No. 43996-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

William Showers,

Appellant.

Pacific County Superior Court Cause No. 12-1-00114-4

The Honorable Judge Michael J. Sullivan

Appellant's Opening Brief

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2. The prosecution failed to prove that Mr. Showers constructively possessed the contents of backpacks found in the bed of a red Dodge pickup truck parked in the neighborhood near where he was arrested.

3. The convictions were based in part on evidence illegally obtained in violation of Mr. Showers's right to be free from unreasonable searches and seizures under the Fourth Amendment and his right to privacy under Wash. Const. art. I, § 7.

4. The police unlawfully searched backpacks found in the bed of a pickup truck which they believed Mr. Showers had been driving before his arrest in a coffee shop nearby.

5. The backpack search was not justified as a search incident to arrest.

6. The backpack search was not justified by Mr. Showers's community custody status.

7. Mr. Showers's conviction was based in part on improper opinion testimony, in violation of his right to an independent jury determination of the facts.

8. The trial court erred by admitting improper opinions of Mr. Showers's guilt.

9. Mr. Showers was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

10. Defense counsel was ineffective for failing to seek suppression of items obtained through an illegal search.

11. Defense counsel was ineffective for failing to object to improper opinion testimony on Mr. Showers's guilt.

12. The convictions were entered in violation of the state constitutional requirement that facts in a felony trial be determined by a jury.

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution was required to prove that Mr. Showers possessed items found in a backpack in the bed of a pickup truck. At trial, the state failed to establish dominion and control over the backpack or its contents. Was the evidence insufficient for conviction?

2. Evidence seized without a warrant is inadmissible at trial, unless the prosecution establishes an exception to the warrant requirement. In this case, police arrested Mr. Showers in a coffee shop, and then searched a pickup truck on the belief that he'd been driving it prior to his arrest. Did the trial court err by admitting illegally seized evidence in violation of Mr. Showers's rights under the Fourth Amendment and Wash. Const. art. I, § 7?

3. A warrantless probation search is permitted based on reasonable suspicion that the probationer has violated a condition of sentence, but only if there is probable cause to associate the probationer with the area to be searched. Here, the police searched backpacks discovered in the bed of a truck which they believed Mr. Showers had been driving, without any evidence that the backpacks belonged to him. Did the search violate Mr. Showers's rights under the Fourth Amendment and Wash. Const. art. I, § 7?

4. A "nearly explicit" opinion on an accused person's guilt violates the person's constitutional right to an independent determination of the facts by the fact-finder. In this case witnesses were permitted to testify that Mr. Showers drove recklessly. Did the opinion testimony violate Mr. Showers's right to an independent determination of the facts, in violation of the Fourteenth Amendment's due process clause?

5. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to seek suppression of illegally seized evidence,

and failed to object to improper opinion testimony. Was Mr. Showers denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. An accused person's state constitutional right to a jury trial is broader and more highly valued than the corresponding federal right. Here, the record does not affirmatively demonstrate that Mr. Showers understood his right to help select the jury, his right to have the jury instructed on the presumption of innocence and the burden of proof, and his right to a unanimous verdict on each charge and aggravating factor. In the absence of such an affirmative showing, was Mr. Showers's waiver of his right to a jury trial inadequate under Wash. Const. art. I, § 21 and § 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

William Showers was arrested at a coffee shop called "One Moore Cup." RP 23, 85. He had an arrest warrant, and police believed he'd been the driver of a red Dodge pickup truck that was found in the middle of the street nearby. RP 8-9, 21.

City of Raymond Reserve Police Officer Eric Fuller had earlier seen the pickup, noticed that it didn't have a front license plate and that the windshield was cracked. RP[1] 7, 8, 27-28. When Fuller tried to stop the pickup, the driver ran a stop sign and pulled up onto a curb. RP 8. A blonde woman got out of the truck, with a baseball cap pulled down over her brows, and walked away quickly.[2] RP 8-9.

The truck pulled away fast, and Officer Fuller turned on his lights and gave chase. RP 9-10. The truck continued speeding, fishtailing at times. RP 11-12. The truck stopped, facing the opposite direction of traffic, then again pulled away fast. RP 13. Fuller could not tell who was driving or how many people were in the truck. RP 13, 30.

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[1] Citations to the trial, which occurred on September 4, 2012, will be RP. Any citations to other volumes of transcript will include the date.

[2] She was later identified as Jolene Anderson. RP 9.

Pacific County Sheriff's Deputy Jon Ashley arrived and motioned for the truck to pull over. RP 14. The truck didn't stop, but made turns and ran another stop sign. RP 14-16.

A juvenile was picking up garbage in the alleyway and was pulled out of the way by his father as the truck sped through. RP 16-18, 41-44. The father said that he saw the driver. RP 44.

Both officers lost sight of the truck at this point. RP 20. They later found it stopped in the middle of a street, unoccupied. RP 21. After Mr. Showers was arrested at the coffee shop nearby, Community Corrections Officer Linda Tolliver came and searched the truck and the truck's bed. RP 64-66, 86. No items related to Mr. Showers were found inside the truck's cab. RP 25. The truck bed contained at least three backpacks and a duffle bag. RP 25, 73. One of the backpacks contained heroin. RP 29, 70-71, 90, 110. Also found in the truck's bed were scales, bolt cutters, needles, small plastic bags, a pipe, methamphetamine, and keys for vehicles. RP 66, 69-72, 86, 88.

The state charged Mr. Showers with Possession of Heroin with Intent to Deliver, Possession of Methamphetamine, and Attempting to Elude a Pursuing Police Vehicle. CP 1-4. To each count, the prosecutor added the allegations that the standard range would be clearly too lenient, and that Mr. Showers's high offender score would result in some offenses

going unpunished. CP 2-4. In addition, the state averred that the eluding charge endangered one or more persons. CP 3.

Prior to trial, Mr. Showers signed a form captioned "Waiver of Jury Trial." Supp. CP. The judge reviewed the form with Mr. Showers as follows:

> THE COURT: Mr. Showers, I know Mr. Hatch reviewed this with you but I'm asking you at this time, the Waiver of Jury Trial means that you're giving up your constitutional right to have 12 people sit over there to your left and decide whether to acquit you or whether to find you guilty of the crime that the State has charged. You're giving up that right and if I find that you're doing this knowingly, intelligently, and voluntarily and I certify this, then in very plain, simple vernacular, you're stuck with me or whichever judge hears that case. It's a one-way street. I know you know this. I'm just making sure that is what your understanding is at this present time.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Very well. And are you in agreement with the Waiver of Jury Trial?
>
> THE DEFENDANT: I am.
>
> THE COURT: Did you sign it only after you reviewed it with your attorney so you were certain you knew what you were signing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Very well. Thank you. Did you sign of your own free will?
>
> THE DEFENDANT: I did.
>
> THE COURT: Any threats or coercion?
>
> THE DEFENDANT: No.

THE COURT: Very well.

RP (8/31/12) 2-3.

The defense attorney added that he had discussed the decision to waive jury with Mr. Showers over the course of three weeks. RP (8/31/12) 3. No details were provided regarding their discussions.

At trial, the man who saw the driver in the alleyway was asked if the driver was in the courtroom. He responded that he did not see him there. RP (9/4/12) 44. Off-duty Officer Heath Layman testified that he saw the red truck that day and that Mr. Showers was the driver. RP (9/4/12) 50-51. However, he did not know if the driver had facial hair, what he may have been wearing, and whether he was bald. RP (9/4/12) 56. A fireman saw the truck drive off-road through a park. He claimed that the person driving "looked very much like the man sitting right there [Mr. Showers]", and that "it could be the person sitting over there". RP (9/4/12) 32-34. He did not remember if the driver wore a hat, what the driver was wearing, whether or not he wore glasses. RP (9/4/12) 38.

During trial, the prosecutor asked Fuller about the driving that he observed:

Q. Is that a safe maneuver?
A. No.
Q. Okay. Would you characterize that kind of driving as reckless?
A. Recklessly, absolutely.
Q. Thank you.

RP (9/4/12) 12.

Defense counsel did not object to this testimony. RP (9/4/12) 12. Fuller was also asked to opine about a safe speed for the alley (20 mph), and whether or not the boy in the alley was in danger. RP (9/4/12) 18. Over defense objection, the officer answered that the juvenile was in fact in danger. RP (9/4/12) 18-19. He also stated that the truck was traveling at 35-40 mph through the alley, when a safe speed would have been 10-15 mph. RP (9/4/12) 20.

The prosecutor asked off-duty Officer Layman the following:

> Q: [A]s a trained law enforcement officer, did it appear to you that that was being driven in a reckless manner?
>
> A: Oh, absolutely.

RP (9/4/12) 52-53.

Deputy Ashley was asked if the driving he saw was "reckless". He responded "Absolutely". RP (9/4/12) 80.

Deputy Ashley described the amount of heroin found as quite large, and the state asked him why a person would buy such a large amount. RP (9/4/12) 92, 98. Over defense objection, he stated that a person has this amount to break it into smaller amounts and sell it. RP (9/4/12) 98.

Judge Sullivan found Mr. Showers guilty as charged. CP 10. He also found that Mr. Showers had endangered another during his attempt to elude, and that his multiple current offenses and high offender score would result in some current offenses going unpunished. CP 10. He specifically relied on the officers' opinions regarding the speed of the truck and the amount of the heroin. Finding of Fact 6, CP 6.

Mr. Showers timely appealed. CP 26-27.

ARGUMENT

I. THE STATE FAILED TO PROVE THAT MR. SHOWERS POSSESSED EITHER CONTROLLED SUBSTANCE.

A. Standard of Review.

Evidence is insufficient for conviction if no rational fact-finder could find the elements proven beyond a reasonable doubt, even when viewing the evidence in the light most favorable to the state. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013). When a case is tried to the bench, a reviewing court must determine if the evidence supports the court's findings of fact,[3] if the findings support the conclusions of law, and if the

[3] The court's findings of fact are reviewed for substantial evidence. *State v. Homan*, 172 Wn. App. 488, 490, 290 P.3d 1041 (2012). Although review is for substantial evidence, the evidence must be stronger than would be sufficient to prove facts by a preponderance of the evidence. *See In re C.B.*, 61 Wn. App. 280, 285-86, 810 P.2d 518 (1991).

conclusions of law support the judgment.[4] *State v. Enlow*, 143 Wn. App. 463, 467, 178 P.3d 366 (2008).

B. Dominion and control over a vehicle is insufficient to prove dominion and control over every item within the vehicle.

To prove constructive possession, the state must show dominion and control over an object and "the ability to reduce [it] to actual possession." *Chouinard*, 169 Wn. App. at 899. Dominion and control are assessed under the totality of the circumstances. *Enlow*, 143 Wn. App. at 468-69. Mere proximity to contraband is insufficient to prove constructive possession. *Chouinard*, 169 Wn. App. at 899.

By itself, dominion and control over a vehicle is insufficient to prove dominion and control over items inside the vehicle. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). For example, in *Shumaker*, the defendant's conviction was overturned because the trial court erroneously instructed jurors that dominion and control over premises– in that case, a car – proved constructive possession of drugs found therein. *Id.* The court held that dominion and control over the

[4] The conclusions of law and finding of guilt are reviewed *de novo*. *Homan*, 172 Wn. App. at 490.

vehicle alone was insufficient to prove dominion and control over the drugs. *Id.*

Similarly, evidence is insufficient to establish constructive possession when the accused had been a passenger in a truck containing contraband. *State v. Cote*, 123 Wn. App. 546, 550, 936 P.3d 410 (2004). This was so in *Cote* even though the defendant's fingerprints were on a container holding the contraband.[5]

C. The court's findings of fact were insufficient to support the legal conclusion that Mr. Showers possessed items found in the bed of the truck.

In support of its conclusion that Mr. Showers was in possession of contraband, the trial court found:

> Mr. Showers was the lone occupant of the pickup truck. Given the totality of the circumstances of the elude [sic], flight from the vehicle, manor [sic] in which the vehicle was controlled, the fact that Mr. Showers was the lone occupant, and that Mr. Showers utilized the vehicle to the exclusion of others demonstrates to this Court that Mr. Showers had dominion and control over this vehicle. Mr. Showers had sufficient dominion and control to be in possession of the contents therein including the controlled substances found therein.

[5] By contrast, evidence is sufficient to show possession of a firearm when the defendant (a) owns the vehicle in which the gun is found, (b) is the sole occupant, and (c) was found seated next to the gun. *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010).

Finding of Fact No. 20, CP 8.[6] Based on this, the judge concluded that Mr. Showers unlawfully possessed heroin with intent to deliver and that he possessed methamphetamine. Conclusions of Law 4 and 5, CP 9.

The court's findings do not support the conclusion that Mr. Showers possessed the controlled substances found in the vehicle. *Shumaker*, 142 Wn. App. at 334.

First, the court erred by concluding that dominion and control over the vehicle was sufficient to establish possession of its contents.[7] *Id.* As *Shumaker* makes clear, dominion and control over a vehicle is inadequate to demonstrate dominion and control over drugs found inside the vehicle. *Id.* Here, the drugs were found in the bed of the truck some time after Mr. Showers had abandoned it. Findings of Fact 14-16, CP 7-8. There was no evidence that Mr. Showers owned the vehicle. Police did not take fingerprints from the drugs' packaging, the other paraphernalia, or the backpacks in which they were found. Nothing inside the backpacks linked them or their contents to Mr. Showers. Furthermore, another person had

[6] The court's findings also indicate that "Any finding which is more appropriately a conclusion is adopted as such." Finding of Fact 22, CP 8. Here, the statement that Mr. Showers "had sufficient dominion and control to be in possession of the contents" of the vehicle is more appropriately a conclusion of law.

[7] The court found that "Mr. Showers had sufficient dominion and control [over the vehicle] to be in possession of the contents." Finding No. 20, CP 8.

been in the truck during the period preceding the search. Finding of Fact 2, CP 5-6.

Second, the court failed to find that Mr. Showers could have reduced the drugs to actual possession. *Chouinard*, 169 Wn. App. at 899. The controlled substances were found inside a container, which was found inside a closed backpack, which was found in the bed of the truck that Mr. Showers was driving. Finding of Fact 16, CP 8. There is no way that Mr. Showers could have reduced the drugs to actual possession while driving. *Chouinard*, 169 Wn. App. at 899.

Finally, the other facts the court relied to establish possession – "the circumstances of the elude [sic], flight from the vehicle, manor [sic] in which the vehicle was controlled" – are irrelevant to establishing dominion and control over the drugs. Finding of Fact 20, CP 8. The court may have intended this finding to suggest that Mr. Showers fled because he was conscious of his own guilt; however, the evidence showed that he had an active DOC warrant when he was arrested, giving him other reason to avoid police contact. RP 8-9.

The court's findings of fact do not support the conclusion that Mr. Shower's possessed the drugs in the bed of the truck. *Chouinard*, 169 Wn. App. at 899. Mr. Showers' drug-related convictions must be reversed for insufficient evidence. *Id.*

II. THE WARRANTLESS SEARCH OF THE BACKPACKS FOUND IN THE TRUCK BED VIOLATED MR. SHOWERS' RIGHTS UNDER ART. I, § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). An unconstitutional search can be a manifest error affecting a constitutional right raised for the first time on appeal. *State v. Swetz*, 160 Wn. App. 122, 128-29, 247 P.3d 802 (2011); RAP 2.5(a)(3).

B. A warrantless search is impermissible unless authorized by one of the carefully-drawn exceptions to the warrant requirement.

Warrantless searches are per se unreasonable under the Washington State Constitution. Wash. const. art. I, § 7; *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012). The exceptions to the warrant requirement are "carefully drawn," and the state bears the burden of establishing facts that support any purported exception. *Snapp*, 174 Wn.2d at 188.

The privacy protections under the state constitution are qualitatively different from those under the Fourth Amendment. *Snapp*, 174 Wn.2d at 187. Art. I, § 7 recognizes a privacy interest in vehicles and their contents. *Id.* Additionally, a "container" such as a purse, suitcase, or

backpack may not be search without a warrant. *State v. Rison*, 116 Wn. App. 955, 959-60, 69 P.3d 362 (2003).

1. The search of the backpacks cannot be justified as a search incident to arrest.

In limited circumstances, a vehicle may be searched incident to the arrest of its driver. This exception to the warrant requirement applies only when, at the time of the search, the arrestee's proximity to the vehicle poses a safety risk or a risk that evidence within the vehicle could be concealed or destroyed. *Snapp*, 174 Wn.2d at 189. The scope of the search is limited to the area within the arrestee's reach at the time of the search. *Arizona v. Gant*, 556 U.S. 332, 343, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Mr. Showers was already in custody and seated in a police cruiser when Tolliver searched the truck and its contents. Finding of Fact 15, CP 7-8; RP 65. At that point, Mr. Showers posed no safety risk and was incapable of concealing or destroying evidence within the truck. Nothing in the cab or the truck bed was within his reach.

The search cannot be justified as a search incident to Mr. Showers's arrest. *Snapp*, 174 Wn.2d at 189; *Gant*, 556 U.S. at 343.

2. Mr. Showers' community custody status did not justify the warrantless search because (1) nothing showed the backpacks

were his, and (2) there was no nexus between his suspected violation and the backpacks.

A community corrections officer may search the person, residence, automobile, or personal property of someone under community supervision if there is reason to believe that he or she has violated a condition of supervision. RCW 9.94A.631. Prior to the search, officers must have probable cause to believe that premises to be searched are actually connected to the supervisee. *State v. Winterstein*, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009).

The probable cause standard is necessary to protect the privacy interests of third parties and to protect citizens from "rash and unreasonable interferences with privacy and from unfounded charges of crime." *Winterstein*, 167 Wn.2d at 629. The probable cause inquiry must be limited to reasonably trustworthy information available to the officer at the time of the search. *Id.* The *Winterstein* court invalidated a search of a residence because the searching officers lacked probable cause to believe that the probationer lived there. *Winterstein*, 167 Wn.2d at 630.[8]

Although no evidence introduced at trial showed that Mr. Showers was under community supervision, the court included a finding to that end

[8] Although *Winterstein* addressed the unlawful search of a residence rather than a backpack, art. I, § 7 protects "private affairs" in addition to homes. This includes a privacy interest in vehicles and their contents as well as "containers" such as suitcases and backpacks. *Snapp*, 174 Wn.2d at 187; *Rison*, 116 Wn. App. at 959-60.

in its written findings of fact. Finding of Fact 16, CP 8. Assuming that this was so, the circumstances did not support a warrantless probation search of the vehicle or the backpacks and their contents.

The only information available to the officers was the allegation that Mr. Showers had been driving the truck recklessly in an apparent attempt to elude the police. The state did not introduce any evidence that the truck or the backpacks belonged to Mr. Showers. Nothing was found indicating that the backpacks or their contents were linked to Mr. Showers. Another occupant had been in the truck shortly before the search. Finding of Fact 2, CP 5-6. If Mr. Showers was indeed the driver, he had abandoned the truck some time before it was searched. Finding of Fact 14, CP 7. Because the police lacked probable cause to believe that the backpacks belonged to Mr. Showers, their search cannot be justified under RCW 9.94A.631; *Winterstein*, 167 Wn.2d 630.

Similarly, there was no nexus between the backpacks and Mr. Showers' suspected violation of the terms of his supervision. Although the officers may have had reasonable cause to believe that Mr. Showers had violated his conditions by attempting to elude a police officer or driving recklessly, they could not have expected to find evidence of those violations in the backpacks. The search of the backpacks cannot be

justified under RCW 9.94A.631 for this reason as well. *Winterstein*, 167 Wn.2d 630.

Because the backpack searches violated Mr. Showers' rights under art. I, § 7, his drug-related convictions must be reversed. *Winterstein*, 167 Wn.2d at 630.

III. MR. SHOWERS WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF IMPROPER OPINION TESTIMONY

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *McDevitt v. Harborview Medical Center*, No. 85367-3, --- Wn.2d ---, 291 P.3d 876, 878 (Dec. 27. 2012). The admission of improper opinion testimony can be raised for the first time on review as a manifest error affecting a constitutional right. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009); RAP 2.5 (a)(3).

B. The court erred in permitting witnesses to provide improper opinions of Mr. Showers' guilt.

Testimony providing an improper opinion of guilt violates the right to a fair trial. U.S. Const. amends. VI, XIV;[9] *State v. Sutherby*, 138 Wn.

[9] *See also* Wash. Const. art. I, § 3.

App. 609, 617, 158 P.3d 91 (2007), *aff'd on other grounds*, 165 Wn.2d 870, 205 P.3d 916 (2009).

An opinion is improper and inadmissible if it is an explicit or "nearly explicit" opinion on the accused person's guilt. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); *see also State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) ("[T]his court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.") Whether other testimony constitutes an improper opinion of guilt depends on the circumstances of the case and turns on a 5-part inquiry. *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). The reviewing court should consider: (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Hudson*, 150 Wn. App. at 653.

Whether the accused drove in a reckless manner is an element of attempting to elude a pursuing police vehicle. RCW 46.61.024(1). The court permitted explicit opinion testimony on this issue.

Here, in response to direct questions from the state, each of the three law enforcement witnesses testified that Mr. Showers drove

recklessly. RP 12 (Officer Fuller); RP 52-53 (Officer Layman); RP 80 (Deputy Ashley). Additionally, Officer Fuller and Travis Wheeler each testified that a safe speed to drive down the alley would have been 10-15 mph. RP 20, 43. Over defense objection, Officer Fuller also testified that a person in the alley was endangered by Mr. Showers's driving. RP 18.

Under the factors outlined in *Hudson*, this testimony infringed Mr. Showers' right to due process. *Hudson*, 150 Wn. App. at 653. Looking first to the type of witness, each law enforcement witness was permitted to testify that Mr. Showers had been driving recklessly. *Id.* Turning next to the nature of the testimony, each officer used the words of the statute, responding to questions framed in terms of the recklessness element of the offense. *Id.* Regarding the nature of the charge, conviction required proof that Mr. Showers drove in a reckless manner. The next factor for analysis is the nature of the defense: Mr. Showers' general denial put each element at issue. Examining finally the other evidence before the trier of fact, almost every witness to the incident provided an improper opinion of guilt. *Hudson*, 150 Wn. App. 653.

Furthermore, the court relied explicitly on Deputy Ashley's opinion that Mr. Showers had driven recklessly in its finding of fact to that effect. Finding of Fact 6, CP 6. The court also specifically found that a safe speed to drive down the alley would have been 15 mph. Finding of

Fact 10, CP 6. The only evidence regarding a safe speed to drive down the alley came in the form of impermissible opinions from Travis Wheeler and Officer Fuller. RP 20, 43.

The court erred by admitting and relying upon impermissible opinion testimony as to Mr. Showers' guilt of attempting to elude a pursuing police vehicle. *Sutherby*, 138 Wn. App. at 617. The admission of this improper testimony constitutes manifest error affecting a constitutional right because it had practical and identifiable consequences as can be seen by the court's explicit reliance on the testimony in its findings of fact. *Johnson*, 152 Wn. App. at 934. Accordingly, Mr. Showers' conviction on count three must be reversed, and the charge remanded for a new trial. *Id.*

IV. MR. SHOWERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Reversal is required if counsel's deficient performance prejudices the defendant. *Id.* (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Mr. Showers' trial counsel provided ineffective assistance by failing to seek suppression of drugs and paraphernalia, and by failing to object to improper opinion testimony.

Counsel's performance is deficient if, based on consideration of all of the circumstances, it falls below an objective standard of reasonableness and cannot be justified as a tactical decision. U.S. Const. Amends. VI, XIV, *Kyllo*, 166 Wn.2d at 862.[10] The accused is prejudiced by the deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

Failure to object to or seek suppression of inadmissible evidence constitutes deficient performance when there is no valid tactical reason for the failure. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007); *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 91 (2006).[11]

Mr. Showers' trial counsel did not seek suppression of evidence illegally seized. As outlined above, officers lacked a warrant or other lawful authority for the search of the backpacks found in the truck bed. Because of this, defense counsel's performance was deficient. *Meckelson*, 133 Wn. App. at 436.

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[10] *See also* Wash. Const. art. I, § 22.

[11] Failure to seek suppression of evidence necessarily prejudices the accused person when suppression would have required dismissal. *Meckelson*, 133 Wn. App. at 438.

Furthermore, the error was prejudicial. Suppression would have required dismissal of the drug charges. Trial counsel argued extensively in closing that there was insufficient evidence linking Mr. Showers to the items seized, but failed to raise the same argument in a motion to suppress. RP (09/04/2012) 125-29, 131. Accordingly, Mr. Showers was prejudiced by counsel's failure to make that dispositive motion. *Id.*

Similarly, on all but one occasion, trial counsel failed to object to repeated instances of inadmissible opinion testimony on Mr. Showers' guilt on the eluding charge. RP 18 (objection); RP 12, 20, 43, 52-53, 80 (no objection). There can be no tactical reason for failing to object to these impermissible opinions. Defense counsel recognized as much in making his single objection, but failed to protect Mr. Showers from the remainder of the prejudicial testimony. The error was prejudicial, as can be seen from the court's findings (which specifically relied upon Deputy Ashley's improper opinion). Finding of Fact 6, CP 6.

Mr. Showers' trial counsel provided ineffective assistance. He should have moved to suppress the drug evidence, and he should have objected to impermissible opinion testimony on multiple occasions. Mr. Showers' convictions should be reversed. *Kyllo*, 166 Wn.2d at 871.

V. MR. SHOWERS DID NOT VALIDLY WAIVE HIS STATE CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *McDevitt*, 291 P.3d at 878. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Smith*, No. 29832-9-III, 298 P.3d 785, 789 (April 9, 2013) (Smith I); *see also State v. Williams*, 23 Wn. App. 694, 695, 598 P.2d 731 (1979).

B. Wash. Const. art. I, § 21 and § 22 provide greater protection of the right to a jury trial than does the Sixth Amendment.

As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right.[12] *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The showing required to waive a constitutional right varies depending on the nature of the right. *See e.g. State v. Vermillion*, 112 Wn.

[12] The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

App. 844, 51 P.3d 188 (2002) (outlining the showing required to waive the right to self-representation); *State v. Robinson*, 172 Wn.2d 783, 263 P.3d 123 (2011) (outlining the showing required for waiver of rights pursuant to a guilty plea). *Gunwall* analysis establishes that waiver of the state constitutional right to a jury trial requires a higher showing than waiver under the Sixth Amendment.

C. Under the state constitution, waiver of the right to a jury trial requires a higher showing than that required for waiver under the Sixth Amendment.

1. The language of the state constitution.

Analysis of a constitutional provision begins and ends with the text. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). This includes an examination of the words themselves, their grammatical relationship with one another, and their context. *Gallwey,* 146 Wn.2d at 459-460. The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

Art. I, § 21 preserves the right of jury trials "inviolate." This term "connotes deserving of the highest protection." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Art. I, § 22 provides strong protection to the jury system. The specific mention of juries in the context

of "criminal prosecutions," and the mandatory language employed by the provision ("shall have the right… to have a speedy public trial by an impartial jury") demand that the jury tradition be afforded the highest respect.

Thus, the language of the two provisions weighs in favor of an independent application of the state constitution in this context.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. art. I, § 21 has no federal counterpart. The Washington Supreme Court in *Mace* found this significant, and held that under the Washington constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." *Mace,* 98 Wn.2d at 99-100. This is in contrast to the more limited protections available under the federal constitution. *Id.*

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution.

3. State constitutional and common law history demonstrate that the drafters of the Washington constitution intended to prohibit waiver of a jury trial in felony cases; this intent suggests that waiver requires more than simple assent.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Art. I, § 21, Washington "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace*, 98 Wn.2d at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (Smith II).

Although "little is known about what the drafters of art. I, § 22 intended in 1889," the explicit enumeration of certain rights suggests "that the drafters of this provision believed that these rights are of great importance." *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011).

In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the states and territories, that the right to a jury trial in felony cases could not be waived. *See e.g., State v. Lockwood*, 43 Wis. 403, 405 (1877) ("The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived"); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant "may waive any... right except that of trial by jury in a felony case"); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882) ("This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is

erroneous"); *United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (Smith III) ("The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...")

This tradition was rooted in the common law:

> There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327... The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court... A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

Harris v. People, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher,* 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in "the soundest conception of public policy." *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

> Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

Carman, 63 Iowa at 131.

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing "[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases." Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.[13, 14] The framers would have been aware of both the prevailing view (described above) and the territorial legislature's experiment.

The state constitutional and common law history show that the framers did not intend for the right to a jury trial to be waivable. It necessarily follows that, if the statute permitting waiver is constitutional, it

---

[13] Instead, as noted above, they adopted language permitting the legislature to allow waiver only in civil cases.

[14] The 1854 statute was implicitly repealed by the adoption of Wash. Const. art. I, § 21, because it was repugnant to that provision of the constitution: "All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature…" Wash. Const. art. XXVII, § 2.

must at least require a higher showing than that required under the much less stringent Sixth Amendment. *Gunwall* factor three favors the interpretation of art. I, § 21 urged by Mr. Showers.

4. Pre-existing state law does not suggest that waiver of the state constitutional right to a jury trial may be made absent a thorough understanding of the right.

The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall,* 106 Wn.2d at 62).

RCW 10.01.060 permits waiver of the right to a jury except in capital cases "with the assent of the court." That provision does not describe, however, what showing is required in order for the court to assent to the waiver. RCW 10.01.060. Likewise, CrR 6.1 permits a case to be tried without a jury but does not describe the showing necessary to find a valid waiver of the right to a jury.

Pre-existing state law is thus inconclusive. Non-constitutional authority does not weigh in favor of or against the position urged by Mr. Showers.

5. Differences in structure between the federal and state constitutions.

The fifth *Gunwall* factor "will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). As in all contexts, this factor favors independent application of the state constitution. *Id.*

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. *See Smith* II, 150 Wn.2d at 152. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: *Gunwall* analysis establishes that waiver of the right to a jury trial under the state constitution requires a higher showing than that under the federal constitution.

Five of the six *Gunwall* factors establish that a valid waiver of the state constitutional right to a jury trial requires a thorough understanding of the right. Factor four (preexisting state law that is not of constitutional dimension) does not contradict this conclusion.

The waiver of the right to a jury trial in this case violates Wash. Const. art. I, § 21 and § 22. Accordingly, Mr. Showers' conviction must be reversed and the case remanded to the trial court for a jury trial.

D. Mr. Showers' waiver of his state constitutional right to trial by jury was not knowing, intelligent, and voluntary because the record does not prove that he thoroughly understood the right and the practical and legal consequences of its waiver.

The state constitutional right to a jury trial is "jealously guarded by the courts." *Auburn Mechanical, Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 897, 951 P.2d 311 (1998). Any purported waiver of the right to a jury trial should be "narrowly construed in favor of preserving the right." *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

The burden of proving waiver of a constitutional right rests with the state. *State v. Chetty*, 167 Wn. App. 432, 439, 272 P.3d 918 (2012). Absent an adequate record to the contrary, "every reasonable presumption" should be indulged against waiver of a constitutional right. *State v. Stone*, 165 Wn. App. 796, 815, 268 P.3d 226 (2012); *see also Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ("Waiver of a constitutional right must clearly consist of an intentional relinquishment or abandonment of a known right or privilege.").

An accused person's waiver of a constitutional right is not knowing and voluntary if she or he lacks a thorough understanding of the

right. *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010). In other contexts, courts have required an affirmative showing that the accused person was informed of the details of the right and all practical and legal consequences of the waiver. *See e.g. Robinson*, 172 Wn.2d 783 (regarding waiver of rights pursuant to a guilty plea); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (regarding waiver of the right to counsel); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (regarding waiver of the right to counsel and the privilege against self-incrimination). In *Faretta*, for example, the court held that valid waiver of the right to counsel required a showing on the record that the accused was made aware of the dangers and disadvantages of waiver and that "he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835.

The right to a jury trial includes, *inter alia,* the right to participate in jury selection, the right to have the jury instructed on the presumption of innocence and the state's burden of proof, and the right to a unanimous verdict on each charge and aggravating factor. *State v. Irby,* 170 Wn.2d 874, 246 P.3d 796 (2011); *State v. Bennett*, 161 Wn.2d at 307; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *In re Beito*, 167 Wn.2d 497, 491, 220 P.3d 489 (2009).

The record does not show that Mr. Showers was advised of each of these things. Instead, he was told only that he was giving up the right to "have 12 people sit over there to [his] left and decide whether to acquit [him] or whether to find [him] guilty." RP 2-3. His written waiver stated only that he was waiving the right to an impartial jury from the county where the offense was alleged to have been committed. Jury Trial Waiver Form, Supp CP. Although Mr. Showers discussed his rights with counsel, no details of that discussion were provided. RP 1-3.

On this record, it is impossible to conclude that Mr. Showers had a full understanding of the rights he was waiving. Nor does the record establish that he made his choice "with eyes open." *Faretta*, 422 U.S. at 835. Mr. Showers' waiver of his state constitutional right to trial by jury was not knowing, intelligent, and voluntary. His convictions must be reversed. Wash. Const. art. I, §§ 21 and 22.

E. *Pierce* and *Benitez* were wrongly decided and should be reconsidered.

Without engaging in *Gunwall* analysis, the Court of Appeals has upheld jury waivers even absent proof of a thorough understanding of the state constitutional right. *State v. Benitez*, No. 42420-7-II, 2013 WL 2606251, --- P.3d --- (June 11, 2013); *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006). Both decisions rest on prior cases that did not

specifically address waiver of the state constitutional right. *Benitez,* 2013 WL 2606251, --- P.3d --- (citing *State v. Brand*, 55 Wn. App. 780, 780 P.2d 894 (1989) and *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994)); *Pierce,* 134 Wn. App. at 613-14 (citing *Brand* and *Stegall*).[15]

Without citation to authority, both *Benitez* and *Pierce* hold that *Gunwall* analysis is irrelevant to waiver of state constitutional rights. *Benitez,* 2013 WL 2606251, --- P.3d --- ("*Gunwall* determines the scope, not the waiver, of a constitutional right"); *Pierce,* 134 Wn. App. at 614 ("*Gunwall* addresses the extent of a right and not how the right in question may be waived"). But the requisites for waiver of a state constitutional right vary depending on the nature of that right. *See e.g. Vermillion*, 112 Wn. App. 844; *Robinson*, 172 Wn.2d 783. The nature of the right itself determines what is required for waiver, and the nature of the right is entirely dependent on *Gunwall.* Thus, validity of any waiver of a state

[15] In *Brand,* the court upheld a jury waiver without a record demonstrating a thorough understanding of the right being waived. *Brand*, 55 Wn. App. at 786. The *Brand* court relied exclusively on pre-*Gunwall* cases providing no independent analysis of the state constitutional right to a jury trial. *Brand*, 55 Wn. App. at 785-89. The court did not engage in state constitutional analysis, and did not even mention *Gunwall.* Notably, however, the *Brand* court did acknowledge that the showing required for a valid waiver of a constitutional right varies depending on the nature of the right. *Brand*, 55 Wn. App. at 785. In *Stegall,* the court held that waiver of the right to a jury of 12 does not require a colloquy on the record. *Stegall*, 124 Wn.2d at 730. The *Stegall* court relied on *Brand,* on cases addressing waiver of federal constitutional rights, and on cases addressing rights under other state constitutions. *Stegall*, 124 Wn.2d at 726-28. Like the court in *Brand,* the *Stegall* court failed to mention *Gunwall. Id.*

constitutional right cannot be determined absent *Gunwall* analysis. *Benitez* and *Pierce* were wrongly decided, and should be reconsidered.

The record does not show a valid waiver of Mr. Showers's state constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial.

CONCLUSION

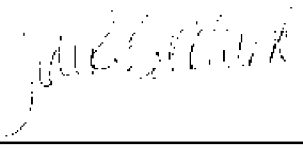
Mr. Showers' convictions must be reversed. The eluding charge must be remanded for a new trial because the conviction was based in part on improper opinion evidence, to which counsel unreasonably failed to object.

The drug charges must be dismissed because the evidence was insufficient for conviction. Furthermore, the evidence introduced at trial was illegally seized following a warrantless search, and defense counsel unreasonably failed to seek suppression of that evidence.

If the drug charges are not dismissed, Mr. Showers is entitled to a new trial on all charges, because the record does not establish that his jury waiver was knowing, intelligent, and voluntary.

Respectfully submitted on June 24, 2013,

BACKLUND AND MISTRY



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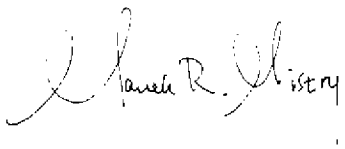

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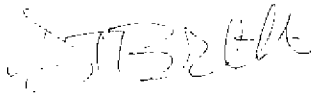

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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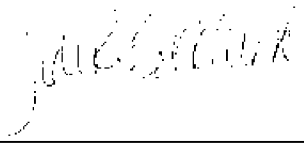
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 24, 2013.



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