No. 97125-1

COA # -49724-7-II
Pierce County No. 15-1-04941-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JUSTIN S. STONE,

Petitioner/Appellant.

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ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO, AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
the Honorable Gretchen Leanderson (trial judge)

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# PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Petitioner Justin Stone, the appellant below, asks the Court to review a portion of the decision referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of decision of the court of appeals, Division Two, in State v. Stone, __ Wn. App. 3d ___ (2019 WL 1379726), issued March 26, 2019. The opinion is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

All parties agree that the drug expert officer gave improper opinion testimony when he declared his belief that Petitioner was possessing the drugs with intent to deliver, a contested issue at trial. The only question was whether the state met its heavy burden of proving this constitutional error harmless.

1. Where there is conflicting evidence and such improper opinion testimony is given, has the state failed to rebut the extremely high burden of proving the constitutional error harmless by showing that the untainted evidence is so overwhelming that every reasonable juror would necessarily have convicted absent the constitutional error?

   Several decisions of the court of appeals have indicated that the constitutional harmless error test is not met when there is conflicting evidence regarding the subject of the opinion or questions about the strength of the state's case. Should this Court grant review to address the apparent conflicts under RAP 13.4(b)(2)?

   Does the court of appeals decision further conflict with State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006), by taking the evidence in the light most favorable to the state instead of assuming that the damaging effect of improper opinion testimony was felt as Moses required?

2. In closing argument, the prosecutor exploited the officer's

opinion testimony Did the court of appeals err in failing to consider this relevant information in applying the "constitutional harmless error" test?

3. Did the court of appeals err in applying an improper "contribution" analysis for review of constitutional harmless error despite this Court's rejection of that analysis in State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)?

D. OTHER ISSUES SUPPORTING REVIEW

4. Should review be granted on all of the issues raised by the Petitioner in his Statement of Additional Grounds for Review?

E. STATEMENT OF THE CASE

Petitioner Justin Stone was charged in Pierce County superior court with, *inter alia*, unlawful possession with intent to deliver 1) methamphetamine, 2) oxycodone, 3) hydrocodone, and 4) Alprazolam, all with firearm and bus stop sentencing enhancements. CP 40-43. He was found guilty of possession with intent and the enhancements for 1) methamphetmine, 2) oxycodone, and 3) hydrocodone. CP 188-96. He was acquitted of possessing the Alprazolam with intent to deliver but found guilty of the lesser offense of simple possession. CP 188-96.

The charges arose after a search warrant was served at Stone's home. 8RP 137-38, 142. A bedroom in the house had a "ledger" which an officer said appeared to document "transactions" exchanging stolen items for drugs. 8RP 228. In a dresser in the room was a wallet with identification from Stone, a digital scale, a plastic container with "residue" and a bag with a pill bottle which had "ten alpraxolam prescription" drugs and two "Oxycontin pills." 8RP 144, 167, 180, 250, 299, 338. On the dresser was some video surveillance equipment and

there were some cameras on the outside of the house. 8RP 168-70, 339.

In the bedroom was a safe which unlocked with a key taken from Stone. 8RP 226-27. In the safe was a large "baggie" of powder later identified as containing 361 grams of a substance which later tested positive for the presence of at least some methamphetamine, a "BB" gun, some documents an officer said showed the safe belonged to Stone," and a "two shot" loaded gun. 8RP 228, 237, 253-59. Also in the safe were four prescription bottles. 8RP 240. One contained 40 pills one of which tested positive for hydrocodone. 8RP 300. One had 199 small pills which tested positive for oxycodone, along with 15 pills not tested that had markings indicating it could be oxycodone. 8RP 300. The third had nine pills which were not tested but had marking which were similar to hydrocodone. 8RP 800-801. The fourth bottle contained 30 tablets which were not tested, but which had markings indicating they could be oxycodone. 8RP 300, 302. Two of the bottles had no labels, one had a name partly scratched off and the last had a sticker over the name area. 8RP 260.

After his arrest, Stone told officers there was methamphetamine and a gun in the safe, that the gun had been given to him by his supplier of "meth" after Stone had been the victim of a recent burglary, and that Stone had himself started to sell methamphetamine because of his drug debt. 8RP 204-11.

At trial, Stone admitted possessing the methamphetamine with intent to deliver but said that he had possessed the hydrocodone, oxycodone and Alprazolam for personal use. 8RP 469-73. He argued

that the quantities of pills were not "dealer-level" as compared to the methamphetamine, noting that he had told the officers he was selling "meth" but the officers never asked if he was a dealer in pills. 8RP 469-70.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE CONSTITUTIONAL HARMLESS ERROR TEST THIS COURT SELECTED IN GULOY REQUIRES THE STATE TO PROVE THAT NO REASONABLE JUROR WOULD FAIL TO CONVICT ABSENT THE ERROR AND THE COURT OF APPEALS IS APPLYING A FAR LESSER, "SUFFICIENCY" OR "CONTRIBUTION" STANDARD

In this case, this Court is yet again faced with questions surrounding the state's use of opinion testimony in gaining criminal convictions. This Court has frequently granted review to address such testimony and has made it plain that "there are some areas that are clearly inappropriate for opinion testimony in criminal trials." State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); see, State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007); State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). It has further held that a witness' opinion on the defendant's guilt or veracity violate the defendant's "constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Kirkman, 159 Wn.2d at 927. In this case, this Court should grant review on the issue of whether the state can meet its burden of rebutting the presumption that the constitutional error compels reversal where there is conflicting evidence on the relevant issue, the officer's opinion was exploited by the state below and the

court of appeals appears to have applied the wrong standard for deciding "constitutional harmless error."

At trial, Mr. Stone was accused of, *inter alia*, possession with intent to deliver the methamphetamine and pills found in the safe, with separate counts for each type of pill. See CP 40-45. In opening argument, the prosecutor emphasized that the State's witnesses were mostly professional investigators, "some with quite a bit of expertise and history of working narcotics cases." 8RP 124. He also told jurors that the officers had served the search warrant on Stone's house "**as they believed there were items of contraband, narcotics at that house that he possessed in order to sell them to other individuals**." 8RP 124 (emphasis added).

Later, over defense objection, a detective who had been qualified as an experienced narcotics investigator was allowed to give his opinion "as to what the defendant was doing" in the home. 8RP 180-81. The following exchange occurred:

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|---|---|
| [PROSECUTOR]: | One final question for you, sir. **Given the items you had found inside the house, did you draw a conclusion as to what the defendant was doing?** |
| [COUNSEL]: | I object. Within the province of the jury. |
| [PROSECUTOR]: | Perhaps I could rephrase. |
| THE COURT: | Would you rephrase, please? |
| [PROSECUTOR]: | Certainly. |
| | **Given your numerous years of being involved in the narcotics division and your training and experience, the items you found in this home, based on that,** |

| | |
|---|---|
| | **did you draw a conclusion as to what the defendant was doing?** |
| [COUNSEL]: | I object. That's giving an opinion as to the ultimate question for this jury. |
| THE COURT: | You know, overruled. |
| THE WITNESS: | Yes. |
| [PROSECUTOR]: | And what did you base that on? |
| THE WITNESS: | It was based on the totality of the investigation, the items that I located, along with additional items that other officers/investigators located. **I concluded that Mr. Stone was in possession of narcotics with intent to distribute.** |

8RP 180-81 (emphasis added).

In closing argument, the prosecutor relied on this declaration and another which involved only the methamphetamine count, reminding jurors that officers who had "expertise" and had opined "that the defendant was engaged in the activity of illegal possess[ion] [sic] of drugs with intent to sell them[.]" 8RP 449-50, 452.

On appeal, Division Two agreed with Mr. Stone that the testimony of the officer was "an improper opinion as to Stone's guilt." App. A at 7. The court of appeals noted that the officer's testimony of the officer "went directly to the ultimate issue for the jury, and it parroted the legal standard" the jury had to apply. App. A at 8-9. Indeed, to its credit, the prosecution conceded that the officer gave improper opinion testimony at trial. App. A at 9.

The issue on review is thus not whether the officer's declaration of belief that Stone was possessing the drugs with intent to deliver

amounted to an unconstitutional and improper opinion on Mr. Stone's guilt. It was. Instead, the issue is Division Two's problematic use of a standard of review for "constitutional harmless error" which was improperly more of a "contribution," balancing or "sufficiency" test, instead of the standards set forth by this Court. Crucial is the question of whether the constitutional harmless error test can be satisfied by the state when there is conflicting evidence and questions about the strength of the state's case.

The question of what standard of review to use in determining whether constitutional error can be deemed "harmless" has long been of concern to this Court. See, e.g., Guloy, 104 Wn.2d at 426; see also, State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). It is well-settled that constitutional error is presumed to be prejudicial and reversal is thus presumptively required. See State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). It is also settled that the state - not the defense - bears the burden of proof to rebut that presumption. See State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

With the court of appeals decision here, what also appears unsettled is the proper standard of review. In Chapman v. California, 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), the federal Supreme Court adopted a "contribution" test for constitutional harmless error. Applying that test, to prove a constitutional error "harmless," the state is required to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. To make that determination, the reviewing court looks at a "host of factors,"

including the "importance of the witness' testimony," whether it was cumulative, whether it was corroborated or contradicted by witnesses on "material points," and "the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986).

This kind of balancing analysis is just what the court of appeals did here. After first recognizing that "[l]aw enforcement opinion testimony is especially likely to influence" jurors, the Court found the comments were improper opinion testimony. App. A at 8. The court then stated the correct standard of "untainted overwhelming evidence," i.e., whether the "untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." App. A at 8-9; State v. Lui, 179 Wn.2d 457, 495, 315 P.3d 493, cert. denied, __ U.S. __ (2013); Watt, 160 Wn.2d at 635. It then applied more of a balancing or "contribution" standard, finding that, because there was evidence which supported the conclusion that the pills were possessed for the purposes of drug dealing which the court found persuasive, that was "overwhelming evidence" to support the convictions for possessing the hydrocodone and oxycodone with intent to distribute. App. A at 9.

But this Court has rejected the Chapman test. Guloy, 104 Wn.2d at 426. Instead, our courts use the "untainted overwhelming evidence" test, to ensure that "a conviction will be reversed where there is any reasonable possibility" the jury used the inadmissible evidence to convict. Id.

Further, the lower appellate court failed to apply the correct

standard regarding the relevant facts. In making its determination that the untainted evidence is so overwhelming that every reasonable juror would have convicted even absent the error, the Moses Court held, the appellate court is required to assume that the damaging potential of the improper opinion testimony was "fully realized." 109 Wn. App. at 732.

Here, the court of appeals did not use such a standard. It focused on the evidence the state presented to support the idea that the pills were possessed with intent to deliver, i.e., that there was a large quantity of several of the pills, that there was also evidence money, a firearm, and packaging, that there was a ledger which appeared to document drug transactions, that the labels were off two of the four pill bottles, that there was some surveillance equipment in the house, as well as "Stone's statements to police." App. A at 8-9. That recitation is taking the facts, however, in the light most favorable to the *state,* not examining them while assuming the damaging effect of the officer's improper opinion on Stone's guilt was fully realized. See App. A at 9.

The court of appeals analysis ends up amounting to more like a sufficiency ruling than one on the constitutional error of improper testimony from an officer on guilt. Constitutional error is not harmless beyond a reasonable doubt unless the prosecution proves that the untainted evidence of guilt is so overwhelming that it *necessarily* leads to a conclusion of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Put simply, this means the state bears the heavy burden of showing that *every reasonable jury* would have convicted even without

the error, i.e., that no reasonable jury would have failed to convict if the error had not occurred. Easter, 130 Wn.2d at 242. This means the state has to prove that the constitutional error could not have had any effect on the fact-finder's decision to convict. Id.

Here, however, the court of appeals used the wrong standard for the facts and a sort of "balancing" test, not the proper standard. Indeed, the standard used by Division Two was more like the standard used in handling "sufficiency of the evidence" challenges on review. In such situations, the evidence is taken in the light most favorable to the state and the defendant must show that *no reasonable juror* would have convicted based on the evidence presented below. See, State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). Instead of reversal being presumed as with constitutional error, with sufficiency questions the opposite is true, and the conviction is affirmed even if *most* reasonable jurors would not have convicted, if *any* might. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). That is far different from the question of whether *every* reasonable juror would *necessarily* have convicted even absent the error. See, e.g., Romero, 113 Wn. App. at 793.

This Court should grant review. The court of appeals took the evidence in the wrong light, in conflict with Moses. It applied a quasi-balancing, more Chapman-like analysis, in conflict with this Court's rejection of Chapman in Guloy. It used more of a sufficiency review standard than the strict constitutional harmless error standard required.

Finally, the Court should grant review, because the court of appeals decision runs afoul of the reasoning and holding of other court of appeals decisions which have made it clear that the state cannot meet its burden of proving "overwhelming untainted evidence" where there is conflicting evidence and questions about the strength of the state's case. In Romero, supra, the state's evidence that the defendant had fired a gun was strong, including an eyewitness who identified him (albeit getting his shirt color wrong), the location of the sound of the shot and the defendant's relative position. 113 Wn. App. at 793. But Romero denied having the gun and jurors might not have believed the identification, so there was conflicting evidence of guilt. Even though the evidence was sufficient to uphold the conviction against a sufficiency challenge, because of the conflicting evidence it did not meet the standard sufficient to prove that every single juror would necessarily have convicted even absent the constitutional error. Id.

In fact, even where there is strong evidence of guilt in a child sex abuse case, where there is conflicting evidence as well, the evidence will not be deemed so overwhelming that it "necessarily" leads to a finding of guilt. See State v. Keene, 86 Wn. App. 589, 594-95, 938 P.2d 839 (1997). Division Two's "sufficiency" style analysis was inconsistent with and conflicts with the holdings of Keene and Romero, which recognize that "overwhelming evidence" requires more than just proof from which a reasonable juror *could have* convicted; rather, there must be proof that all reasonable jurors *would have* done so without the error. Given that reasonable jurors who sat on this case rejected the state's theory that

some of the pills were possessed with intent to deliver, it is hard to conclude that all reasonable jurors would necessarily have found that the hydrocodone and oxycodone were possessed with intent to deliver, given the conflicting evidence below.

This Court has noted that it is "impossible for courts to contemplate the probabilities any evidence may have on" jurors' minds. State v. Robinson, 24 Wn.2d 909, 167 P.2d 986 (1946). Applied properly, the constitutional harmless error test ensures that, when constitutional errors occur, the resulting convictions are not upheld even if the reviewing Court might believe in the defendant's guilt, unless every reasonable juror would have convicted. The court of appeals failed to properly make the determination and apply the correct standard as set forth in Guloy. This Court should accept review under RAP 13.4(b)(1) and (2), to answer the question of whether where, as here, there is conflicting evidence and the jury has had obvious questions about the state's version of events, the state can meet its burden of proving the evidence so "overwhelming" that no reasonable juror would fail to convict, as required to prove "constitutional harmless error."

G. OTHER ISSUES PRESENTED FOR REVIEW

2. REVIEW SHOULD ALSO BE GRANTED ON ALL THE ISSUES PETITIONER RAISED PRO SE

Mr. Stone filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG") in the Court of Appeals. See App. A at 18-22. More specifically, he argued that the warrant listed the wrong address and that the warrant was invalid as issued by a court lacking

jurisdiction, that one of the judges who ruled on his motions had been an attorney he had previously consulted in violation of the appearance of fairness and judicial integrity, that his trial counsel was ineffective in failing to raise multiple issues and that counsel was ineffective in failing to interview and call exculpatory witnesses. See App. A at 18-21. Division Two rejected all of his arguments without appointing counsel to assist or research the issues raised. See App. A; see also RAP 10.10(f). This Court has not yet resolved the issue of how a Petitioner who has filed a SAG should seek review of the issues presented in the SAG in such circumstances.

In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), this Court held that it would not address arguments parties tried to incorporate by reference from other cases. However, this Court has not disapproved of incorporation by reference of arguments raised pro se when counsel has not been appointed on those issues pursuant to RAP 10.10. Thus, to comply with RAP 13.7(b) and raise all issues in this Petition without making any representations about their relative merit as required by the WSBA Rules of Professional conduct, incorporated herein by reference are the arguments Mr. Stone, raised in his RAP 10.10 SAG. This Court should grant review on those issues as well.

H. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 25th day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Piece County Prosecutor's Office via email at pcpatcecff@ao.pierce.wa.us, and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Justine Stone, DOC 729991, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 25th day of April, 2019.

KATHRYN RUSSELL SELK, No. 23879
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Filed
Washington State
Court of Appeals
Division Two

March 26, 2019

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JUSTIN STONE,<br><br>Appellant. | No. 49724-7-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

MELNICK, J. — A jury convicted Justin Stone of three counts of possession of a controlled substance with intent to distribute for methamphetamine, hydrocodone, and oxycodone respectively, all with firearm and school bus route stop enhancements. It also convicted him of unlawful possession of a firearm and possession of a controlled substance for alprazolam. Stone appeals his convictions, arguing that the State elicited improper opinion testimony as to his guilt and that the resulting error was not harmless. He also contends he received ineffective assistance of counsel when his attorney did not object to several irrelevant pieces of evidence, his convictions violated his double jeopardy rights, and the trial court erred in assessing legal financial obligations (LFOs) and failing to recognize its discretion in sentencing him. Stone makes additional arguments in a statement of additional grounds (SAG).

We affirm Stone's convictions but remand for the trial court to review the assessment of LFOs in light of legislative changes.

## FACTS

### I. INCIDENT

On December 4, 2015, Lakewood police executed a search warrant at Stone's Tacoma residence. A Lakewood Municipal Court judge issued the warrant. Police removed Stone from his home and placed him in custody before searching. After Stone waived his *Miranda*[1] rights, Detective Sean Conlon asked Stone if he had methamphetamine in the residence. Stone said the police would find approximately ten ounces of methamphetamine and a gun in a safe in his bedroom. He told Conlon how to open it. Stone said his methamphetamine supplier had given him the gun. Stone admitted he had started selling methamphetamine to get out from under a debt to his supplier. Police found $400 and the keys to the safe on Stone's person.

Consistent with Stone's statements, police found a safe in Stone's bedroom. Inside, officers discovered methamphetamine, money, a loaded handgun, a BB gun, and documents showing that the safe belonged to Stone. Officers also found four prescription bottles containing pills in the safe. Two bottles had the labels removed and another had the name scratched off. The bottles contained 49 hydrocodone tablets and more than 200 oxycodone tablets.

In Stone's bedroom, police found a ledger containing documented drug transactions, two digital scales, at least of one which had methamphetamine residue, packaging material, and surveillance equipment. The ledger contained records of transactions and a list of merchandise. A detective testified that such lists are consistent with a common practice where drug traffickers request specific items of merchandise so that drug users without a source of income may shoplift the requested items and exchange them for drugs.

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

Also in the bedroom, police found a wallet containing Stone's identification, a pill bottle with 13 grams of methamphetamine, ten alprazolam pills, and two OxyContin pills.

In total, police found 307-349 grams of methamphetamine, 10 alprazolam pills, 49 hydrocodone pills, and 230-250 oxycodone pills.

Stone's home was located within 1,000 feet of multiple school bus stops.

## II. CRIMINAL CHARGES

The State charged Stone with four counts of possession of a controlled substance with intent to deliver, one each for methamphetamine, oxycodone, hydrocodone, and alprazolam, each with firearm[2] and school bus route stop[3] enhancements, and one count of unlawful possession of a firearm in the first degree.

Stone consulted with attorney Michael Schwartz but did not retain him. Schwartz then became a judge for the Pierce County Superior Court and presided over Stone's case for several pretrial and motion hearings. Schwartz denied Stone's motion to suppress physical evidence seized from his residence and his motion for a new attorney.

Stone's attorney raised this potential conflict issue regarding Schwartz at a motion hearing, and Schwartz asked whether he wanted another judge to hear the motion. Stone's attorney declined this offer.

Before the start of trial, the State raised the issue of Stone's consultation with Schwartz and requested that another judge review each motion on which Schwartz had ruled. Another judge had already reviewed and denied Stone's counsel's motion to withdraw and denied a motion to

[2] RCW 9.94A.533(3).

[3] RCW 9.94A.533(6); *see* RCW 69.50.435(1)(c).

suppress Stone's statements to police. The court heard arguments on the motion for a new attorney and the motion to suppress physical evidence and denied them both.

At trial, the State called numerous detectives from the Lakewood Police Department who executed the warrant at Stone's residence. Several officers testified as to their extensive training and experience in drug investigations and listed many items that drug dealers would be likely to possess and use, including many items that they found at Stone's residence.

One detective testified that, in his 15 years in the drug unit, he had never seen a user hold the quantity of methamphetamine found in Stone's home. He stated that the quantity of pills in the pill bottles was consistent with the amount a dealer would have on hand and that the lack of labels on the bottles was indicative of drug dealing. Another detective testified that the quantity and sizes of bags seized from Stone's bedroom, along with their placement near digital scales with methamphetamine residue, were "consistent with low-level narcotics trafficking." 3 Report of Proceedings (RP) at 345.

During Detective Jeff Martin's testimony, the prosecutor asked Martin whether he had "draw[n] a conclusion as to what the defendant was doing." 2 RP at 180. Stone objected and the prosecutor rephrased the question. "Given your numerous years of being involved in the narcotics division and your training and experience, the items you found in this home, based on that, did you draw a conclusion as to what the defendant was doing?" 2 RP at 181. Stone again objected on grounds that that would be "giving an opinion as to the ultimate question for this jury." 2 RP at 181. The court overruled the objection and Martin testified that, "based on the totality of the investigation, the items that [he] located, along with additional items that other officers/investigators located," he "concluded that Mr. Stone was in possession of narcotics with intent to distribute." 2 RP at 181.

Conlon testified immediately after Martin. The prosecutor asked Conlon, "Looking at what you had found inside the home and given what Mr. Stone had indicated to you in his statements, did you form an opinion as to what Mr. Stone was involved in?" 2 RP at 206. Conlon testified that, based on his "training and experience and what [police] had found there and [Stone's] own statements, that [Stone] was, in fact, selling methamphetamine." 2 RP at 206. Conlon also testified that the quantity of drugs found in Stone's home indicated to him that Stone was "a mid-level dealer of methamphetamine." 2 RP at 207. Stone did not object to this testimony.

The jury found Stone guilty of three counts of possession with intent to distribute for methamphetamine, hydrocodone, and oxycodone, each with firearm and school bus route stop enhancements. It also found him guilty of unlawful possession of a firearm in the first degree. The jury found Stone not guilty of possession of alprazolam with intent to distribute, but it found him guilty of the lesser included offense of possession of alprazolam.

The court sentenced Stone to a standard range sentence of 36 months flat time on each firearm enhancement, 24 months on each school bus route stop enhancement, concurrent to one another, and 116 months for unlawful possession of a firearm, totaling 248 months.[4] The parties agreed that the firearm enhancements would run consecutively to one another and consecutively to the rest of the time imposed.

The court imposed a $250 drug investigation fund, a $500 crime victim penalty assessment, a $100 deoxyribonucleic acid (DNA) database fee, and a $200 criminal filing fee, for a total of $1,050.

Stone appeals. The court signed an order of indigency for Stone's appeal.

[4] The sentences on the other substantive crimes were all shorter than 116 months and concurrent with the unlawful possession of a firearm sentence, so did not add to Stone's total time in custody.

## ANALYSIS

### I. OPINION TESTIMONY

Stone contends that Martin and Conlon provided unlawful opinion testimony as to his guilt. The State concedes that Martin's opinion testimony as to Stone's guilt was improper, but contends that the error was harmless. It claims that, because Stone did not object to Conlon's testimony at trial, it is not preserved on appeal because it did not give rise to manifest constitutional error. We agree with the State.

We review decisions to admit evidence under an abuse of discretion standard. *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). The trial court abuses its discretion on an evidentiary ruling if it is contrary to law. *Quaale*, 182 Wn.2d at 196.

#### A. Conlon's Testimony

Stone contends that he preserved his challenge to Conlon's testimony by objecting to Martin's testimony. We disagree.

On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Chacon*, 192 Wn.2d 545, 547, 431 P.3d 477 (2018); RAP 2.5(a).

We "'are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to manifest constitutional error reviewable for the first time on appeal.'" *State v. Warren*, 134 Wn. App. 44, 56, 138 P.3d 1081 (2006) (quoting *State v. Madison*, 53 Wn. App. 754, 762, 770 P.2d 662 (1989)). In part, this rule prevents defense counsel from "'deliberately let[ting] error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.'" *Warren*, 134 Wn. App. at 56 (quoting *Madison*, 53 Wn. App. at 763). "An issue is not preserved for appeal unless proper and

particularized objection was made at the time of the ruling." *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004).

Stone objected to Martin's opinion testimony that he was "in possession of narcotics with intent to distribute" on the grounds that Martin would be giving an opinion as to the ultimate question for the jury. 2 RP at 181. The court overruled his objection. Stone did not make any objection to Conlon's testimony that, based on his "training and experience and what [police] had found there and [Stone's] own statements, that [Stone] was, in fact, selling methamphetamine." 2 RP at 206. Nor did he object to Conlon's opinion that the amount of drugs found at Stone's residence indicated that Stone was "a mid-level dealer of methamphetamine." 2 RP at 207.

Stone's earlier objection to Martin's testimony did not preserve his objection to Conlon's testimony.[5]

B. Martin's Testimony

Stone contends and the State concedes that Martin provided improper opinion testimony as to Stone's guilt. We agree.

Opinions on guilt are improper when made directly or by reference. *Quaale*, 182 Wn.2d at 199. Impermissible opinion testimony as to guilt violates the defendant's right to a jury trial, which includes "the independent determination of the facts by the jury." *Quaale*, 182 Wn.2d at 199. Personal opinions as to the defendant's guilt, the intent of the accused, or the veracity of witnesses are "inappropriate for opinion testimony in criminal trials." *Quaale*, 182 Wn.2d at 200. Improper opinion testimony is also "more troubling if stated in conclusory terms parroting the

[5] Even if we were to consider this unpreserved challenge, Conlon testified only about Stone's methamphetamine dealing. Stone conceded at oral argument that any erroneously admitted testimony about his methamphetamine dealing was harmless and focused exclusively on Martin's opinion testimony as to Stone's dealing prescription pills.

legal standard." *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 581, 854 P.2d 658 (1993)). Law enforcement opinion testimony is especially likely to influence the jury. *State v. Demery*, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001).

Martin's opinion testimony that Stone was "in possession of narcotics with intent to distribute" went directly to the ultimate issue for the jury, and it parroted the legal standard. 2 RP at 181. This testimony was an improper opinion as to Stone's guilt. We accept the State's concession. We next consider whether this improper testimony was harmless.

C. Harmless Error

Stone conceded at oral argument that any error resulting from Martin's improper testimony was harmless as to his methamphetamine conviction. However, the parties dispute whether the error was harmless as to Stone's two convictions for possession of prescription pills with intent to distribute.

Improper opinion testimony as to a defendant's guilt violates a defendant's constitutional right to have a fact critical to his guilt determined by the jury. *Quaale*, 182 Wn.2d at 201-02. Admission of such testimony is constitutional error and we apply the constitutional harmless error standard to determine whether the error was harmless. *Quaale*, 182 Wn.2d at 202.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We find the error harmless "only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (internal

citation omitted). If the error was not harmless, the defendant must have a new trial. *Easter*, 130 Wn.2d at 242.

A law enforcement officer's opinion testimony is "especially likely" to influence the jury. *Demery*, 144 Wn.2d at 762. Additionally, improper opinion testimony is "more troubling if stated in conclusory terms parroting the legal standard." *Montgomery*, 163 Wn.2d at 594 (citing *Heatley*, 70 Wn. App. at 581).

Supporting Stone's convictions, the State presented a large quantity of methamphetamine and pills, money, a firearm, packaging, a ledger documenting drug transactions, including one for Percocet,[6] surveillance equipment installed at his home, and Stone's statements to police. Police found the pill bottles in the safe with Stone's methamphetamine, guns, and other drug dealing paraphernalia, and the labels were scratched off two of the four bottles. Witnesses testified that the quantities of pills in Stone's home were consistent with amounts a dealer would have and the lack of labels on the pill bottles was indicative of drug dealing.

Because the State presented overwhelming evidence of Stone's possession of hydrocodone and oxycodone with intent to distribute, we conclude that the improper opinion testimony as to his guilt was harmless.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Stone contends that his trial counsel was ineffective for failing to object to evidence that Stone possessed a BB gun and that he encouraged shoplifting. He claims that this evidence was irrelevant and prejudicial and its admission prejudiced his case. We disagree.

[6] Percocet is a brand name for oxycodone. Prescriber's Digital Reference, Drug Information: Percocet, https://www.pdr.net/drug-information/percocet?druglabelid=2483.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33; *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842, (2018). Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 446 U.S. at 688). Prejudice exists if there is a reasonable probability that, except for counsel's errors, the results of the proceedings would have differed. *Grier*, 171 Wn.2d at 34. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

A defendant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). "[E]xceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

To prove that failure to object rendered counsel ineffective, a defendant must show "that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *Davis*, 152 Wn.2d at 714 (footnotes omitted). Accordingly, we look to the

merits of the underlying claim that the evidence was irrelevant and inadmissible. If that claim would have failed before the trial court, Stone's trial counsel was not deficient for failing to raise it and he cannot show prejudice as a result.

The threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

A. BB Gun

Stone claims the admission of the BB gun prejudiced his case because people have strong reactions to such weapons and courts have "uniformly condemned" admission of unrelated and irrelevant firearms. Br. of Appellant at 24.

Irrelevant admission of guns may be prejudicial because "[p]ersonal reactions to the ownership of guns vary greatly," and "[m]any individuals view guns with great abhorrence and fear," while "others may consider certain weapons as acceptable but others as 'dangerous.'" *State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). Evidence of dangerous weapons "'which have nothing to do with the crime charged'" is highly prejudicial. *State v. Freeburg*, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (quoting *United States v. Warledo*, 557 F.2d 721, 725 (10th Cir. 1977)).

A detective testified that police found a BB gun in Stone's safe, alongside the drugs, money, firearm, and documents. Officers testified that drug dealers frequently keep firearms near their drugs to protect them.

The BB gun was relevant to the State's arguments that weapons in proximity to Stone's drugs were indicative of drug dealing. Thus, if Stone's counsel had objected, the objection would have been overruled because the evidence was relevant. Stone is unable to show deficiency or prejudice and we reject his ineffective assistance of counsel claim.

B. Ledger

Evidence that a defendant committed prior crimes, wrongs, or acts "is inadmissible if it is offered to establish a person's character or to show he acted in conformity with that character." *State v. Lillard*, 122 Wn. App. 422, 430-31, 93 P.3d 969 (2004). However, such evidence may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). "The true test for admissibility of unrelated crimes is not only if they fall into any specific exception, but if the evidence is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Kidd*, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

In this case, the court admitted evidence of a ledger containing a list of drug transactions and a separate list of specific items of merchandise. A detective with experience and training in drug investigations testified that drug dealers often keep such lists because they obtain these items from customers in lieu of money. He testified that customers without money will then often shoplift these items and exchange them for drugs.

The evidence of the ledger in this case was not admitted for purposes of showing Stone's propensity to commit crimes or act in conformity with a criminal character. Rather, the State introduced the ledger as evidence that Stone not only possessed drugs, but sold them and exchanged them for merchandise. The ledger constituted relevant, substantive evidence about Stone's intent to distribute drugs, regardless of whether any shoplifting ever actually occurred. Had Stone's counsel objected, the objection would have been overruled because the evidence was relevant and its probative value outweighed any possible prejudicial effect. Stone is unable to show deficiency or prejudice and we reject his ineffective assistance of counsel claim.

III. DOUBLE JEOPARDY

Stone contends that his three convictions for possession of a controlled substance with intent to deliver violate his double jeopardy rights. He contends that this court should apply the "unit of prosecution" test and that a single unit of prosecution for dealing drugs is "based upon the 'nature of the defendant's intent,'" as opposed to whether he possessed different specific substances. Br. of Appellant at 31 (quoting *State v. Gaworski*, 138 Wn. App. 141, 149, 156 P.3d 288 (2007)). He claims we must reverse two of his three convictions for possession of a controlled substance with intent to distribute.[7] We disagree.

"The United States Constitution provides that a person may not be subject 'for the same offense to be twice put in jeopardy of life or limb.'" *State v. Chouap*, 170 Wn. App. 114, 122, 285 P.3d 138 (2012) (quoting U.S. CONST. amend V). "Similarly, the Washington Constitution provides that a person may not be put in jeopardy twice for the same offense." *Chouap*, 170 Wn. App. at 122 (citing WASH. CONST. art I, § 9). Double jeopardy violations may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998). We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

Where a defendant is convicted under multiple criminal statutes for a single act, we must determine whether the legislature intended multiple punishments. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). We first look to the statutory language. *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). Where the language of the statutes are silent on

[7] Stone cites to multiple cases that discuss when multiple counts constitute the "same criminal conduct" for sentencing purposes. *See* Br. of Appellant at 30-31 (citing *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994); *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993)). These cases are inapplicable to our analysis of whether Stone's double jeopardy rights were violated because same criminal conduct is a distinct issue from double jeopardy. The trial court in this case ruled that these three counts constituted the same criminal conduct at sentencing.

this point, we apply the "same evidence" test. *Louis*, 155 Wn.2d at 569; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "Under the same evidence test, double jeopardy is deemed violated if a defendant is 'convicted of offenses that are identical both in fact and in law.'" *Louis*, 155 Wn.2d at 569 (quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)).

When a defendant is "convicted for violating one statute multiple times, the same evidence test will *never* be satisfied." *Adel*, 136 Wn.2d at 633. Accordingly, in such situations, the proper inquiry is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *Adel*, 136 Wn.2d at 634. "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *Adel*, 136 Wn.2d at 634.

*State v. O'Neal*, 126 Wn. App. 395, 415, 109 P.3d 429 (2005), addressed which test should apply where the defendant is convicted of manufacturing two different controlled substances. The defendant argued that the "unit of prosecution" test should apply, citing a case that applied that test to determine whether two separate marijuana grow operations had the required "'separate and distinct'" intent to be separate units of prosecution. *O'Neal*, 126 Wn. App. at 416 (quoting *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 175, 12 P.3d 603 (2000)). The defendant pointed out that a single statute, RCW 69.50.401, prohibits "manufacture of 'a controlled substance'" without "specifying a particular substance." *O'Neal*, 126 Wn. App. at 415 (quoting RCW 69.50.401).

*O'Neal* distinguished *Davis* on the basis that the defendant had violated two different subsections of RCW 69.50.401 by manufacturing different substances. 126 Wn. App. at 416-17. Accordingly, it applied the "same evidence" test and concluded that double jeopardy was not

violated because the offenses were "neither identical in law nor in fact." *O'Neal*, 126 Wn. App. at 417.

Stone was convicted for possessing three different controlled substances with intent to distribute. Each count was charged as a violation of RCW 69.50.401, under two different subsections. Stone's methamphetamine count was charged as a violation of RCW 69.50.401(2)(b), while his hydrocodone and oxycodone counts were each charged as violations of RCW 69.50.401(2)(a)(i). As in *O'Neal*, we use the same evidence test where the convictions for possessing with intent to distribute different substances come under separate statutory subsections.

RCW 69.50.206 lists hydrocodone and oxycodone as two distinct schedule II substances under subsections (a)(1)(xi) and (a)(1)(xvi). Although Stone's convictions for distributing both of these substances were charged as violations of RCW 69.50.401(2)(a)(i), the State was required to prove different facts for each of these counts because it had to prove that Stone possessed different substances with intent to distribute each. Accordingly, we apply the "same evidence" test to determine whether Stone's hydrocodone and oxycodone convictions violated double jeopardy.

"Under the same evidence test, double jeopardy is deemed violated if a defendant is 'convicted of offenses that are identical both in fact and in law.'" *Louis*, 155 Wn.2d at 569 (quoting *Calle*, 125 Wn.2d at 777). "If each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted." *Louis*, 155 Wn.2d at 569.

Applying the same evidence test in this case, each count requires proof of an element that the other does not. Each count required the State to prove that Stone possessed and intended to deliver that specific substance. Stone's three convictions did not violate his double jeopardy rights.

## IV. SENTENCE

Stone raises two issues regarding his sentence. He claims the trial court erred by failing to recognize its discretion to run the firearm enhancements concurrently as an exceptional downward sentence. We disagree with this claim. Stone also asserts that this court must reverse his LFO obligations in light of statutory amendments. We agree with this assertion.

### A. Consecutive Firearm Enhancements

Stone contends that the trial court erred by imposing consecutive firearm sentencing enhancements without considering its authority to impose an exceptional concurrent sentence. He also claims that his trial counsel was ineffective for failing to request a downward departure on the firearm sentencing enhancements. We disagree.

In *State v. McFarland*, 189 Wn.2d 47, 50, 399 P.3d 1106 (2017), the primary case Stone relies on, all parties at trial agreed that firearm-related sentences had to run consecutively to one another pursuant to RCW 9.41.040(6) and 9.94A.589(1)(c). The sentencing court stated that it did not have much discretion given that the firearm-related sentences had to run consecutively, and imposed the low end of the standard sentence range. *McFarland*, 189 Wn.2d at 51. The defendant appealed, contending the trial court erred by not running her firearm-related sentences concurrently as an exceptional sentence on the mistaken belief it could not do so. *McFarland*, 189 Wn.2d at 51.

*McFarland* ruled that sentencing courts have discretion to impose concurrent firearm-related sentences when the standard range consecutive sentence is "clearly excessive in light of the purpose" of the Sentencing Reform Act. 189 Wn.2d at 55. It remanded for resentencing because the sentencing court "erroneously believed it could not impose concurrent sentences, and the record demonstrate[d] that it might have done so had it recognized its discretion." *McFarland*,

189 Wn.2d at 56. This is because "every defendant is entitled to have an exceptional sentence actually considered" and the sentencing court errs when it "operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *McFarland*, 189 Wn.2d at 56 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

In sentencing Stone, the court acknowledged the difficulties he had in life and expressed regret that Stone would not be there for his son. It expressed its frustration with Stone's dealing drugs and keeping a gun in proximity to his son and observed the impact drugs have on the community. The court noted that it "would like to have some more sympathy for Mr. Stone," but did not feel as though it could due to the damage drugs cause to the community. 4 RP at 539. Both parties and the court all agreed that the firearm enhancements would run consecutively. The court did not have any regret or misgivings about imposing a high-end standard range on Stone, for a total sentence of approximately 20 years.

Like *McFarland*, "defense counsel did not request and the sentencing court did not consider imposing an exceptional sentence downward." 189 Wn.2d at 51. *McFarland*, however, considered the court's discretion to run sentences for firearm crimes concurrently as an exceptional sentence. In this case, the record shows the trial court did not consider running the firearm enhancements concurrently. Also unlike *McFarland*, the court imposed a high-end standard range sentence and did not express any regret about the length of Stone's sentence. Nothing in the record in this case suggests that the court would have imposed an exceptional sentence downward. The trial court did not err.

The trial court's high-end standard range sentence suggests that, had Stone's trial counsel requested an exceptional sentence below the standard range through the imposition of concurrent

firearm enhancements, the trial court would likely have rejected it. We note that Stone's trial counsel requested a total sentence of 10 years flat time, which the court rejected. Because Stone cannot show deficiency or prejudice, we reject his ineffective assistance of counsel argument.

B. Legal Financial Obligations

Stone contends that the sentencing court violated his constitutional rights by imposing LFOs despite his inability to pay. We need not decide the constitutional issue but agree the trial court must reevaluate the imposition of LFOs.

Since the parties filed their briefs in this case, the legislature amended the statutory LFO scheme. These amendments eliminated interest accrual on non-restitution LFOs, made the DNA database fee non-mandatory for offenders whose DNA had already been collected due to a prior conviction, and prohibited imposition of the $200 filing fee and discretionary LFOs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018); RCW 10.01.160(3); RCW 10.82.090(1); RCW 36.18.020(2)(h); RCW 43.43.7541. The amendments apply to cases that are not final on appeal, which includes this case. *Ramirez*, 191 Wn.2d at 748-49. In light of these legislative changes, we remand for the court to review Stone's LFOs.

## STATEMENT OF ADDITIONAL GROUNDS

### I. SEARCH WARRANT JURISDICTION

Stone contends that the search warrant authorizing the search of his residence was invalid because the issuing court lacked jurisdiction. He claims that a judge from the Lakewood Municipal Court lacked jurisdiction to issue a warrant to search a residence in Tacoma.[8] A court's subject

[8] Stone also claims that the warrant erroneously listed a Lakewood address for his Tacoma home. Contrary to Stone's assertion, the warrant lists Tacoma as his address.

matter jurisdiction is reviewed de novo. *City of Medina v. Primm*, 160 Wn.2d 268, 273, 157 P.3d 379 (2007).

On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *Chacon*, 192 Wn.2d at 547. "The defendant must identify a constitutional error and 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." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). To determine whether Stone can show "actual prejudice," we consider the merits of his claim.

In Washington, "an 'absolutely necessary component of a valid warrant is that it be issued by a magistrate with the legal authority to issue it.'" *State v. Lansden*, 144 Wn.2d 654, 663, 30 P.3d 483 (2001) (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994)).

Washington's courts of limited jurisdiction are created by the legislature and the legislature has sole authority to prescribe their jurisdiction and powers. *State v. Bliss*, 191 Wn. App. 903, 908, 365 P.3d 764 (2015). RCW 3.50.010 provides cities and towns with populations less than 400,000 with authority to establish inferior courts to be designated as "municipal courts."

State courts of limited jurisdiction "have no inherent authority to issue administrative search warrants" and must "rely on an authorizing statute or court rule for such authority." *Lansden*, 144 Wn.2d at 663. However, RCW 2.20.030 provides municipal judges with authority to issue warrants for "any person or evidence located anywhere within the state," so long as the offense is alleged to have occurred in the county in which the district or municipal court is located.

In this case, Conlon, a detective with the Lakewood Police Department, swore an affidavit of probable cause to a Lakewood Municipal Court judge. He swore that evidence of the crime of unlawful possession of a controlled substance with intent to deliver was located at Stone's address

in Tacoma. The affidavit noted it was sworn in Pierce County. The municipal judge then issued a search warrant for Stone's residence in Tacoma.

The Lakewood Municipal Court and Stone's residence were both in Pierce County. The court had jurisdiction to issue warrants for searches anywhere in the state, so long as the offense was alleged to have occurred in the county where the court sat. RCW 2.20.030. Because Stone was alleged to be dealing methamphetamine out of his residence in Pierce County, the Lakewood judge had authority to issue a search warrant for evidence of the offense. Accordingly, Stone cannot show actual prejudice and this issue does not present a "manifest constitutional error."

Stone also contends that he received ineffective assistance of counsel when his trial counsel did not challenge the validity of the search warrant. To the extent Stone refers to his argument that the municipal judge lacked jurisdiction to issue the warrant, his argument lacks merit, as discussed above. Because this argument lacks merit, Stone's trial counsel was not deficient for failing to make it and this failing did not prejudice Stone's case.

To the extent Stone contends his trial counsel was ineffective for failing to challenge his warrant more generally, Stone's trial counsel filed a motion to suppress evidence seized from Stone's residence and continued raising issues with the warrant and objecting to seized physical evidence through the second day of trial. We reject Stone's ineffective assistance of counsel claim.

## II. CONSULTATION WITH JUDGE

Stone contends that because he consulted with Judge Schwartz while the judge was in private practice and because the judge decided important motions in his case, error occurred. He claims that an unwaivable conflict existed and that the judge should have recused himself. Stone does not request any particular relief, but he claims this error "implicates the integrity of the criminal justice system." SAG at 3

Washington's appearance of fairness doctrine "not only requires a judge to be impartial, it also requires that the judge appear to be impartial." *Tatham v. Rogers*, 170 Wn. App. 76, 80, 283 P.3d 583 (2012). A "reasonable concern" of impartiality "can exist even where there is no proof of actual bias." *Tatham*, 170 Wn. App. at 81. Recusal decisions lie within the sound discretion of the trial court. *Tatham*, 170 Wn. App. at 87.

"A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Tatham*, 170 Wn. App. at 96. However, "a litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal." *In re Welfare of Carpenter*, 21 Wn. App. 814, 820, 587 P.2d 588 (1978).

In this case, Judge Schwartz specifically asked if Stone would like a different judge to hear the motions at issue and he declined. Additionally, other superior court judges reviewed and affirmed each of Judge Schwartz's orders. Stone waived any error by declining to have a new judge hear his motions, and if had not, would be unable to show any prejudice due to these other judges' identical rulings. We deny Stone relief on this issue.

Stone also claims he received ineffective assistance of counsel for his trial counsel's failure to raise this issue. Each issue that Judge Schwartz ruled on before trial was subsequently reviewed and affirmed by another superior court judge. Stone has not shown prejudice and we reject his ineffective assistance of counsel claim.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Stone also contends he received ineffective assistance of counsel because his trial counsel failed to interview and call exculpatory witnesses.

Stone has neither named any witnesses nor stated what their testimony would have been. The record is inadequate to address this claim for relief. If Stone wishes this court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

CONCLUSION

We affirm Stone's convictions, but we remand for the trial court to review Stone's LFOs.

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 in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Lee, J.

## RUSSELL SELK LAW OFFICE

## April 25, 2019 - 4:58 PM

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