SUPREME COURT NO. 94188-2
C.O.A. No. 47593-6-II
Cowlitz Co. Cause NO. 14-1-01468-3

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS SOLIS-VAZQUEZ,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter, affirming Solis-Vazquez's convictions and reversing the trial court's grant of the motion for arrest of judgment. The respondent respectfully requests this Court deny review of the January 24, 2017, Court of Appeals' opinion in *State of Washington vs. Jesus Solis-Vazquez*, No. 47593-6-II.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision that if there was manifest error it was harmless beyond a reasonable doubt conflict with a decision of the Supreme Court or Court of Appeals or involve a significant question of constitutional law?

2. Was there a manifest error when Solis-Vazquez opened the door to opinion evidence and this evidence had no practical, identifiable consequence on the outcome of the trial?

3. Does the Court of Appeals' decision that there was sufficient evidence to support the jury's verdicts as to the firearm enhancements conflict with a decision of the Supreme Court or involve a significant question of constitutional law?

IV. STATEMENT OF THE CASE

On December 12, 2014 at 9:44 p.m., Deputy Brady Spaulding of the Cowlitz County Sheriff's Office stopped a two-door Toyota Celica

with four occupants for a front headlight that was out. RP at 323-25, 151, 176, 211. After the car was stopped, Deputy Spaulding observed the driver, Evan Hadlock, and the front passenger, Vanessa Slape, switch seats. RP at 325. Jesus Solis-Vazquez was seated in the backseat directly behind the driver's seat. RP at 328. Another man, referred to by Solis-Vazquez as "Delo," was in the backseat behind the front passenger seat. RP at 494. Deputy Spaulding observed Solis-Vazquez and Delo making movements. RP at 326. Deputy Spaulding obtained identification from both of the drivers, Slape and Hadlock, and from Solis-Vazquez who was not wearing a seatbelt. Solis-Vazquez provided Deputy Spaulding a Mexican passport bearing the name "Genero Padraza-Martinez." RP at 328-29. Deputy Spaulding returned to his vehicle to "[r]un the names" and discovered that Hadlock had a suspended driver's license. RP at 330. Additional police arrived. RP at 330.

Deputy Spaulding opened the passenger door to arrest Hadlock and observed him place something by the dash and move his right hand toward his leg. RP at 331. Between the passenger front seat and the door, Deputy Spaudling observed a black, sawed-off, pistol grip shotgun in the area where Hadlock's hand went toward. RP at 331, 344. Upon seeing the shotgun, Deputy Spaulding "stomped" Hadlock's arm with his foot, pinning his arm against his leg while drawing his firearm. RP at 332. The

shotgun and Hadlock were removed from the car. RP at 332. The shotgun was loaded. RP at 346. The other police took cover positions holding the remaining three occupants in the vehicle at gunpoint. RP at 73, 196, 216. Despite being held at gunpoint and ordered to keep their hands up, the occupants of the car continually dropped their hands and reached toward the floor. RP at 210, 217. Slape put her hand underneath a handbag in her lap. RP at 120. Slape could not reach beyond her knee because she was still wearing her seatbelt and was restrained by the shoulder harness in the driver's seat. RP at 132, 137. Slape did not want to exit because she had a cat with her; eventually she was removed and handcuffed. RP at 121, 123.

With his firearm drawn, Officer Jeff Gann of the Castle Rock Police Department covered Solis-Vazquez in the backseat on the driver's side. RP at 71, 73-74, 99, 153. Officer Gann observed Solis-Vazquez bring his hands down to his lap. RP at 75. Officer Gann ordered Solis-Vasquez to "get his hands up." RP sat 75. Despite the fact that he was ordered by armed officers to keep his hands up, Solis-Vazquez twice more put his hands down while being covered. RP at 75. After Officer Gann observed Solis-Vasquez reach toward the floor of the vehicle, he told him to get his hands up or he would shoot him. RP at 75.

After Delo was removed from the car, Solis-Vasquez placed his hands down in "the middle of the seat area" and then "lunged out the open

passenger side door." RP at 76, 161. Solis-Vasquez took off running and nearly collided with a police officer who was in the process of handcuffing Delo. RP at 76. Deputy Spaulding attempted to stop Solis-Vasquez. RP at 77. Solis-Vasquez swung at Deputy Spaulding with closed fists. RP at 77, 163. After breaking free of Deputy Spaulding, Solis-Vasquez ran onto 12th Avenue. RP at 78. Deputy Spaulding was able to catch up to Solis-Vazquez and grab hold of him. RP at 78. Officer Gann was able to catch up to them. RP at 78. Solis-Vazquez swung his fists at Deputy Spaulding and Officer Gann. RP at 78-79. Solis-Vazquez punched Officer Gann in the face with a closed fist, knocking his glasses off. RP at 79. Officer Geary Enbody of the Woodland Police Department arrived to assist. RP at 79, 147. Officer Enbody deployed a taser into Solis-Vazquez's shoulder blade, however the taser was ineffective. RP at 79-80.

Solis-Vazquez fought vigorously to escape, swinging his arms at the police. RP at 80. When Officer Gann attempted to apply a vascular neck restraint, Solis-Vazquez kicked him in the right knee causing him to fall to the ground. RP at 80-82. When Officer Gann grabbed his foot, Solis-Vazquez stomped on his hand. RP at 82. Solis-Vazquez broke free of the officers and ran. RP at 83. Deputy Spaulding again caught up with Solis-Vazquez and applied a taser to him. RP at 83. Solis-Vazquez was able to break free of the wires and render the taser ineffective. RP at 83.

He then attempted to take the taser away from Deputy Spaulding, but was unsuccessful. RP at 83-84. Officer Gann removed the cartridge from his taser and applied it to Solis-Vazquez in "drive stun mode." RP at 84. Solis-Vazquez continued to swing his arms and elbows at the officers. RP at 85. Officer Enbody used an expandable baton to strike Solis-Vazquez in the back of his thigh. RP at 85. Even after being struck and verbally instructed to get on the ground, Solis-Vazquez refused to comply. RP at 86. After several strikes, Solis-Vazquez's knee buckled, and he went to the ground. RP at 86. On the ground, Solis-Vazquez continued to throw punches at the officers. RP at 87. Officer Enbody employed a vascular neck restraint to Solis-Vazquez, causing him to begin losing consciousness. RP at 87. The other officers handcuffed him. RP at 87. Solis-Vazquez was searched incident to arrest; on his person, was $1,933 in cash in denominations of fives, tens, and twenties. RP at 95.

When Solis-Vazquez exited the car, Delo escaped from custody. RP at 218-220. Police pursued Delo, but lost sight of him near the rear corner of the Superior Tire building. RP at 221-22. Several tractor trailers at this location that were large enough to hide underneath. RP at 223. Underneath the rear end of one of these tractor trailers, police located two baggies containing methamphetamine. RP at 236, 260. The baggies were

wrapped in white plastic bags. RP at 238. Without packaging the methamphetamine in each of these bags weighed 25.4 grams.

Slape permitted the police to search the vehicle. RP at 126, 342. A loaded Kel-Tec .32 caliber semiautomatic pistol was under the front passenger seat, positioned so the front seat passenger could easily access it with the grip to the front of the car and barrel pointed rearward. RP at 342-43. Behind the front passenger seat, where Delo had been sitting, was a box containing a Springfield XD .40 caliber semiautomatic pistol with a bullet in the chamber. RP at 172-73, 344-45. The case also contained three magazines, two of which were loaded. RP at 173, 345. Inside a paper bag that was between the two back seats, with the opening toward where Solis-Vazquez had been sitting, was a "Ruger five shot revolver LCR .38 caliber Special." RP at 174, 345-46. Although empty, this gun was made to hold five rounds. RP at 454. Exactly five .38 caliber bullets were founds scattered on the back seat. RP at 346. Because this was a revolver, it could easily be emptied of ammunition by allowing the bullets to fall out of the cylinder. RP at 356. Underneath the rear of the driver's seat, directly in front of where Solis-Vazquez had been sitting, were two black plastic bags. RP at 347. Including the packaging, these two bags weighed 61.4 grams. RP at 348. Without packaging the larger of these bags contained 41.2 grams of a white, crystal substance containing

methamphetamine. RP at 265. The smaller bag also contained a crystal substance consistent with methamphetamine. RP at 266, 309. Two baggies with a crystal residue consistent with methamphetamine were also found in the dashboard ashtray. RP at 363.

An ounce, which is slightly more than 28 grams of methamphetamine, normally sells for between $600 and $1,000. RP at 290. A typical user amount of methamphetamine is half a gram to a gram per day. RP at 292. An ounce of methamphetamine supplies a user of methamphetamine for about a month. RP at 293. Street drug deals typically involve smaller denominations of bills such as fives, tens, and twenties. RP at 295. The most common method for transporting drugs in Cowlitz County is in cars. RP at 297. Guns are also commonly brought to drug transactions for protection. RP at 300.

Because he had provided false identification, police booked Solis-Vazquez under the name "Genero Padraza-Martinez." RP at 189. However, eventually a corrections officer recognized Solis-Vazquez from a prior booking and discerned his true identity from a prior booking photo. RP at 320-21.

Solis-Vazquez was charged with Possession with Intent to Deliver Methamphetamine with four firearm enhancements, Unlawful Possession of a Firearm in the First Degree, two counts of Assault in the Third

Degree, Disarming a Law Enforcement Officer, and Criminal Impersonation in the First Degree. CP at 6-8. The case proceeded to jury trial. During his cross examination of Deputy Spaulding, Solis-Vazquez's attorney elicited from Deputy Spaulding that his reason for arresting Slape, who was sitting in front Solis-Vazquez, was "for the drugs under the seat." RP at 447. On redirect examination, the prosecutor asked Deputy Spaulding if he believed the people in the car were accomplices. RP at 457. Solis-Vazquez's attorney objected on the grounds that the question called for a legal conclusion and lack of foundation, moving to strike the response. RP at 457. The court sustained the objection. RP at 457. The prosecutor then asked Deputy Spaulding what he believed about the three people in the car. RP at 457. Solis-Vazquez's attorney objected, stating: "Foundation. Calls for a narrative." RP at 457. The Court overruled this objection. RP at 457. Deputy Spaulding answered that he believed they had knowledge of the drugs. RP at 457.

When the parties discussed jury instructions, Solis-Vazquez's attorney objected to the accomplice instruction. RP at 386. The court noted the quantity of drugs far exceeded a normal user amount, suggesting possession with intent to deliver. RP at 390. The court ruled there was sufficient evidence for the accomplice instruction. RP at 392. In addition to the large amount of drugs, there were multiple guns with ammunition

for them, a large amount of cash, and the people were in the car together with these items. RP at 392. The court noted that the facts were sufficient for the jury to find the "individuals in the front seat were accomplices" of Solis-Vazquez. RP at 392. Because there was circumstantial evidence of aid being provided, the court ruled direct evidence of an agreement to aid was unnecessary to giving the accomplice instruction. RP at 392.

After the State rested, the court granted Solis-Vazquez's motion to dismiss the charge of Disarming an Officer. RP at 463, 474. The jury found Solis-Vazquez guilty of Possession with Intent to Deliver Methamphetamine with four firearm enhancements, two counts of Assault in the Third Degree, and Criminal Impersonation in the First Degree. RP at 634-36. The jury could not come to an agreement on the remaining count of Unlawful Possession of a Firearm in the First Degree. RP at 633

After the trial, Solis-Vazquez moved for arrest of judgment to set aside the verdicts on the firearm enhancements. RP at 645. The court ruled there was sufficient evidence to support the firearm enhancements with regard to the two firearms located in the back of the car, but set aside the two firearm enhancements for the firearms in the front of the car stating it "was not sure there was a sufficient connection." RP at 663-64. Solis-Vazquez appealed. The State filed a cross-appeal of the court's decision to set aside these two jury verdicts.

For the first time on appeal, Solis-Vazquez argued that Deputy Spaulding's testimony was improper opinion evidence. The Court of Appeals found that because there was overwhelming untainted evidence supporting Solis-Vazquez's convictions, if there was a manifest error it was harmless beyond a reasonable doubt. *Slip Opinion* at 7. The Court of Appeals reversed the trial court's motion granting arrest of judgement, finding there was substantial evidence supporting the jury's unanimous determination that the firearm enhancements applied.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Solis-Vazquez's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Solis-Vazquez's petition fails to demonstrate that the Court of Appeals' holding was in conflict with a prior case of the Court of Appeals or Supreme Court or that it presents a significant question of constitutional

law.[1] For these reasons, his petition does not meet the criteria required for review under RAP 13.4(b). Further, his claim of manifest error is unfounded because he opened the door to opinion evidence by eliciting it at trial and there is no showing the evidence had a practical, identifiable impact on the outcome of the trial.

A. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR COURT OF APPEALS OR INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The Court of Appeals ruled consistently with existing case law and applied the correct standard of review when it found that because there was overwhelming, untainted evidence of Solis-Vazquez's guilt, if the admission of opinion evidence was manifest error, it was harmless beyond a reasonable doubt. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.2d 640 (2007). Because Solis-Vazquez did not object to the complained of opinion evidence as improper at trial to raise the issue for the first time on appeal, he must show it was a manifest error affecting a constitutional right. The Court of Appeals analyzed the specific facts of Solis-Vazquez's case and determined that the untainted

[1] Solis-Vazquez does not allege that either of the issues he raises involve an issue of substantial public interest.

evidence at trial was so overwhelming that it necessarily would lead to a finding of guilt. *Slip Opinion* at 7. Because the claimed error met the standard of harmless beyond a reasonable doubt, the Court of Appeals did not decided whether the introduction of the opinion evidence was manifest error. By applying the correct standard of review and considering the facts in proper context, the decision was consistent with existing Supreme Court, Court of Appeals, and constitutional case law.

Solis-Vazquez maintains that the Court of Appeals' holding of harmless error conflicts with *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 213 (2014). However, this argument fails to consider important distinctions between this case and his own. In *Quaale*, essentially the only issue was whether the or not a driver was impaired, and the opinion elicited was that he was impaired because of the results of the Horizontal Gaze Nystagmus test. *Id.* at 200. Here, unlike *Quaale*, with regard to the question of possession with intent to deliver, knowledge of drugs in the car was not the only element at issue. More importantly, there was overwhelming additional evidence of Solis-Vazquez's knowledge including: the location of the large quantity of methamphetamine at his feet, his reaching toward that location even when told not to do so at gunpoint, his providing a false identification, his fleeing from and fighting against the police, the firearms and ammunition found in the car, and the

$1,933 in cash on his person. Solis-Vazquez fails to show any case where such a quantum of evidence has failed to meet the standard applied by the Court of Appeals. Thus, he fails to establish RAP 13.4(b) (1), (2), or (3).

B. BECAUSE SOLIS-VAZQUEZ'S ATTORNEY OPENED THE DOOR BY INTRODUCING THE DEPUTY'S OPINION AND THE JURY WAS PROPERLY INSTRUCTED, HE DID NOT SUFFER MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

Because Solis-Vazquez opened the door to the deputy's opinion and there was no practical, identifiable consequence on the outcome of the trial, he did not suffer manifest error affecting a constitutional right. "A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence. And a theory not presented to the trial court may not be considered on appeal." *State v. Price*, 126 Wn.App. 617, 637, 109 P.3d 27 (2005). Solis-Vazquez did not object on the basis of improper opinion testimony at trial. Thus, unless he can show that he suffered manifest error, he cannot raise the issue for the first time on appeal. Because the Court of Appeals found any error was harmless beyond a reasonable doubt, it did not decide whether the opinion evidence was manifest error. *Slip Opinion* at 7. For two reasons, the opinion evidence was not manifest error. First, there was no error because Solis-Vazquez's attorney opened the door to the deputy's opinion by eliciting it during cross-examination. Second, any alleged

error was not "manifest" because there is no evidence that the opinion had a practical, identifiable impact on the outcome of the trial.

1. There was no error because Solis-Vazquez opened the door to Deputy Spaulding's opinion.

Because Solis-Vazquez's attorney put Deputy Spaulding's opinion at issue during cross-examination creating a false impression, he opened the door to correcting this false impression during redirect examination. It is well-established that "when a party opens up the subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), *overruled on other grounds* by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). When Solis-Vazquez's attorney asked Deputy Spaulding his reason for arresting Slape, this introduced his opinion into evidence and created the impression that Deputy Spaulding believed Slape to be solely responsible for possessing the drugs. After the defense elicited a portion of the deputy's opinion, the State was entitled to correct this false impression.

In *State v. Stevens*, 69 Wn.2d 906, 907, 412 P.2d 360 (1966), the defendant's attorney cross-examined the State's chief witness regarding "mug shots," creating the appearance that the witness had been unable to

pick out a picture of the defendant. On redirect, the prosecutor had the witness testify that she had picked out a photograph resembling the defendant. *Id.* The prosecutor then successfully moved to have the photograph, which was a photograph of the defendant taken by the sheriff's department in Sacramento, California, admitted. *Id.*

On appeal, the defendant argued the court had erred by entering his "mug shot" into evidence. *Id.* The Supreme Court disagreed explaining: "If the state was not permitted to clarify the testimony of its own witness, as elicited on cross-examination, it would leave the state's case in an untenable position." *Id.* Without allowing the State to respond to the evidence elicited by the defense, the jury would have been left to believe that the witness had been unable to pick out the defendant in a photograph, thus the first time she had seen him after the robbery was at the preliminary hearing. *Id.* This would have been untrue, as the witness had selected the defendant's picture out of hundreds of photographs. *Id.* The Court noted: "The purpose of redirect examination is to clarify matters that may tend to be confused by cross-examination and to rehabilitate the witness before the trier of facts[.]" *Id.* (citing *State v. Ward*, 144 Wn. 337, 258 P. 22 (1927)). Because the defendant's attorney "opened the door for the admission of the 'mug shot' by his cross-examination," he could not argue against its use to rehabilitate the witness. *Id.*

Relying on *Stevens*, the *Gefeller* Court stated:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

76 Wn.2d at 455. To avoid this result, a trial court has discretion to admit otherwise inadmissible evidence when a party raises a material issue and the evidence in question bears directly on that issue. *State v. Berg*, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). Our Supreme Court has held that a prosecutor may elicit testimony that would otherwise be inadmissible when the defense opens the door to such testimony. *State v. Jones*, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988). The doctrine of opening the door also allows a party to introduce evidence on the same issue to rebut a false impression created by the other party. *Berg*, 147 Wn.App. at 939.

Here, Solis-Vazquez's attorney opened the door to Deputy Spaulding's opinion, when he elicited from the deputy that he arrested Slape "for the drugs located under her seat." RP at 447. By introducing his reason for the arrest, Solis-Vazquez's attorney necessarily introduced Deputy Spaulding's opinion into evidence. The strategy behind this was obvious: Because the drugs were found in a location between where Slape

and Solis-Vazquez were seated, the defense attorney sought to create the impression that Deputy Spaulding believed the drugs were possessed by Slape rather than Solis-Vazquez. To do so he elicited that the deputy had arrested Slape for the evidence that was found, but did not elicit the fact that Solis-Vazquez was also arrested on this same basis. Consistent with *Stevens*, once Solis-Vazquez's attorney opened the door by introducing Deputy Spaulding's opinion, creating a false impression, the State was entitled to introduce evidence within the scope of this line of questioning to rebut this false impression. For this reason, there was no error.

2. Because there was no practical, identifiable consequence on the outcome of the trial the alleged error was not manifest error.

Because Solis-Vazquez did not raise the objection to the evidence admitted that he now raises on appeal, the issue was waived. "No case of this court has held that a manifest error infringing a constitutional right *necessarily* exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (emphasis in original). At trial, Deputy Spaulding expressed his opinion that the people in the car had knowledge of the drugs. Solis-Vazquez did not object on the grounds of improper

opinion.[2] Even if this was an improper opinion, it did not create a manifest error affecting a constitutional right, allowing Solis-Vazquez to raise the issue for the first time on appeal.

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). The manifest error analysis has been applied to opinion evidence in circumstances similar to those presented here. In *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008), witnesses for the State on multiple occasions provided their opinion as to the ultimate fact at issue in the case—whether the defendant had possesses methamphetamine with intent to manufacture. *Id.* at 588. After finding the opinion testimony given there was improper, the Court analyzed whether Montgomery could challenge the improper opinion testimony for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a). *Id.* at 595. The Court explained: "This exception is a narrow one, and we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences." *Id.*

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[2] The specific objection made was: "Foundation. Calls for a narrative." RP at 457.

The Court then stated: "Important to the determination of whether opinion testimony prejudices a defendant is whether the jury was properly instructed." *Id.* at 595. The Court noted that in the prior case of *Kirkman*, it had dealt with alleged improper testimony as to witness credibility. *Id.* (citing *Kirkman*, 150 Wn.2d at 937). Because the jury instructions stated that the jurors were the sole judges of witness credibility, were not bound by expert opinions, and there was no indication that the jury had been unfairly influenced, it was presumed that the jurors had followed the court's instructions. *Id.* 595-96. Because virtually identical instructions were given in Montgomery's case, the Court presumed the jury followed the court's instructions as it had in *Kirkman*. *Id.* at 596. The Court also noted that on one occasion Montgomery had objected to a question that went to the ultimate legal question and this objection was sustained, indicating that had Montgomery raised objections to the other instances of improper opinion testimony, they would have been sustained and curative instructions given if requested. *Id.* Because the record did not provide any indication that Montgomery suffered actual prejudice he did not suffer a manifest error affecting a constitutional right.

Here, as in *Montgomery* and *Kirkman*, the jurors were instructed they were "the sole judges of the credibility of each witness" and if a witness had "special training, education, or experience," they were

"not...required to accept his or her opinion." CP at 28, 33. The jurors were also instructed that if any evidence was ruled inadmissible not to "discuss that evidence during your deliberations or consider it in reaching your verdict." CP at 27. There is no evidence the jury failed to follow these instructions. Even if Deputy Spaulding expressed an improper opinion, it did not establish manifest error affecting a constitutional right, because, as in *Montgomery*, there is no evidence of actual prejudice. By properly instructing the jury, the court avoided the risk of the jury believing it was required to accept Deputy Spaulding's opinion.

Solis-Vazquez maintains that the opinion evidence was of constitutional error, primarily because this testimony came from a police officer. While there is always a concern that jurors will give the testimony of an officer undue weight, to show a manifest error requires more than speculation as to how jurors received testimony. Rather it requires a showing of actual prejudice. None was shown here.

C. THE COURT OF APPEALS' FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S UNANIMOUS FINDINGS AS TO THE FIREARM ENHANCEMENTS DOES NOT CONFLICT WITH ANOTHER DECISION OF THE SUPREME COURT OR RAISE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

When all reasonable inferences from the case are drawn in favor of the State and interpreted most strongly against Solis-Vazquez, there was sufficient evidence to support the jury's verdicts that Solis Vazquez or an

accomplice was armed with the firearms found in the car. The Washington Supreme Court has stated:

> When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). When the proper standard for sufficiency of the evidence is considered, there was sufficient evidence for the jury to find that the occupants of the car were Solis-Vazquez's accomplices.

When determining the sufficiency of evidence the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." RCW 9A.08.020(1). This "represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation." *State v. Hoffman*, 116 Wn.2d 51, 104,

804 P.2d 577 (1991). A participant in a crime may be held responsible for another's conduct, "so long as both participated in the crime." *See id.* at 105. Jurors need not be "unanimous as to the accomplice's and the principal's participation as long as all agree that they did participate in the crime." *Id.* at 104. "Where criminal liability is predicated on accomplice liability, the State must prove only that the accomplice had general knowledge of his coparticipant's substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant's crime." *State v. Truong*, 168 Wn.App. 529, 540, 277 P.3d 74 (2012), *review denied*, 175 Wn.2d 1020, 290 P.3d 994 (2012).

In *State v. Nyegaard*, 154 Wn.App. 641, 649, 226 P.3d 783 (2010) (*remanded on other grounds*, 172 Wn.2d 1006, 260 P.3d 208 (2011)), sufficient evidence was found to support a conviction for possession with intent to deliver methamphetamine with a firearm enhancement based on accomplice liability. Nyegaard was stopped in a vehicle traveling at night, with two other occupants. *Id.* at 644, 649. Nyegaard and the backseat passenger were both moving their hands. *Id.* at 644. A firearm and a paper bag containing large quantity of controlled substances were within Nyegaard's reach. *Id.* at 648. Because Nyegaard was traveling with two others in a vehicle late at night, possessed the firearm and contraband, and one of the other men had a large bundle of cash on his person, it was

reasonable for the jury to find he either aided or agreed to aid another in the possession of methamphetamine with intent to deliver. *Id.* at 649.

Here, there was sufficient evidence to support the jury verdicts that Solis-Vazquez or an accomplice was armed with the firearms. The jury could have found the front occupants were providing transportation for drug trafficking as they were driving together with Solis-Vazquez and Delo at night with a four-month supply of methamphetamine in the vehicle, far beyond a normal user amount. A further connection existed with the small user amount of a crystal substance consistent with methamphetamine in the ashtray within their access. Most concerning, when Deputy Spaulding approached, Hadlock reached for the loaded sawed-off, pistol-grip shotgun. Attempting to pull an illegal gun on an officer strongly suggested Hadlock's involvement—both knowledge and participation—in a criminal enterprise. Both firearms in the front of the vehicle were loaded and within the reach of the front passenger, and both Slape and Hadlock had occupied that seat. After Hadlock was removed, all occupants of the car reached down despite being held at gunpoint, the jury could have found this was to manipulate evidence – either the firearms or the loaded firearms.

Further, in the rear of the vehicle, the Springfiled XD firearm had a round chambered and two loaded magazines and was positioned where

Delo had been sitting. The Ruger .38 Special revolver, found in the bag, held a maximum of five rounds. Exactly five .38 caliber bullets were found emptied in the back seat area. Under these circumstances, it was most reasonable to conclude that the gun was fully loaded immediately before the stop and emptied when Deputy Spaulding pulled the car over. The location of the gun was in a bag between where Solis-Vazquez and Delo sat, with the opening toward Solis-Vazquez's side. The fact that the jury could not agree on a verdict as to whether or not Solis-Vazquez possessed this gun has no bearing on the question of whether he or his accomplice did. Because of the large quantity of methamphetamine split between them and their joint escape effort, there was sufficient evidence to find Delo and Solis-Vazquez were trafficking drugs in concert and the firearms were in their possession. Because there was sufficient evidence for the jury to find Solis-Vazquez or an accomplice was armed with each of the firearms, he fails to raise grounds under RAP 13.4(b)(1) or (3).

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 12th day of May, 2017.

Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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

Signed at Kelso, Washington on May 12th, 2017.

Michelle Sasser

Michelle Sasser