No. 43996-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SHOWERS,

Appellant.

Pacific County Superior Court Cause No. 12-1-00114-4
The Honorable Michael J. Sullivan

STATE'S REPLY BRIEF

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1. The State proved Mr. Showers had dominion and control over the property within the vehicle, which included the backpack and the methamphetamine and heroin within the backpack.

2. Mr. Showers' Community Corrections Officer (CCO) was entitled to search Mr. Showers' vehicle and the items contained therein. Further, Appellant failed to preserve this matter for appeal.

3. Mr. Showers' CCO was entitled to search Mr. Showers' property and the search was not limited in scope. As with any probationer, privacy expectations are diminished, and with probable cause to believe Mr. Showers violated the terms of release, a CCO may search the offender's property without a warrant. The vehicle was associated with Mr. Showers; he had fled in the vehicle, was the lone occupant in the vehicle and, during the pursuit, abandoned the vehicle in the middle of the road and fled on foot.

4. Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony is admissible. The testimony was properly admitted.

5. Defense was not ineffective for not bringing a pre-trial motion to suppress evidence or for declining to make an objection during trial.

6. Contrary to Appellant's assertion, a defendant may waive his right to a jury trial. In accepting Mr. Showers' written waiver of jury trial, the trial judge ensured Mr. Showers had sufficient time to discuss the waiver and its implications with his attorney, that he understood the waiver process, and understood his rights. Mr. Showers had discussed the matter with his attorney and, as the record demonstrates, Mr. Showers made a knowing, intelligent, and voluntary decision to waive his right to a jury trial.

STATEMENT OF THE CASE

On July 6, 2012 Officer Eric Fuller observed a pickup truck being driven by Mr. Showers traveling on highway 101 with a defective windshield and without a front license plate. PR (9/4/12) 5-8. Officer Fuller made a U-turn to stop the pickup and observed the vehicle turn into the town of Raymond, then fail to stop at a stop sign before pulling to the curb. RP (9/4/12) 8. When Mr. Showers' vehicle pulled up to the curb a female exited, took a backpack from the vehicle and, at a fast pace, walked away from the vehicle, pulling her cap over her face. PR (9/4/12) 8-9. Officer Fuller observed the vehicle pull away as soon as the female exited and, as the Officer closed the distance to the pickup, he activated his emergency lights to stop Mr. Showers' vehicle. PR (9/4/12) 9-10. Mr. Showers sped away at 50 MPH in a 25 MPH zone, made a turn back onto highway 101, fishtailing, as he fled. PR (9/4/12) 10-12. As Mr. Showers approached the intersection of highway 101 and 105, another officer reached the chase from the opposite direction; Mr. Showers, obviously seeing the second officer's vehicle, slid his vehicle in a 360 degree turn, into on-coming traffic, and burned out in the middle of the highway, traveling into the opposing lanes of travel and past the pursuing police vehicles. RP (9/4/12) 12-13, 79. Mr. Showers fled past the officer and headed back into the congested town center, running stop signs along the

way. RP (9/4/12) 12-15. Mr. Showers' speed was estimated to be 50-60 MPH in a 25 MPH zone. RP (9/4/12) 15-16. Mr. Showers turned his vehicle down an alley, spinning sideways, and traveling at 40-50 MPH as he approached a child— Mr. Showers nearly struck the child before the child's father pulled him out of Mr. Showers' path. PR (9/4/12) 16-17, 41-43. Mr. Showers' vehicle was within a foot of the child, traveling at 40-50 MPH in an alley where the safe speed would have been 15-20 MPH. RP (9/4/12) 18. Mr. Showers placed the child in danger and absent the father's immediate actions of pulling the child out of Mr. Showers' path, the child "would have been smashed and run down." RP (9/4/12) 19, RP (9/21/12) 7. The vehicle continued racing through town, squealing tires, nearly striking a vehicle head-on, and fleeing from pursuing police vehicle with lights and siren activated and eventually traveled past off-duty Deputy Police Chief Heath Layman who observed Mr. Showers as the driver and lone occupant of the pickup truck. PR (9/4/12) 50-59.

Mr. Showers made a turn and, when out of view of the officers, fled on foot from his pickup, leaving it abandoned in the middle of the roadway. RP (9/4/12) 83. Officers approached the vehicle to ensure it was unoccupied, took the keys from the vehicle's ignition to ensure it could not be driven, and then began searching for Mr. Showers. RP (9/4/12) 83. Citizens who observed Mr. Showers flee from the vehicle

began pointing and directing officers to a local establishment where officers located a sweaty, out-of-breath and shirtless Mr. Showers hiding in the bathroom. RP (/9/4/12) 84-85.

Mr. Showers' Community Corrections Officer, Linda Tolliver, searched Mr. Showers' vehicle and located all of the items admitted at trial from the bed of Mr. Showers' pickup truck. Officer Tolliver testified that Mr. Showers could have reached the items through the open window which separated the bed from the cab of the pickup, making them immediately capable of being reduced to actual possession. PR (9/4/12) 74. Officers retrieved heroin, two scales, several small plastic baggies, methamphetamine, a glass smoking device and hypodermic needles from the backpacks in the bed of the pickup truck. RP (9/4/12) 66, 69-72, 86, 88. The heroin located was a significant quantity and Deputy Ashley, an eight-year veteran and member of the Pacific County Narcotics Taskforce, had only seen a quantity that large on a couple of other occasions. RP (9/4/12) 97-98.

Mr. Showers executed a written waiver of his right to a jury trial. Attached as Exhibit 1. The trial court found Mr. Showers understood his right to a jury trial, and that he made a knowing, intelligent and voluntary waiver of his right to a jury trial. RP (8/31/12) 2-3.

Mr. Showers timely appealed.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO PROVE MR. SHOWERS POSSESSED HEROIN AND METHAMPHETAMINE.

A. Standard of review.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter,* 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga*, 137 Wash.2d 703, 709, 974 P.2d 832 (1999). Appellate courts defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Walton*, 64 Wash.App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992). A trial court's findings of fact are entitled to deference and

will be upheld unless they are clearly erroneous. *State v. Allert*, 117 Wash. 2d 156, 815 P.2d 752 (1991).

B. Mr. Showers had dominion and control over the vehicle and the controlled substances therein. The record supports the trial court's findings and ultimate determination of guilt.

A defendant may be convicted of possession of a controlled substance if they have active or constructive possession of a controlled substance. Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wash.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession of a controlled substance may be shown if the person charged has dominion and control over the drugs or the premises in which those drugs are located. *State v. Bradford*, 60 Wash.App. 857, 862, 808 P.2d 174, *review denied*, 117 Wash.2d 1003, 815 P.2d 266 (1991)(upholding a constructive possession where the defendant had control over the premises). An automobile may be considered a "premises." *State v. George*, 146 Wash.App. 906, 930, 193 P.3d 693 (2008), citing *State v. Potts*, 1 Wash.App. 614, 617, 464 P.2d 742 (1969).

Whether a person has dominion and control is determined by considering the totality of the circumstances. *State v. Mathews*, 4 Wash.App. 653, 656, 484 P.2d 942 (1971)(upholding a conviction for constructive possession of heroin where the substance was found under the carpet in the back seat of the vehicle the defendant was driving); see also *State v. Huff*, 64 Wash.App. 641, 826 P.2d 698(1992)(upholding a conviction where the defendant was deemed to constructively possess a controlled substance located in a purse hidden under a pile of laundry in the back seat of a vehicle); see also *State v. Partin,* 88 Wash.2d 899, 906, 567 P.2d 1136 (1977)(upholding based on constructive possession where the defendant had possession of the location and therefore the contraband located therein).

This division has previously held that, where a person is the sole occupant, owner, and driver of a vehicle, and when the person has the vehicle's keys, constructive possession of the vehicle is established. *State v. Bowen*, 157 Wn.App. 821, 828, 239 P.3d 1114 (2010). But no court has held that all of these factors are necessary. Outside the context of automobiles, in *State v. Turner*, the court held that there was sufficient evidence for the jury to find the Defendant had constructive possession of heroin found in a locker to which he had the keys. 18 Wn.App. 721, 571 P.2d 955 (1977). And in *State v. Davis*, the court held that possession of

an apartment may be inferred from paying rent for or possessing the keys to the apartment. 16 Wn.App. 657, 659, 558 P.2d 263 (1977). Just as constructive possession may be inferred from possession of the key to a locker or an apartment, so too may it be inferred from possession of the key to an automobile.

Here, Mr. Showers possessed the keys to the vehicle. RP (9/4/12) 83. Mr. Showers had a prior occupant who left the vehicle taking her property, a backpack, resulting in exclusive control of the vehicle to Mr. Showers. PR (9/4/12) 8-9. Mr. Showers had sufficient familiarity with the vehicle to elude police. RP (9/4/12) 83. Mr. Showers' flight from officers and, later, from the vehicle, leaving the contraband behind, demonstrates his consciousness of guilt.

Another aspect of dominion and control is that the defendant may reduce the object to actual possession immediately. *State v. Jones*, 146 Wash.2d at 333. Mr. Showers' Community Corrections Officer, Linda Tolliver, testified that Mr. Showers could have immediately retrieved the narcotics and bags from the bed of the pickup truck through the open rear sliding-glass window, thereby reducing the object to actual possession.

The evidence, and inferences drawn from the evidence, is supported by the record and the trial court's findings of fact and conclusions of law.[1]

Appellant seems to request that all inferences should be drawn against the trial court's findings, asserting error in the underlying findings of fact and outlining the number of perceived deficiencies or alternate theories. However, as *Walton, supra*, indicates the persuasiveness of the evidence presented at trial is left to the trier of fact. Here, it is evident from the conclusions of law and the record below that the trial court was persuaded Mr. Showers had dominion and control over the heroin and methamphetamine and rendered a verdict accordingly.[2]

II. WARRANTLESS SEARCH IS UNTIMELY ASSERTED, YET THE SEARCH WAS PERMISSIBLE.

A. Standard of review.

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[1] Findings of fact which are conclusions of law will be interpreted as conclusions of law. *Ridgeview Properties v. Starbucks*, 96 Wash.2d 716, 638 P.2d 1231(1982).

[2] Appellate takes issue with the findings, yet the record supports the ultimate conclusion of law and any deficiency in the actual finding is harmless. Insufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis. *State v. Banks*, 149 Wash.2d 38, 43, 65 P.3d 1198 (2003). An error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

For the first time on appeal, Mr. Showers assigns error to the search of the backpacks located in the bed of his vehicle. A party must raise an issue at trial to preserve the issue for appeal, unless the party can show the presence of a "'manifest error affecting a constitutional right.'" *State v. Fenwick*, 164 Wash.App. 392, 398, 264 P.3d 284 (2011), quoting *State v. Robinson*, 171 Wash.2d 292, 304, 253 P.3d 84 (2011) (further quoting *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009)). "'The constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.'" *Id.* citing *State v. Kirkpatrick*, 160 Wash.2d 873, 879, 161 P.3d 990 (2007) (quoting *State v. Scott*, 110 Wash.2d 682, 687, 757 P.2d 492(1988)).

Appellant suggests that *State v. Swetz*, 160 Wn. App. 122, 247 P.3d 802 (2011) provides the basis to raise this issue for the first time on appeal; however, *Fenwick, supra*, disagreed with the Appellant's assertion and the state requests this court not review this matter as untimely asserted.

B. The Search of Mr. Showers' property was a lawful search by his Community Corrections Officer.

Because this matter was not raised below, the record does not lend itself to a significant review of factors known to Mr. Showers' trial

counsel or information the State could have brought to further justify the search, including exigent circumstances or officer safety; however, as noted in Appellant's Brief at page 17, Mr. Showers was on Community Custody and Department of Corrections Community Corrections Officer, Linda Tolliver, conducted a search of Mr. Showers' backpacks following his flight from police and abandonment of the vehicle in the middle of the road.

Citing *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), Appellant asserts the warrantless search of the vehicle is impermissible; however, Mr. Showers has a lesser expectation of privacy as a result of his community custody status. *State v. Lucas*, 56 Wash.App. 236, 239–40, 783 P.2d 121 (1989), *review denied*, 114 Wash.2d 1009, 790 P.2d 167 (1990)(Washington law recognizes that probationers and parolees have a diminished right of privacy which permits a warrantless search based on probable cause).

As noted in *State v. Parris*, 163 Wash. App. 110, 118-19, 259 P.3d 331 (2011):

> RCW 9.94A.631 authorizes a warrant exception for a CCO to search a probationer's residence and "other personal property" when the CCO has reasonable cause to believe probationer has violated release conditions. *State v. Massey*, 81 Wash.App. 198, 199, 913 P.2d 424 (1996). A warrantless search of parolee or probationer is reasonable if an officer has well-founded suspicion that a violation has

> occurred. *Massey*, 81 Wash.App. at 200, 913 P.2d 424. Analogous to the requirements of a *Terry* stop [citation omitted], reasonable suspicion requires specific and articulable facts and rational inferences. *Simms*, 10 Wash.App. at 87, 516 P.2d 1088. "Articulable suspicion" is defined as a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wash.2d 1, 6, 726 P.2d 445 (1986).

Once the Community Corrections Officer had reasonable grounds to suspect that Mr. Showers had violated the terms of his release, the search was valid.

Appellant further asserts that there must be a nexus between the probation violation and the backpacks before a search is permissible. Appellant's Brief at 17. The search need not be particularized or limited by scope. *Parris* 163 Wash. App. at 122, citing *U.S. v. Conway*, 122 F.3d 841, 843 (9th Cir.1997)(It does not matter whether the community corrections officers believed they would find evidence or contraband. Washington law does not require that the search be necessary to confirm the suspicion of impermissible activity, or that it ceases once the suspicion has been confirmed).

Here, Mr. Showers was identified by police officers and was in the process of committing a felony, which is a violation of his community

custody.[3] The vehicle which was searched was identified as Mr. Showers and he had been in exclusive control of the vehicle prior to his flight from the vehicle.[4] There was, at a minimum, probable cause to believe Mr. Showers had committed a violation of his release and was in possession of the vehicle which was searched.

For the foregoing reasons, the State urges this Court not to grant review of the search as untimely, and, if the Court does review the search, find the search lawful.

III. EVIDENCE WAS PROPERLY ADMITTED.

A. Standard of review.

A party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). This objection gives a trial court the opportunity to prevent or cure error. *State v. Boast*, 87 Wash.2d 447, 451, 553 P.2d 1322 (1976). Only

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[3] Mr. Showers also had DOC warrant for violation of a condition of probation, for, among other things, failure to comply with treatment. RP (9/14/12) 9, RP (9/21/12) 5.

[4] DOC CCO Tolliver conducted the search of Mr. Showers' belongings following his arrest on the DOC warrant and the felony charge. Further, Deputy Ryan Tully was involved in the apprehension of Mr. Showers was a former CCO who had supervised Mr. Showers and knew Mr. Showers and the woman in the vehicle were frequent drug users together. RP (9/14/12) 10.

issues of manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a). Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. *State v. Kirkman*, 159 Wash.2d, 918, 936, 155 P.3d 125 (2007). To determine whether statements are impermissible opinion testimony, reviewing courts consider the circumstances of a case, including, (1) "the type of witness involved," (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." *Id.* at 298.

"Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *State v. Lewellyn*, 78 Wash.App.788, 895 P.2d 418 (1995), citing *Seattle v. Heatley*, 70 Wash.App. 573, 854 P.2d 658 (1993), *review denied*, 123 Wash.2d 1011, 869 P.2d 1085 (1994)(Lay witnesses also may give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge. ER 701. A lay person's observation of intoxication is an example of a permissible lay opinion); see also *State v. Baird*, 83 Wn.App. 477, 485, 922 P.2d 157 (1996). On the contrary, lay

witnesses are not entitled to testify, without more specialized training, on a defendant's state of mind. *State v. Farr-Lenzini*, 93 Wash.App. 453, 970 P.2d 313 (1999)(trooper testified that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop). Trial courts are afforded broad discretion to determine the admissibility of ultimate issue testimony. *Heatley*, 70 Wn.App. at 579.

Even if this evidence were inadmissible, other admissible evidence may outweigh any prejudice as to render the admission of otherwise inadmissible evidence harmless. *State v. Thompson*, 90 Wah.App. 41, 950 P.2d 977 (1998)(upholding a conviction for reckless driving where the officer testified the driving was reckless and the trial court had granted defendant's motion in limine to exclude the officer's opinion). This is particularly true in a bench trial. In a bench trial, there is even a more "liberal practice in the admission of evidence" on the theory that the court will disregard inadmissible matters. *State v. Jenkins*, 53 Wash.App. 228, 766 P.2d 499 (1989), citing *State v. Miles*, 77 Wash.2d 593, 601, 464 P.2d 723 (1970). Moreover, even if a trial court's decision to admit certain evidence is in error, i.e., an abuse of discretion, an appellant must still demonstrate that the error was prejudicial. *Jenkins*, 53 Wash.App. at 231, citing *State v. Robtoy*, 98 Wash.2d 30, 44, 653 P.2d 284 (1982).

B. Testimony was properly admitted.

Testimony which is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony and therefore admissible. *Cf Lewellyn, supra*; *State v. Demery*, 144 Wash.2d 753, 30 P.3d 1278 (2001).

Here, Mr. Showers was charged with attempting to elude a police vehicle, which requires, among other things, proof that Mr. Showers failed to stop for pursing police officers and in doing so drove recklessly. The officer's testimony described Mr. Showers' driving, but the mere fact that someone drove 50 or 60 MPH in a 25 MPH zone does not, without more, assist the trier of fact in determining whether the driving was also reckless. Police officers have specialized training in the rules of the road, operations of motor vehicles on the roads and what constitutes safe driving. Furthermore, the officer's testimony outlined the conduct, and then qualified the driving based on the conduct. This is not unlike other permissible testimony such as cases involving impaired driving. A driver may have alcohol on their system, yet not be intoxicated; in those cases an officer is permitted to describe their observations of the driver, explain the test conducted and the driver's performance, and may, permissibly, state

that a defendant was impaired. *State v. Baity*, 140 Wash.2d 1, 18, 991 P.2d 1151 (2000).

Because the evidence admitted in this case did not invade the province of the jury in determining whether Mr. Showers both drove recklessly while attempting to elude police officers, it was not improper ultimate issue testimony which was properly admitted.

IV. MR. SHOWERS RECEIVED EFFECTIVE COUNSEL.

A. Standard of review.

A claim of ineffective assistance of counsel presents a mixed question of fact and law which is reviewed *de novo*. *State v. Sutherby*, 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

B. Trial counsel was not ineffective when he declined to raise an unsupported claim or failed to object to admissible testimony.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127

Wash.2d 322, 334, 899 P.2d 1251 (1995), citing *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (applying the 2–prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

There is a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). A claim of ineffective assistance of counsel cannot be sustained without demonstration of actual prejudice. *McFarland*, 127 Wash.2d at 334. It is not *per se* deficient representation for failure to move for suppression of evidence obtained following warrantless arrest. *Id.*

Here, Appellant asserts Mr. Showers' trial counsel was deficient for failure to seek suppression. Appellant's Brief at 23. As noted above, the evidence gathered above was not subject to suppression as a result of Mr. Showers' community custody status. Further, there are a number of reasons that suppression was not supported, including community

caretaking, exigent circumstances and abandonment. Additionally, an inventory of the vehicle would have been required under the circumstances and would have revealed the heroin and methamphetamine. As a result, it cannot be said that Mr. Showers' trial counsel was deficient.

Appellant further seeks to declare trial counsel's performance deficient for failing to object to certain testimony. Appellant's Brief at 24. As noted above, the evidence was admissible, and even if it was not, trial counsel objected and the decision not to further object was tactical. Certainly repeated objections have an impact, even if they are sustained. Regardless, Appellant has failed to demonstrate the outcome would have been different but for any perceived deficiency.

As a result, Mr. Showers has failed to demonstrate a deficiency or actual prejudice.

V. MR. SHOWERS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL.

A. Standard of review.

Waiver of a right to a jury trial is reviewed *de novo*. *State v. Ramirez-Dominguez,* 140 Wash.App. 233, 165 P.3d 391 (2007), citing *State v. Treat*, 109 Wash.App. 419, 427, 35 P.3d 1192 (2001). Findings of fact are not disturbed unless they are clearly erroneous. *State v. Estrella*,

115 Wash.2d 350, 355, 798 P.2d 289 (1990) (citing *State v. Pennington*, 112 Wash.2d 606, 608, 772 P.2d 1009 (1989)). Unchallenged findings of fact are verities on appeal. *Morris v. Woodside*, 101 Wash.2d 812, 815, 682 P.2d 905 (1984).

B. A defendant may waive his right to a jury trial and the record supports the trial court's findings that Mr. Showers made a knowing, intelligent and voluntary waiver of his right to a jury trial.

Appellant, essentially, asserts that a defendant may not waive his right to a jury trial. Appellant's Brief at 28. Appellant further seeks to overrule the recently affirmed jury trial waiver case of *State v. Benitez*, 302 P.3d 877 (2013) and *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006), both upholding a waiver of a jury trial. Appellant's brief at 35.

Washington law allows a defendant to waive a jury trial. *State v. Stegall*, 124 Wash.2d 719, 723, 881 P.2d 979 (1994). The waiver may be made either in writing or orally, provided that, upon review, the record is sufficient to determine that the defendant's waiver is knowingly, intelligently, voluntarily and free from improper influences. *Id.* Defense counsel's representation that defendant knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *State v. Downs*, 36 Wash.App. 143, 146, 672 P.2d 416 (1983). What little is required to uphold a defendant's request to waive his right to a jury trial

can be noted in *State v. Forza*, 70 Wash.2d 69, 422 P.2d 69 (1966)(arguing the waiver of a jury trial is unconstitutional):

> The Court: Do I understand that the defendant has waived his right to a jury trial?
>
> Mr. Alfieri [Defendant's counsel]: That is right. I might inform the court, for the record, that he understands this is a constitutional right that he has and that I have discussed it with him and also discussed what I thought the strategy should be in relation to the defense to be interposed here and on that basis we will waive the jury.

Id. Forza (upholding the waiver based on the above) quoted *State v. Lane*, 40 Wash.2d 734, 736, 246 P.2d 474 (1952):

> [i]t is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done.

Here, Mr. Showers presented the trail court with a written waiver of his jury trial right. Exhibit 1 attached. The trial court conducted a colloquy with Mr. Showers, ensuring that he understood his right to a jury trial, that he had discussed the matter with his attorney so he knew what he was waiving, and that his request was voluntary. RP (8/31/12) 2-3.

The record supports the trial court's findings that Mr. Showers made a knowing, intelligent and voluntary waiver of his right to a jury trial. Mr. Showers decision should not be disturbed on appeal.

CONCLUSION

Evidence was sufficient to demonstrate that Mr. Showers had dominion and control over the methamphetamine and heroin located in his vehicle. Evidence was properly admitted and not ultimate opinion testimony. Mr. Showers fails to demonstrate deficient representation. Mr. Showers' trial counsel was not ineffective for not bringing a pre-trial motion which would have been unsuccessful, or for not continuing to object at trial. Mr. Showers' decision to proceed without a jury was made with advice of counsel, and was a knowing, intelligent and voluntary decision which should not be disturbed on appeal. Finally, because substantial evidence supports the trial court's findings, the verdict should be upheld.

Respectfully submitted this 20th day of August, 2013.

DAVID J. BURKE
PACIFIC COUNTY PROSECUTOR

By. _____
Mark McClain, WSBA#30909
Chief Deputy Prosecuting Attorney

EXHIBIT 1

WPF CR-04.0700 (8/82)

FILED

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SUPERIOR COURT OF WASHINGTON
COUNTY OF PACIFIC

State of Washington, Plaintiff,

NO. 12-1-00114-4

vs.

WILLIAM SHOWERS Defendant(s)

WAIVER OF JURY TRIAL

The undersigned defendant states that:

1. I have been informed and fully understand that I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is alleged to have been committed;

2. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the court;

3. I freely and voluntarily give up my right to be tried by a jury and request trial by the court.

Dated: 8-31-12

William Showers
Defendant

Defendant's Lawyer
DAVID S. MARCY

JUDGE'S CERTIFICATE

The foregoing statement was read by or to the defendant and signed by the defendant in the presence of his lawyer. The court finds that defendant knowingly, voluntarily and intelligently waived his right to a jury trial. The court does (~~not~~) consent to defendant's waiver of a jury trial.

Dated: 8/31/2012

Judge

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the State's Reply Brief electronically with the Court of Appeals, Division II, using the Court's online filing portal. With the permission of the recipient(s), a true and correct copy was delivered by electronic mail to, Jodi R. Backlund, Attorney for Appellant, at backlundmistry@gmail.com.

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

Dated this 21st day of August, 2013 at South Bend, Washington.

Brandi Huber

Brandi Huber, Paralegal

PACIFIC COUNTY PROSECUTOR

August 21, 2013 - 12:51 PM

Transmittal Letter

Document Uploaded: 439964-Reply Brief.pdf

Case Name: State of Washington v. William Showers

Court of Appeals Case Number: 43996-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

State's Reply Brief

Sender Name: Brandi Huber - Email: **bhuber@co.pacific.wa.us**

A copy of this document has been emailed to the following addresses:

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mmclain@co.pacific.wa.us