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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

NO. 37504-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANDREW O'CONNOR,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Andrew O'Conner to be convicted on evidence that should have been suppressed where the evidence used at trial against O'Conner was unconstitutionally obtained from a search incident to arrest of a passenger in a pickup truck driven by O'Conner.

2. The trial court erred in denying the second motion to suppress, filed March 4, 2008.[1]

3. The trial court erred in failing to instruct the jury on unanimity where the State did not elect which of the two acts it relied on as the basis for possession of methamphetamine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing O'Conner to be convicted on evidence that should have been suppressed where the evidence used at trial against O'Conner was unconstitutionally obtained from a search incident to arrest of a passenger in a truck driven by O'Conner, where O'Conner was the non-arrested driver? Assignment of Error 1.

2. Whether the State violated O'Conner's constitutional right under Article 1, § 7 of the Washington Constitution when searching a vehicle incident to the passenger's arrest, searched a glove that the police believed to

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[1] Contrary to the requirement of CrR 3.6(b), Findings of Fact and Conclusions of Law

be associated with or owned by O'Conner, who was a non-arrested driver? Assignment of Error 2.

3. Did the trial court err in failing to instruct the jury on unanimity where the State did not elect which of the two acts it relied on as the basis for possession of methamphetamine? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural history:

Andrew O'Conner [O'Connor] was charged by information filed in Pacific County Superior Court with one count of possession of methamphetamine, contrary to RCW 69.50.4013. Clerk's Papers [CP] at 2-3.

a. First suppression motion.

O'Conner's counsel moved to suppress methamphetamine found in a plastic baggie located in O'Conner's left rear pocket as a result of a search of O'Conner's person, and to suppress statements O'Conner made at that time of the search. CP at 4-5; Report of Proceedings [RP] (January 25, 2008) at 13. In a Memorandum Decision filed January 28, 2008, Judge Pro Tem Douglas Goelz found that the O'Conner's consent to search his person was

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for the March 4, 2008 suppression hearing have not been entered as of time of filing this Brief.

not voluntary and suppressed the methamphetamine found in his back pocket as a result of the search, and suppressed statements O'Conner made to police. CP at 13-14.

The court entered the following Findings of Fact and Conclusion of Law on February 28, 2008:

> 1. On November 30 2007, shortly after noon Deputy Rich Byrd was on the Bolstad Beach approach in his unmarked patrol vehicle in Pacific County, State of Washington. He observed a brown Chevy pickup drive past his location and enter the beach northbound. As the vehicle passed by him, he recognized the driver as Andrew O'Conner and the passenger as Angela Mathewson. Deputy Byrd recognized them on sight having known both subjects for more than ten years. Deputy Byrd believed that Mathewson had outstanding warrants for her arrest from research that he had performed the previous day.
>
> 2. Deputy Byrd followed the vehicle northbound on the beach while he checked on the warrants. The warrants for Mathewson were confirmed as active. The vehicle stopped about 1.5 miles north of Cranberry Road and the passenger let a dog out. Deputy Byrd drove past the vehicle and positively identified the passenger as Angela Mathewson and the driver as Andrew O'Conner. Deputy Byrd turned around, pulled behind the vehicle and activated his emergency lights. Deputy Byrd exited his vehicle and approached the driver. The dog came at Deputy Byrd aggressively and had to be restrained by Andrew O'Conner.
>
> 3. Deputy Byrd made contact with Mathewson and

informed her that she had several outstanding warrants for her arrest. Deputy Byrd requested that she exit the vehicle. She didn't immediately get out and began making furtive movements with her hands. Eventually Mathewson stepped out of the vehicle. Deputy Byrd instructed Mathewson to stand at the rear of the vehicle until a backup unit arrived.

4. Deputy Langendorfer arrived and Mathewson was placed under arrest. Deputy Rich Byrd asked Mr. O'Conner to step out of the vehicle so that it could be searched. A search incident to arrest revealed a large glass pipe lying on the seat where Mathewson was sitting. The pipe had a white residue inside. Through Deputy Byrd's training and experience he believed it to be a pipe commonly used for smoking methamphetamine.

5. On the seat between the driver and the passenger Deputy Byrd located a rubber glove commonly used in the fishing industry. Deputy Byrd knew that Mr. O'Conner employed in the fishing industry. Inside the glove Deputy Byrd located another glass which Deputy Byrd recognized as one commonly used to smoke methamphetamine. The pipe was burnt from used and had a small amount of residue inside.

6. Undersheriff Ron Clark arrived on the scene and asked if Mr. O'Conner had been searched yet. Deputy Langendorfer was near Mr. O'Conner at this time. After the search of the vehicle Undersheriff Ron Clark was talking to Mr. O'Conner. Ron Clark asked Mr. O'Conner if he had any needles, pipes or drugs on his person. Deputy Byrd asked Mr. O'Conner if there was any methamphetamine in the vehicle. He responded, "not to my knowledge". Deputy Byrd told Mr. O'Conner that he was aware that he used methamphetamine. Mr. O'Conner indicated that he

Based upon the Findings of Facts above and the Conclusions of Law found, the Court hereby orders:

1. Mr. O'Conner's statements prior to the consent to search are admissible in the State's case in Chief.

2. All evidence and statements discovered as a result of the search of Mr. O'Conner are not admissible in the State's case in Chief.

CP at 23-27.

O'Conner was tried by a jury, the Honorable Michael Sullivan presiding.

No objections or exceptions to the court's instructions to the jury were made. RP at 89, 90.

The jury found O'Conner guilty as charged of unlawful possession of a controlled substance. CP at 46, 47-61.

The court sentenced O'Conner as a first time offender. RP (March 21, 2008) at 6. CP at 52.

Timely notice of appeal was filed on March 21, 2008. CP at 62-63. This appeal follows.

b. Second suppression motion.

On March 4, 2008, the morning of trial, counsel reported that he had only realized the day before that findings of fact were entered following the

suppression hearing on January 25, 2008, and had filed a motion to suppress the pipe found in the rubber glove located in the area between where O'Conner and Mathewson had been sitting in the pickup truck. CP at 44-45; RP at 3-5. Defense counsel argued that under *State v. Parker*[2] the court should suppress the pipe that was found in the rubber glove because it was clearly and closely associated with O'Conner, who was the non-arrested driver of the vehicle. RP at 3-6. Counsel also argued that if the pipe was admissible, evidence that the pipe was found in the glove is inadmissible. RP at 8.

Judge Sullivan ruled that the pipe from the glove was admissible, but that the State's witnesses could not mention that that they knew that O'Conner was a fisherman or that the pipe was found in a type of glove that Deputy Byrd had used while working in the fishing industry. RP at 17-18.

2. <u>Trial testimony:</u>

Pacific County Deputy Chief Rich Byrd was on patrol on the Bolstad Beach Approach in Long Beach, Washington, in an unmarked vehicle shortly after noon on November 30, 2007. RP at 35. He observed a brown Chevrolet S-10 pickup being driven past his location and travel onto the beach and proceed northbound. RP at 36. Deputy Byrd recognized the

[2] *State v. Parker,* 139 Wn.2d 486, 987 P.2d 73 (1999).

passenger in the truck as Angela Mathewson, and believed that she had active warrants for her arrest due to information gathered in a drug investigation conducted the previous day. RP at 35, 36, 48. He had known Mathewson for approximately ten years. RP at 35. After he saw Mathewson in the truck, Deputy Byrd called Deputy Langendorfer, who confirmed that Mathewson had active warrants for her arrest. RP at 36.

Deputy Byrd followed the vehicle northbound on the beach to the Cranberry Beach approach while waiting for Deputy Langendorfer to get to his location. RP at 36. The driver stopped the pickup truck and Mathewson got out to let a dog run on the beach. RP at 36. Deputy Byrd drove up next to the truck, then drove around it and pulled in behind the truck and then activated the emergency lights on the unmarked vehicle. RP at 37. Deputy Byrd got out of the car and approached O'Conner, who was seated on the driver's side of the vehicle. RP at 37. The dog came at Deputy Byrd aggressively and O'Conner exited the truck in order to control the dog. RP at 37.

Mathewson was sitting on the passenger side of the truck. RP at 37-38. Deputy Byrd informed Mathewson that she had several outstanding warrants for her arrest. RP at 38. Deputy Byrd requested that she get out of the truck, but she did not do so immediately. RP at 38. Mathewson remained

seated in the truck for one to two minutes and told Deputy Byrd that she was "controlling the dog." RP at 38. Deputy Byrd stated that he saw Mathewson's "hands were dropping below my vision towards the seat of the vehicle." RP at 38. After approximately two minutes she got out of the truck and Deputy Byrd instructed Mathewson to stand at the rear of the vehicle until back up police units arrived. RP at 39.

Deputy Langendorfer arrived and Mathewson was handcuffed and placed under arrest and then put in the back of Deputy Langendorfer's vehicle. RP at 39. Deputy Byrd directed O'Conner to get out of the truck so that it could be searched. RP at 39-40. During a search of the truck the police found a glass pipe under the seat where Mathewson was seated. RP at 40. Exhibit 1. Police found a second pipe "between the driver and the passenger, basically where a middle passenger would be seated . . . ." RP at 40. Exhibit 2. According to Deputy Bryd's testimony from the first suppression hearing, this pipe was located inside a rubber glove. RP (January 25, 2008) at 10. During the suppression hearing, Deputy Byrd testified that the glove he found was the type "commonly used in the fishing industry." RP (January 25, 2008 at 11. Deputy Byrd knew that O'Conner had been employed in the fishing industry during the ten years that he had known him. RP (January 25, 2008) at 11. The pipe was burnt and had a small amount of

white residue inside of it. RP at 45.

Both glass pipes tested positive for the presence of methamphetamine. RP at 72, 74.

O'Conner did not testify at trial. RP at 91.

D. ARGUMENT

1. DEPUTY BYRD BELIEVED THAT THE RUBBER GLOVE FOUND ON THE SEAT OF THE PICKUP TRUCK WHERE THE DRIVER AND PASSENGER WERE SITTING BELONGED TO THE NON-ARRESTED DRIVER, O'CONNER. BECAUSE O'CONNER WAS NOT UNDER ARREST, THE GLOVE COULD NOT BE SEARCHED WITHOUT A WARRANT. THE WARRENTLESS SERACH OF THE RUBBER GLOVE VIOLATED O'CONNER'S RIGHT TO PRIVACY UNDER ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION.

a. O'Conner Has Automatic Standing To Challenge The Search Of The Truck He Was Driving Incident To The Arrest Of His Passenger.

Since the crime with which O'Conner was charged and convicted involves the possession of a controlled substance (methamphetamine) as an essential element, and as there was evidence that he was driving the vehicle, he had a legitimate expectation of privacy in the area searched and has standing to challenge the search incident to the arrest of his passenger. *State v. Jones,* 146 Wn.2d 328, 331-34, 45 P.3d 352, *reviewed denied,* 149 Wn.2d

1029 (2003); *State v. Simms,* 10 Wn. App. 75, 79, 515 P.2d 1088 (1974).

b. Applicable Law.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and Art. 1, § 7 of the Washington Constitution, provide that warrantless searches are *per se* illegal unless they come within one of the few, narrow exceptions to the warrant requirement. *State v. Parker,* 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *State v. Hendrickson,* 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Parker,* 139 Wn.2d at 496; *State v. Hendrickson, 129* Wn.2d at 71. In each case, the State bears the burden of demonstrating that a warrantless search falls within an exception. *State v. Parker,* 139 Wn.2d at 496.

One exception to the warrant requirement is a search incident to a lawful arrest. *State v. Johnson,* 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The authority for this flows directly from the fact of the arrest itself and the simultaneous lessening of the arrestee's privacy interest. *State v. White,* 44 Wn. App. 276, 278, 722 P.2d 118, *reviewed denied,* 107 Wn.2d 1006 (1986) (once arrested there is a diminished expectation of privacy in the person of the arrestee). It is well settled that under Art. 1, § 7 of the Washington

Constitution, "the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment." *State v. O'Neill,* 148 Wn.2d 564, 62 P.3d 489 (2003).

Under Article I, § 7, our courts have specifically recognized that "[r]egardless of the setting...'constitutional protections [are] possessed *individually.*'" *State v. Broadnax,* 98 Wn.2d 289,296, 654 P.2d 96 (1982) (quoting *Ybarra v. Illinois,* 444 U.S. 85, 92,100S.Ct. 338, 62 L.Ed. 2d 238 (1979))(emphasis in original.) Accordingly, a person's "mere presence" in a place validly to be searched does not justify a search of that person. *Broadnax,* 98 Wn.2d at 295,301; see *State v. Worth,* 37 Wn. App. 889, 892, 683 P.2d 622 (1984).

Readily recognizable personal effects are protected from search to the same extent as the person to whom they belong. *See also, Worth,* 37 Wn. App. at 892. Personal items may be "so intimately connected with" an individual that a search of the items constitutes a search of the person. *State v. Hill*, 123 Wn.2d at 641, 644, 870 P.2d 313 (1994). Personal effects need not be worn or held to fall within the scope of protection. *Worth,* 37 Wn. App. at 893-94 (narrow focus on whether person is holding or wearing a personal item undercuts purpose of constitutional protection and leaves vulnerable to search readily recognizable personal effects which a person has under his or

her control and seeks to preserve as private).

In *State v. Parker,* 139 Wn.2d 486, 987 P.2d 73 (1999), the court considered the scope of protection to be afforded the property of non-arrested occupants of cars searched without a warrant but incident to the driver's arrest. The court reviewed searches in three consolidated cases.

In the first and third case, officers arrested the male driver and subsequently searched the purse of the female passenger. *Parker,* 139 Wn.2d 489-92. In second case, officers arrested the male driver and searched a jacket from which they saw a male passenger withdraw his own identification. *Id.* at 490-91. In invalidating the search in all three cases, the court held as follows:

> We hold the arrest of one or more vehicle occupants does not, without more, provide the "authority of law" under Article I, § 7 of our state constitution to search other, non-arrested vehicle passengers, including personal belongings clearly associated with such non-arrested individuals. In determining whether an item within a vehicle is "clearly and closely" associated with a non-arrested passenger, we adopt the test recently enunciated by the Wyoming Supreme Court in *Houghton v. State,* 956 P.2d 353 (Wyo. 1998), *rev'd,* 526 U.S. 295, 119 S. Court. 1297, 143 L. Ed. 2d 408 (1999).
>
> In *Houghton,* the Wyoming Supreme Court invalidated the search of a woman's purse found in a vehicle where the police had probable cause to search the vehicle but did not have probable cause to believe the passenger was involved in any criminal activity. *Houghton,* 956 P.2d at 370. The Wyoming court adopted a straightforward rule allowing police officers to assume all containers within the vehicle may be validly

> searched, unless officer *know* or *should know* the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect immediately prior to the search.

Parker, 139 Wn.2d at 502-03.

Here, the holding in *Parker* makes it abundantly clear that the non-arrested party in a vehicle does not lose his or her individual privacy interest in their personal items. Thus, contrary to the trial court's conclusion in O'Conner's case, articles of clothing fall within the scope of personal items that cannot be searched if an officer knew or had reason to know that the clothing belongs to the non-arrested driver.

Under our facts, Deputy Byrd located on the truck seat—between where the driver O'Conner and passenger Mathewson were seated—a glove that had cotton on the outside and was rubberized on the gripping portion of the glove. RP (January 25, 2008) at 10. The type of glove led Deputy Byrd to conclude that O'Conner owned the glove. Inside the glove the deputy found a glass pipe that he believed was used to smoke methamphetamine. He stated during the first suppression hearing:

> Q. Okay. You indicated that you located a glass pipe inside a rubber glove.
>
> A. Yes.
>
> Q. And do you know—could you describe that rubber glove.

A. I don't know how to describe it. Kind of cotton on the outside and rubberized on the part that—that would grip.

Q. And have you ever seen those rubber gloves, how they're used.

A. I know that they're commonly used in the fishing industry. We used them back when I used to work in the oysters.

Q. Okay. Do you happen to know how Mr. O'Conner in the 10 years that you've known him has been employed?

A. In the fishing industry.

RP (January 25, 2008) at 10-11.

Deputy Byrd clearly believed that the glove belonged to O'Conner. As such, prior to searching the glove, Deputy Byrd was obliged to first obtain a warrant to examine the inside of the glove. To find otherwise would only encourage law enforcement officers to blind themselves to the obvious and search personal items without lawful authority.

2. THE TRIAL COURT ERRRED IN FAILING TO INSTRUCT THE JURY ON UNANIMITY AFTER THE STATE FAILED TO ELECT ONLY ONE OF THE MULTIPLE ACTS AS THE BASIS FOR THE CHARGE OF POSSESSION OF METHAMPHETAMINE.

At trial the State introduced two glass pipes that it alleged contained methamphetamine and were in O'Conner's constructive possession. Exhibits

1 and 2. The court committed reversible error when it allowed the jury to convict O'Conner of possession of methamphetamine without requiring the State to elect the act it relied on for the charge, and without providing the jury with a unaniminity instruction.

A unanimity instruction was not requested at trial on the possession of methamphetamine charge. The court asked counsel, shall the jury choose to convict O'Conner, whether the instructions distinguish if they are finding him guilty of the first pipe, the second pipe, or both, or whether it mattered. RP at 85. The State responded that "it didn't make any difference." RP at 85.

A trial court's failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error and may be raised for the first time on appeal. *State v. Kiser*, 87 Wn.App. 126, 129, 940 P.2d 308 (1997), *rev. denied,* 134 Wn.2d 1002 (1998); *State v. Holland*, 77 Wn.App. 416, 424, 891 P.2d 49 (1995); RAP 2.5(a)(3).

A defendant has a federal constitutional right to a jury trial and a corresponding constitutional right that the jury be unanimous as to its verdict. U.S. Const. amend. 6; Const. art. 1, § 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1998). Thus, a person may be convicted only when a unanimous jury concludes that the criminal art charged in the information

has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where the state charges one count of criminal conduct and presents evidence of more than criminal act, to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that they all must agree as to what act or acts were proved beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411; *State v. Petrich,* 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Here, the State neither elected the act upon which it relied, nor did the trial court instruct the jury on unanimity. The State charged O'Conner with possession of methamphetamine, but presented evidence of more than one act which could constitute the offense. Police obtained two glass pipes from the truck, both of which contained residue that tested positive for the presence of methamphetamine. Either of these alleged acts standing alone could constitute possession of methamphetamine.

Despite the clear testimony identifying two separate pipes that could form the basis for the possession of methamphetamine charge, the court did not provide the jury with a *Petrich* instruction.

The State may argue that the two acts of possession constituted a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d

453 (1989). If the acts constitute a continuing course of conduct, the State need not elect which of the multiple acts upon which it is relying and the court does not need to instruct the jury on unanimity. *State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996). "A continuing course of conduct requires an ongoing enterprise with a single objective." *Id; State v. Gooden*, 51 Wn.App. 615, 619-20, 754 P.2d 1000, *rev. denied,* 111 Wn.2d 1012 (1998).

In *State v. King*, Division One of this Court concluded that multiple instances of possession of controlled substances were not a continuing course of conduct and thus a unanimity instruction was required. *State v. King*, 75 Wn.App. 899, 903-04, 878 P.2d 466 (1994), *rev. denied*, 125 Wn.2d 1021 (1995). During a traffic stop, officers saw the driver and the passenger, King, reach down in between their seats and then subsequently make throwing motions towards the interior of the car when they got out. *Id*, at 901. The officers recovered a pill bottle containing cocaine between the car seats, as well as cocaine in King's fanny pack. *Id.* King was charged with one count of possession and testified at trial that the cocaine in his fanny pack was planted by the officers. *Id.* The trial court failed to give a unanimity instruction and the prosecutor, rather than electing one incident as the basis

for the charge, argued that both acts constituted possession of cocaine. *Id.* at 903.

Division One reversed King's conviction, finding that there were two distinct instances of possession occurring at different times, in different places, involving different containers, and using different methods of possession (constructive versus actual). *Id.* A rational juror could have concluded that King did not possess the cocaine found in the car but possessed the cocaine in the fanny pack. *Id.* at 903-4. Alternatively, a rational juror could also have concluded that King possessed the cocaine in the car, but the cocaine in the fanny pack was planted on him. *Id.*at 904. Therefore, the failure to give a unanimity instruction was not harmless. *Id.; Cf. State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996) (finding a continuing course of conduct where two counts of possession of cocaine, coupled with other evidence of drug sales, suggested a single objective of drug trafficking); *State v. Fiallo-Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995) (two deliveries of cocaine were a continuing course of conduct where there was a smaller, sample drug sale between the parties followed by a larger drug sale).

The two acts of possession of methamphetamine attributed to

O'Conner do not constitute a continuing course of conduct. Like *King*, the substances were found in two different places in the truck.

a. The Court's Failure to Give a *Petrich* Instruction Was Not Harmless.

When a trial court commits an error of constitutional magnitude, the jury's verdict will only be affirmed if the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed. 705, 87 S. Ct 824 (1967); *Kitchen* 110 Wn.2d at 409.

When the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error. The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen* 110, Wn.2d at 411.

Therefore, a *Petrich* error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime. *Kitchen*, 110 Wn.2d at 412 (quoting *State v. Loehner*, 42 Wn.App. 408, 411-12, 711 P.2d 377 (1985), *review denied*, 105 Wn.2d 1011 (1986).

A rational juror could have found that O'Conner possessed the pipe found on the seat between O'Connor and Mathewson. A rational trier of fact could have also have found that O'Connor possessed the pipe found

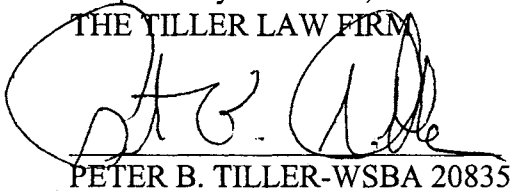
where Mathewson was sitting. Because a rational juror could have a reasonable doubt as to either one of the alleged instances of possession attributed to O'Connor, the error was not harmless. *Kitchen*, 110 Wn.2d at 412.

F. CONCLUSION

The trial court erred denying the appellant's second motion for suppression and erred in failing to give a unanimity instruction. The case should be remanded to the trial court with an order to dismiss.

DATED: August 4, 2008.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Andrew O'Conner

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. ANDREW O'CONNOR, Appellant.	COURT OF APPEALS NO. 37504-4-II PACIFIC COUNTY NO. 07-1-00258-6 CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Andrew O'Connor, Appellant, and David Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on August 4, 2008, at the Centralia, Washington post office addressed as follows:

Mr. David John Burke
Prosecuting Attorney
P.O. Box 45
South Bend, WA 98586-0045

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Mr. Andrew O'Connor
P.O. Box 82
Chinook, WA 98614

Dated: August 4, 2008.

THE TILLER LAW FIRM

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828