed Ramirez entering 3903 Ocean Beach Highway, apartment J4, through the front door with a key and saw Macias's white Tahoe in the apartments' parking lot. Later that day, law enforcement followed Macias's Tahoe to a restaurant used for laundering the DTO's drug sale profits, then back to 3903 Ocean Beach Highway, where Macias exited the Tahoe and entered apartment J4 through the front door using a key. On July 16, law enforcement first observed Macias's maroon Accord parked at 3903 Ocean Beach Highway and then later the same day observed it at his Alpha Drive

[4] CI2's gender is not revealed by the record. We refer to CI2 as a male for clarity.

residence, where his white Tahoe and silver Cherokee also were parked.

On July 23, based on these facts, law enforcement successfully requested a warrant to search 3903 Ocean Beach Highway, apartment J4, for evidence of an ongoing conspiracy to distribute cocaine and methamphetamine, including drugs and related items—such as records of drug transactions, paraphernalia of drug distribution or use, and evidence of other DTO members' identities.[5] On July 30, Ramirez, who was the apartment's lessee, answered the door when law enforcement executed the warrant.

The apartment had two bedrooms. Inside the first bedroom closet, law enforcement officers discovered a backpack containing a brick of a white, powdery substance that later tested positive as cocaine and three plastic baggies containing a white, powdery substance. A number of pocketed shirts hung in the closet; in one pocket, officers discovered a baggy containing a crystalline substance that later testified positive as methamphetamine. Officers also discovered an electronic scale with a white, powdery residue on a shelf above the closet clothes rack.

The first bedroom also contained a dresser. In one of its drawers, officers discovered another electronic scale with traces of a white, powdery substance. Officers photographed[6] the items inside or around the dresser and bedroom, including a children's book belonging to one of Macias's daughters; Macias's social security card; a pay stub belonging to Macias's wife, Anabell Gonzales, addressed to the Alpha Drive residence; Gonzales's birth certificate; a video game console system belonging to one of Macias's daughters; soccer socks belonging to one of

[5] The affidavit for the search warrant that Macias challenges was for numerous places, vehicles, and people believed related to the DTO and is 24 pages long. We address only those portions relevant to apartment J4 and Macias's challenges.

[6] These photographs were admitted as exhibits 20 and 21 at trial.

Macias's daughters; and title documents naming Macias as the registered owner of the maroon Accord at the Alpha Drive address.

In a linen closet between the two bedrooms, officers discovered receipts for international money transfers. Two receipts were for transfers from Macias to a woman in Mexico in the amounts of $500 and $1,000. The other receipt was a transfer from Ramirez to another woman in Mexico for $2,500. In either the kitchen or living room, officers discovered a cable television bill addressed to Ramirez at 3903 Ocean Beach Highway, apartment J4.

Trial and Conviction

The State charged Macias with delivery of cocaine based on the June 3 controlled buy (count I); delivery of cocaine with a school bus route stop enhancement based on the June 4 controlled buy (count II); delivery of cocaine based on the June 5 controlled buy (count III); delivery of cocaine based on the June 9 controlled buy (count IV); delivery of cocaine based on the June 19 controlled buy (count V); and unlawful possession of cocaine with intent to deliver and unlawful possession of methamphetamine based on the July 30 search (counts VI and VII).

Before trial, Macias argued that the search warrant affidavit did not establish probable cause and unsuccessfully moved to suppress the evidence seized during the July 30 search of 3903 Ocean Beach Highway, apartment J4. At trial, several law enforcement officers and CI1 testified consistently with the affidavit's descriptions of CI1's controlled drug buys from Macias. Gonzales testified that the photo exhibits 20 and 21 were taken in Macias's residence, not in 3903 Ocean Beach Highway, apartment J4.

The jury found Macias guilty of all charges except count V, the June 19 controlled buy. He appeals.

ANALYSIS

Erroneous Reasonable Doubt Instruction

The trial court gave the following jury instruction on reasonable doubt, which instruction is referred to as the *Castle* instruction:

> The defendant has entered pleas of not guilty. This plea put in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him or her guilty. If on the other hand, you think there is a real possibility that he or she is not guilty, you must give him the benefit of the doubt and find him not guilty.

CP at 138.

Macias did not object to this instruction at trial. Thus, he argues for the first time on appeal that the trial court erred in giving the *Castle* reasonable doubt jury instruction, based on our Supreme Court's disapproval of such an instruction in *Bennett*, requiring reversal and remand for a new trial. The State responds that Macias failed to preserve this issue by not objecting at trial because the error is not of constitutional magnitude. We agree with the State.

A. Standard of Review

RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). But RAP 2.5(a)(3) allows

appellants to raise claims for the first time on appeal if such claims constitute manifest error affecting a constitutional right. To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and, if the claim is correct, assess whether it implicates a constitutional interest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

B. No Constitutional Error

In *Bennett*, our Supreme Court expressly disapproved of the same *Castle* instruction the trial court gave here. 161 Wn.2d at 309, 317-18. The *Bennett* court used its inherent supervisory power to unambiguously direct trial courts to use only the reasonable doubt instruction provided in Washington Pattern Jury Instruction (WPIC) 4.01, "until a better instruction is approved." 161 Wn.2d at 318. Nonetheless, it concluded that "the *Castle* instruction satisfies the constitutional requirements of the due process clause of the United States Constitution" and that the *Castle* instruction "is constitutionally adequate." *Bennett*, 161 Wn.2d at 315.

Bennett makes clear that the trial court erred in giving the *Castle* reasonable doubt instruction instead of WPIC 4.01. *State v. Lundy*, 162 Wn. App. 865, 871, 256 P.3d 466 (2011). In *Lundy*, we addressed whether a *Castle* instructional error raised for the first time on appeal was harmless under the constitutional harmless error standard. 162 Wn. App. at 870, 872. We did not first consider whether such an error is of constitutional magnitude. We do so now. Again, as *Bennett* makes clear, it is not. 161 Wn.2d at 315.

Macias nonetheless argues that holding that he failed to preserve the issue would undermine our Supreme Court's inherent supervisory power and render our Supreme Court's exercise of such power "unenforceable and illusory." Br. of Appellant at 16-17. We disagree.

Our Supreme Court exercised its supervisory powers to inform trial courts that they err when they do not instruct juries on reasonable doubt using WPIC 4.01. But issue preservation rules also require parties to inform the trial court of its errors. *See Robinson*, 171 Wn .2d at 304. By doing so, issue preservation rules "encourage 'the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Robinson*, 171 Wn.2d at 304–05 (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). Macias cites no authority supporting a conclusion that our Supreme Court has carved out an issue preservation exception for *Castle* instructional errors. *See Robinson*, 171 Wn.2d at 305 (recognizing an exception for retroactive new constitutional interpretations). Accordingly, we hold that he may not raise this issue for the first time on appeal.[7]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Ineffective Assistance of Counsel

Macias also argues that his counsel was ineffective for failing to object to the *Castle* instruction. We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel

[7] If we were to reach the merits of Macias's claim, we would hold that any instructional error was harmless. Under the nonconstitutional harmless error standard, reversal is required only if there is a reasonable probability that error materially affected the trial's outcome. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). See our discussion under Macias's challenge for ineffective assistance of counsel.

claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *McFarland*, 127 Wn.2d at 334–35. A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance claim. *See McFarland*, 127 Wn.2d at 334–35; *see also Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, we accept the State's concession that defense counsel's performance was deficient for failing to object to the instruction. But Macias must also demonstrate prejudice. To demonstrate prejudice, he must show a reasonable probability exists that absent trial counsel's deficient performance, the proceeding would have resulted in a different outcome. *McFarland*, 127 Wn.2d at 335. But we hold that under the facts of this case, there was no reasonable probability that the use of the *Castle* instruction materially affected the trial's outcome.

Here, the State produced overwhelming evidence of Macias's guilt, including the testimony of several law enforcement officers who observed the controlled buys between CI1 and Macias; CI1's testimony about those controlled purchases, the cocaine purchased by CI1; Macias's connections to 3903 Ocean Beach Highway, apartment J4; the cocaine and methamphetamine recovered from a bedroom in that apartment; and Macias's personal items and photographs of his personal items found in that bedroom or around the apartment. Accordingly, there was no reasonable probability that the instructional error materially affected the trial's outcome. Thus, it follows that there was no reasonable probability that the trial's outcome would have been different had defense counsel objected to the *Castle* instruction and had the trial court instructed on the WPIC 4.01 reasonable doubt instruction. Macias's claim fails.

Probable Cause for Search Warrant

Macias also argues that the search warrant affidavit was insufficient to establish probable cause to search 3903 Ocean Beach Highway, apartment J4. Macias challenges only the trial court's legal conclusion that probable cause supported issuance of the warrant. We again disagree.

A. Standard of Review

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 only on a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause requires a nexus between (1) the criminal activity and the items to be seized and (2) the items to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Our review is limited to the four corners of the probable cause affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). In reviewing the trial court's legal determination of probable cause, we give great deference to the trial court. *Neth*, 165 Wn.2d at 182.

"Two different standards apply to our review of a probable cause determination." *State v. Emery*, 161 Wn. App. 172, 201, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). We apply the abuse of discretion standard to "'historical facts'" in the case, i.e., the events "'leading up to the stop or 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)). Thus, we apply an abuse of discretion standard to our review of an issuing judge's finding that information from an unnamed informant is sufficiently reliable and credible to qualify as historical fact. *Emery*, 161 Wn. App. at 201–202. 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).

> 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. It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.

State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citation omitted). Facts standing alone that would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). "We evaluate an affidavit 'in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.'" *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

B. Staleness

Macias argues that CI2's early July observation of cocaine inside 3903 Ocean Beach Highway, apartment J4, was stale when the task force executed the search warrant on July 30, nearly four weeks later, thus fatally undermining the issuing judge's probable cause determination. The State argues that the information was not stale because this case involved a DTO that engaged in the continuous enterprise of drug trafficking. We agree with the State.

Facts supporting the issuance of a search warrant must support the conclusion that the evidence is probably at the premises to be searched at the time the judge issues the warrant. *Lyons*, 174 Wn.2d at 360. Accordingly, the issuing judge must determine whether the passage of

time between the officer's or informant's observations and the application for a warrant "is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale." *Lyons*, 174 Wn.2d at 360-61. Common sense is the test for staleness of a search warrant affidavit's information. *Maddox*, 152 Wn.2d at 505.

The issuing judge determines staleness based on the totality of the circumstances. *Lyons*, 174 Wn.2d at 361. Accordingly, along with the passage of time, staleness depends on the alleged criminal activity's nature and scope, the activity's length, and the nature of the property to be seized. *Maddox*, 152 Wn.2d at 506.

Macias argues that it was unlikely, given that drug dealers either sell or consume cocaine, that any of the four ounces of cocaine observed inside 3903 Ocean Beach Highway, apartment J4, within 48 hours of July 2, or that any other drugs or paraphernalia remained there when the judge signed the warrant on July 23, three weeks later. But we must consider the totality of the circumstances. This case involved an alleged ongoing criminal enterprise in drug trafficking.

As the Ninth Circuit Court of Appeals has observed, "'[w]ith respect to drug trafficking, probable cause may continue for weeks, if not months, of the last reported instance of suspect activity.'" *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (emphasis omitted) (quoting *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986)); *see also United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) ("When the evidence sought is of an ongoing criminal business . . . greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time."). In *Pitts*, the affidavit established that Pitts was "more than a one-time drug seller" and a "regular supplier." 6 F.3d at 1370. Accordingly, the court determined that information about Pitts's sale of crack cocaine 121 days before law

enforcement executed a search warrant for Pitts's home was not stale. *Pitts*, 6 F.3d at1368, 1370.

Washington courts have made similar observations about search warrants alleging marijuana grow operations. For example, in *State v. Hall*, 53 Wn. App. 296, 298, 300, 766 P.2d 512 (1989), two months elapsed between the informant's observation of marijuana plants inside Hall's home and the warrant's issuance. Nonetheless, Division Three of this court found that the information was not stale because the affidavit established that the grow operation was still in existence. *Hall*, 53 Wn. App. at 300. Likewise, Division One of this court has observed that although a two-week gap between an informant's observation and the warrant's issuance "may be too long when the suspected criminal activity is the sale of small amounts of marijuana, it is sufficient to establish probable cause where an informant observes 'an extensive growing operation.'" *State v. Petty*, 48 Wn. App. 615, 621-22, 740 P.2d 879 (1987) (citation omitted) (quoting *State v. Smith*, 39 Wn. App. 642, 651, 694 P.2d 660 (1984)).

As in *Pitts*, *Hall*, and *Petty*, here the affidavit established that Macias was involved in a continuing criminal enterprise of cocaine and methamphetamine distribution as a "large quantity dealer" who supplied other DTO members, such as Ricardo on June 3. CP at 73. Moreover, he personally sold cocaine to CI1 during four controlled buys in the 16 days between June 3 and June 19. The issuing judge reasonably inferred that because Macias was engaged in a continuous enterprise selling cocaine, that probable cause existed to believe that some cocaine might be found at 3903 Ocean Beach Highway, apartment J4, when the judge issued the warrant. The information was not stale, and Macias's staleness claim fails.

C. Nexus between Items and Apartment

Macias also challenges the search warrant by arguing that the affidavit did not establish a

sufficient nexus between the items to be seized—cocaine; methamphetamine; and related paraphernalia, records, and other evidence of the DTO's drug trafficking—and 3903 Ocean Beach Highway, apartment J4. We disagree.

Here, the affidavit established that CI2 observed approximately four ounces of cocaine in apartment J4 within 48 hours of July 2. Then, within 48 hours of observing the cocaine at Ramirez's Ocean Beach Highway apartment, CI2 also observed Ramirez and Alex purchasing methamphetamine from Orozco at Orozco's residence. CI2 identified Orzoco as a "pound level methamphetamine dealer." CP at 73. The affidavit also established Macias's role in the DTO as a "large quantity dealer" of cocaine and methamphetamine, his participation in four controlled drug buys, and Ramirez's DTO membership and presence during one of Macias's drug transactions. CP at 73.

Both Macias and Ramirez were observed entering apartment J4 with keys to the front door. The affidavit further established the presence of vehicles used by DTO members in selling drugs parked at 3903 Ocean Beach Highway, including the silver Honda used during controlled buys with DTO members Alex, Macias, and Ramirez; the maroon Honda Accord used by Macias in two controlled buys; and the white Chevrolet Tahoe registered to Macias. In addition, law enforcement followed the white Tahoe from 3903 Ocean Beach Highway to a restaurant used for laundering the DTO's drug sale profits, then followed it back to 3903 Ocean Beach Highway, where Macias exited the Tahoe and entered apartment J4 through the front door using a key. From these facts, it was reasonable for the issuing judge to conclude that there was probable cause to believe that cocaine or methamphetamine or related evidence of drug trafficking could be found at the apartment. A sufficient nexus existed between evidence of the DTO's drug

trafficking and 3903 Ocean Beach Highway, apartment J4. *See Thein*, 138 Wash.2d at 140. Thus, Macias's nexus claim fails.

Sufficiency of the Evidence

Finally, Macias argues that sufficient evidence did not support a finding that he possessed the cocaine and methamphetamine found at 3903 Ocean Beach Highway, apartment J4 during the July 30 search, requiring dismissal of counts VI and VII, unlawful possession of cocaine with intent to deliver and unlawful possession of methamphetamine. This claim also fails.

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *Goodman*, 150 Wn.2d at 781. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d

400 (1969). Actual possession occurs when the item is in the physical custody of the person charged with possession. *Callahan*, 77 Wn.2d at 29; *State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987). Because Macias was not in actual possession of the cocaine or the methamphetamine when it was discovered, we must determine if the evidence was sufficient to establish that Macias had constructive possession of the drugs.

"Constructive possession cases are fact sensitive." *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). To determine if Macias had constructive possession of the drugs, we look at the totality of the circumstances to determine whether it supports a reasonable inference that he had dominion and control over them. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). "Exclusive control is not necessary to establish constructive possession, but mere proximity to [the item] is insufficient." *State v. Davis*, 117 Wn. App. 702, 708-09, 72 P.3d 1134 (2003); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession "may be proved by substantial circumstantial evidence." *State v. Sanders*, 7 Wn. App. 891, 893, 503 P.2d 467 (1972).

In determining constructive possession, we consider the surrounding facts and circumstances, including (1) the defendant's motive to possess the item; (2) the quality, nature, and duration of the possession; (3) why possession terminated; (4) whether another person claimed ownership of the item; and (5) whether the defendant had dominion and control over the premises where the item was found. *See, e.g.*, *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994); *Callahan*, 77 Wn.2d at 30–31; *State v. Summers*, 107 Wn. App. 373, 386, 28 P.3d 780 (2001), 43 P.3d 526 (2002); *State v. Bowman*, 8 Wn. App. 148, 153, 504 P.2d 1148 (1972); *State*

v. Werry, 6 Wn. App. 540, 548, 494 P.2d 1002 (1972).

Here, Macias argues that his numerous personal items discovered in and around the bedroom's dresser, including some items establishing that he resided at another address, are insufficient to demonstrate his dominion and control over the drugs found in the bedroom closet. But in making this argument, Macias overlooks additional facts that demonstrated his dominion and control over the premises.

Law enforcement observed that his vehicles and vehicles driven by him during drug transactions were parked at the apartment complex over a period of time and, more importantly, they observed Macias enter the 3903 Ocean Beach Highway, apartment J4 using a key. These facts tended to demonstrate his dominion and control over the apartment. *See State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977), *overruled on other grounds by Lyons*, 174 Wn.2d 354.

Furthermore, the jury could reasonably infer his dominion and control over the bedroom from the presence of numerous official documents and personal effects belonging to him, his wife, and his children. Moreover, the clothes in the closet did not fit Ramirez, the apartment's only other known occupant. Thus, the jury could reasonably infer that they belonged to Macias. Finally, the jury heard testimony about Macias's four drug sales to CI1 within a 16-day period and the jury could reasonably infer that he had a motive to possess a brick and three baggies of cocaine. And Ramirez did not claim ownership of these drugs. Accordingly, sufficient evidence supported Macias's constructive possession of the drugs and, thus, his convictions for possession of cocaine with intent to deliver and unlawful possession of methamphetamine, counts VI and VII. His claim fails.

We affirm.

Van Deren, J.

We concur:

Hunt, J.

Worswick, C.J.