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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant Alexander failed to preserve his challenge to allegedly improper testimony where he did not object at trial?
2. Did the trial court properly instruct the jury to preserve defendant Alexander's constitutional right to a unanimous special verdict?
3. Has defendant Alexander and defendant Harrison failed to show ineffective assistance of counsel for counsels' failure to object to proper testimony?
4. Does defendant Harrison's sentence comply with the Supreme Court's decision in *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009) as a determinate sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On July 26, 2007, the State charged LANCE ALEXANDER (defendant Alexander) and TIFFANY NICOLE HARRISON (defendant Harrison) each with one count of unlawful possession of a controlled substance with intent to deliver, to wit: Ecstasy (MDMA), one count of unlawful possession of a controlled substance with intent to deliver, to wit:

marijuana. CPA¹ 1-2; CPH 1-2. The State alleged that defendants were armed with a firearm during the commission of the drug crimes. CPA 1-2; CPH 1-2. In addition, the State charged defendant Alexander with one count of possession of a stolen firearm. CPA 1-2.

On September 8, 2008, the State amended the charges to include two counts of possession of stolen property in the second degree, one count of unlawful possession of a payment instrument, and one count of identity theft in the second degree. *See* CPA 14-17; CPH 12-15. The State also alleged the original drug crimes were committed within 1,000 feet of a school or school bus route. CPA 14-17; CPH 12-15.

On September 8, 2008, the parties proceeded to trial before the Honorable Bryan Chushcoff. RP 1. Prior to eliciting any evidence, the parties held a CrR 3.5 hearing to determine if statements made by both defendants' to Deputy Darby were admissible. RP 16-70. The court found that both defendants' statements were voluntary and entered written findings of fact and conclusions of law in support of its ruling. CPA 170-174; CPH 200-204.

At the close of the State's case, defendant Harrison moved to dismiss the delivery of marijuana charge, the identity theft charge, and the

¹ Citations to defendant Alexander's designated Clerk's Papers will be to "CPA." Citations to defendant Harrison's designated Clerk's Papers will be to "CPH." Citations to the verbatim report of proceedings will be to "RP," except for the transcripts of the sentencing hearings. Defendant Alexander's sentencing hearing is designated "RPA;" defendant Harrison's is "RPH."

school bus route enhancement. RP 831-34, 838. The court denied defendant Harrison's motion. RP 840-41, 847. Defendant Alexander then moved to dismiss the charges of possession of stolen property, unlawful possession of a payment instrument, and identity theft in the second degree. RP 847. The court granted the motion and dismissed the charges as they related to defendant Alexander. RP 853. The parties then stipulated that there was a school bus stop within 1,000 feet of the defendants' residence, the firearm found in the apartment had been stolen, and that a credit card, two debit cards, a passport, and a checkbook found in the apartment had been stolen. CPA 43-44, 41-42, 37-38, 39-40; CPH 40-41, 44-45, 38-39, 42-43; RP 857-58.

Defendant Alexander rested without presenting any evidence.

Defendant Harrison testified on her own behalf. RP 859.

On September 23, 2008, the jury received instructions for the following crimes:

Defendant Alexander

- Count I – possession with intent to deliver a controlled substance, to wit: methylenedioxymethamphetamine (Ecstasy);
- Count I (lesser included) – possession of a controlled substance, to wit: Ecstasy;
- Count II – possession of a controlled substance with intent to deliver, to wit: marijuana;
- Count II (lesser included) – possession of a controlled substance, to wit: marijuana;
- Count V – possessing a stolen firearm.

Defendant Harrison

- Count III – possession with intent to deliver a controlled substance, to wit: Ecstasy;
- Count III (lesser included) – possession of a controlled substance, to wit: Ecstasy;
- Count IV – possession of a controlled substance with intent to deliver, to wit: marijuana;
- Count IV (lesser included) – possession of a controlled substance, to wit: marijuana;
- Count V – possessing stolen property in the second degree;
- Count VIII – possessing stolen property in the second degree;
- Count VI – identity theft in the second degree;
- Count VII – unlawful possession of payment instruments.

CPA 108-159; CPH 109-160 (Appendix A²). The following day, the jury found defendant Alexander guilty of the lesser included crime of possession of Ecstasy, unlawful possession of marijuana with intent to deliver, and possession of a stolen firearm. CPA 160, 161, 162, 163, 164. In addition, the jury found that defendant Alexander was armed with a firearm for Count I, and Count II occurred within 1,000 feet of a school bus stop. CPA 166, 167, 169.

The jury found defendant Harrison guilty of the lesser included crime of unlawful possession of Ecstasy, and guilty as charged on all other counts. CPH 185, 186, 187, 188, 189, 190, 191, 192. The jury also found

² The court gave the jury one set of instructions for both defendants. While each defendant separately designated the court's instructions to the jury, the State has attached one copy as an appendix to this brief.

that defendant Harrison had been armed with a firearm during the commission of Count III, and Count IV occurred within 1,000 feet of a school bus stop. CPH 194, 196 197.

On October 24, 2008, the court sentenced defendant Alexander to 18³ months on Count I, 6 months on Count II, and 15 months on Count V. CPA 177-190. The court also imposed a firearm sentence enhancement of 18 months on Count I, and a school zone enhancement of 24 months on Count II. CPA 177-190. The court sentenced defendant Harrison to 18⁴ months on Count III, 12 months plus one day on Count IV, and four months on counts V-VIII. CPH 208-222.

The defendants filed timely notices of appeal. CPA 200; CPH 225-242.

2. Facts

On July 25, 2007, at approximately 6:50 a.m., Pierce County Sheriff's deputies arrived at 6811 Lakewood Drive, Apartment 66,

³ Defendant Alexander had an offender score of two, giving him a standard range of 51-68 months on Count I, 0-6 months on Count II, and 13-17 months on Count V. CPA 177-190. The State believes that both defendants received improper exceptional sentences downward. However, as the court imposed a sentence recommended by the State and neither defendant challenges the term of their sentence, that issue is not before this court.

⁴ Defendant Harrison had an offender score of five, giving her a standard range of 68+ - 100 months on Count III, 6+ - 18 months on Count IV, and 4-12 months on Counts V-VIII. CPH 208-222.

Lakewood, Washington to serve a search warrant.⁵ RP 266, 328, 482, 562, 590. The officers knocked and loudly announced their presence twice, while another officer used the public address system on a patrol car to announce the officers' presence, as well. RP 267, 329, 564. When no one answered the door, the officers forced entry. RP 267, 482.

As they attempted to push the door open, they found a couch and coffee table shoved against the door, barricading it from the inside. RP 333, 483, 544, 720. The officers gained entry only after they were able to force the couch out of the way. RP 484, 720.

Once inside, the first two officers observed a naked woman running from the bathroom to the bedroom. RP 334, 484. Deputies Brand and Shaviri followed her to the bedroom, but the woman slammed the door shut and blocked it with her body. RP 334, 484-85, 721. Deputy Brand attempted to gain entry by kicking the door open twice, but he was unsuccessful. RP 378, 485. Finally, the deputies put their shoulders into the door, causing the entire door to fall inward onto the woman. RP 485, 720-22. The deputies took the woman, later identified as defendant Harrison, into custody without further incident. RP 337-38, 486.

Meanwhile, Deputies Frye and Johanson confronted defendant Alexander in the apartment's bathroom. RP 269-70, 801. The deputies

⁵ The validity of the warrant was not challenged at trial or on appeal. The officers acquired the warrant to search defendant Alexander's dwelling after a month-long investigation. RP 572-77, 592.

engaged in a shoving match with defendant Alexander over the door. RP 269, 801. When the deputies finally entered the bathroom, defendant Alexander continued to resist efforts to restrain him. RP 271, 801. Deputy Frye eventually had to strike defendant Alexander several times on the side of his face to subdue him and take him into custody. RP 427.

Once both defendants were in custody, the deputies searched the apartment. RP 488, 802. The officers found, in various locations within the apartment, several containers with marijuana residue, three digital scales, and a grinder used for marijuana. RP 281, 283, 284-85, 312-13, 730-31. They found empty Swisher Sweet's boxes⁶ with marijuana residue inside. RP 283-84. A container in the kitchen revealed 28 blue and red Ecstasy pills. RP 506. The bag defendant Alexander threw into the toilet contained six smaller bags, four of which contained 100 blue and red Ecstasy pills and two contained wet, purple paste. RP 273-74, 461. The officers located 37 green Ecstasy pills in defendant Harrison's purse and \$1,000.00 in cash in defendant Alexander's trousers, both located in the living room. RP 496, 498, 502. In a second purse located in the bedroom closet, they found numerous documents with defendant Harrison's name, together with credit cards, checkbooks, and passports of people unrelated to either defendant. RP 612. Finally, the officers found a

⁶ Swisher Sweets are cigarillos that are often used to make "blunts." RP 868. A blunt is a cigar or cigarillo that has had its tobacco replaced with marijuana. RP 439.

gun, later confirmed to be stolen, under the head of the bed, near the edge. RP 304, 307.

Deputy Darby interviewed each defendant separately. RP 597-98. Defendant Harrison waived her *Miranda*⁷ rights and immediately wanted to know “who the snitch was that was in her apartment.” RP 599. Defendant Harrison told Deputy Darby that she had been living at the apartment for seven to eight months and had been dating defendant Alexander for approximately one year. RP 599. Defendant Harrison also stated that she had no source of income and that she had no idea that drugs were being sold from the apartment. RP 599.

Defendant Alexander also waived his *Miranda* rights. RP 600. He said he had been staying at the apartment for several months and that defendant Harrison was his girlfriend. RP 601. He told Deputy Darby he had a key to the apartment. RP 697. Defendant Alexander informed Deputy Darby that he “rarely” sold Ecstasy, and when he did sell, it was for five dollars per pill. RP 601. He said he “occasionally” sold marijuana, but sold an ounce to his close friends on a weekly basis. RP 601. Defendant Alexander told Deputy Darby that there was a stolen firearm and marijuana in the apartment. RP 601-02. He also stated that the deputies would find approximately 500 Ecstasy pills in a blue box near his bed. RP 603. His explanation for having the firearm was that

⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

approximately two months prior to the warrant being served, someone had forced entry into his residence, pistol-whipped defendant Harrison, and stolen marijuana from him. RP 603.

Defendant Alexander did not testify, but defendant Harrison testified on her own behalf. RP 859. According to defendant Harrison she and defendant Alexander ended their relationship shortly after they were arrested in the current case. RP 860. She claimed that defendant Alexander never lived in the apartment; but that he was “splitting” his time between the apartment and his daughter’s house. RP 865-66. Defendant Harrison admitted that defendant Alexander always had access to the apartment, even when she was not present. RP 866. Defendant Alexander would “party” at the apartment when she was not home. RP 903.

Defendant Harrison was not surprised that there were drugs in the apartment as she and defendant Alexander were regular drug users. RP 867. Defendant Harrison claimed that she smoked marijuana every day, all day, estimating her use between seven and twenty grams per day. RP 869. She also claimed ownership of the 36 green Ecstasy pills, stating that it was one week’s supply. RP 870. She also had digital scales to weigh the marijuana she purchased and to weigh the amounts she place in the Swisher Sweets. RP 871.

Defendant Harrison claimed to have no knowledge of the rest of the Ecstasy found in her apartment. RP 872. According to defendant

Harrison, she was not selling drugs, was not helping defendant Alexander sell drugs, and did not know if defendant Alexander was engaged in selling drugs. RP 871-72. According to defendant Harrison, she bought marijuana in bulk for personal use. RP 926.

Defendant Harrison also claimed that she had the various credit cards, checkbooks, and passports in her purse because defendant Alexander's cousin, DeSean Ruch, had left them at her apartment in a backpack. RP 874. After Ruch had left his backpack at her apartment for two weeks, she removed his important documents from the backpack to her own purse so "nothing would come up missing." RP 875.

Defendant Harrison testified that she pushes her couch and coffee table against the door every night for protection. RP 882. Someone had broken into her apartment, hit her with a pistol, and stole marijuana and money from her. RP 882-83.

C. ARGUMENT.

1. AS DEFENDANT ALEXANDER FAILED TO OBJECT TO ANY OF THE TESTIMONY HE NOW CONTENDS IS IMPROPER OPINION TESTIMONY, HE HAS FAILED TO PRESERVE THIS ISSUE ON APPEAL.

Generally, when a defendant does not object to impermissible opinion testimony, he has failed to preserve the issue for appeal. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *review*

denied, 129 Wn.2d 1007 (1996); ER 103(a)(1). Only an improper opinion which deprives the defendant of his right to a jury trial may be raised for the first time on appeal. See **Kirkman**, 159 Wn.2d at 926-27.

Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. **Kirkman**, 159 Wn.2d at 927. However, our Supreme Court has explained that admission of witness opinion testimony on an ultimate fact without objection is not automatically reviewable as a manifest constitutional error. **Kirkman**, 159 Wn.2d at 933, 936-37; RAP 2.5(a)(3). To qualify as such "manifest" error, a witness must make an explicit or almost explicit statement expressing a personal opinion as to the defendant's guilt or veracity, or the veracity of another witness. **Kirkman**, 159 Wn.2d at 933, 936-37.

In **State v. Montgomery**, 163 Wn.2d 577, 183 P.3d 267 (2008), officers had followed two defendants while they purchased items which could be used to make methamphetamine. One of the officers testified that he, "felt very strongly that [the defendants] were, in fact, buying ingredients to manufacture methamphetamine based on what [the defendants] had purchased, the manner in which [the defendants] had done it, going from different stores, going to different checkout lanes." *Id.* at 587-88. A second officer testified that the defendants were not apprehended at the store because, "[i]t's always our hope that if the person

buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location.” *Id.* at 588. The officer then testified, “those items were purchased for manufacturing.” *Id.* Finally, the forensic chemist testified that the combined purchases made by the defendant’s “lead me toward this pseudoephedrine is possessed with intent.” *Id.*

The Court held that each of these statements was an improper opinion regarding the defendant’s guilt as each went to the core issue and only disputed element, the defendant’s intent. *Montgomery*, 163 Wn.2d at 594. The Court found that the testimony was quite direct, and the explicit expressions of personal belief were most troubling. *Id.* Yet despite the explicit language, the Court ultimately ruled that Montgomery failed to preserve the issue for appeal as he failed to object each of the statements. *Id.* at 596. The Court determined that there was no actual prejudice since the jurors were instructed that they were the sole judges of credibility of witnesses and a timely objection would have cured any potential error. *Id.*

Defendant Alexander failed to object to any of the statements to which he now assigns error. As none of these statements were explicit or near-explicit statements expressing the officers’ personal opinions as to defendant’s guilt or veracity, they are not manifest and cannot be raised for the first time on appeal.

- a. Deputy Darby's testimony that narcotics were being repackaged was not a statement expressing the officer's personal opinion of defendant Alexander's guilt or veracity.

On redirect examination, Deputy Darby testified that the presence of the baggies found in the apartment shows that “there is [sic] narcotics coming in, being repackaged, and being sold.” RP 714. Defendant Alexander failed to object to the testimony; therefore he has waived this issue on appeal, unless he can show the error is manifest. Defendant Alexander cannot make such a showing.

Deputy Darby's statement was in response to questioning by both defendants questions on cross-examination. Defendant Alexander's questions suggested that plastic baggies could serve a number of innocuous purposes, none of which related to drug use. RP 706. Defendant Harrison's questions related to whether drug buyers acquire the plastic baggies in which the drugs are packaged, thereby suggesting that the presence of baggies was consistent with personal use. RP 709-10. Deputy Darby acknowledged that drug buyers receive the packaging as well as the drugs during a transaction. RP 709-10. On redirect, Deputy Darby testified that it was not uncommon in drug sales to have multiple tiers of buying and selling before the final purchase by the consumer, and that the presence of four separate sizes of plastic baggies, some with marijuana residue, indicated that large quantities of marijuana were being repackaged into smaller sizes for transport. RP 713. Deputy Darby did

not testify that he believed the defendants' were selling marijuana out of the apartment. Nor did he express an opinion as to the veracity of defendant Alexander or any witness. As Deputy Darby's testimony was not an explicit or near-explicit statement expressing a personal opinion as to defendant Alexander's guilt or veracity, defendant Alexander's failure to object precludes him from raising this issue for the first time on appeal.

- b. Deputy Olesen's testimony relating to the general acquisition of a search warrant is impermissible opinion testimony.

During direct examination, Deputy Olesen testified that, during a narcotics investigation:

Well, somehow or another somebody becomes a suspect. You either buy from them or, through investigation, you figure out what is going on. You apply - - when you get enough probable cause, reason to, you apply for a search warrant, and then you serve the search warrant.

RP 327. Defendant Alexander did not object to this testimony. RP 327.

Deputy Olesen's testimony related to how officers generally perform an investigation and was not an opinion of defendant Alexander's guilt, explicit or otherwise.

- c. Testimony that defendant Alexander lived at the apartment was not impermissible opinion testimony.

During direct and cross examination, several of the officers testified that defendant Alexander lived at the apartment. *See* RP 268,

591-93, 624, 696-97. Deputy Darby testified that he interviewed defendant Alexander at the scene. RP 600. During the interview, defendant Alexander told Deputy Darby that he had been staying at the apartment for several months and that he had a key. RP 601, 697. He also admitted that he knew that there was Ecstasy, a stolen firearm, and marijuana inside the apartment. RP 601-02. Defendant Alexander's theory of the case was not that he was unaware of, or had no control over, the drugs within the apartment, but that the drugs were for personal use only. That the officers testified that defendant Alexander lived in the apartment was not the equivalent as testifying that defendant Alexander was selling drugs out of the apartment.

2. THE SPECIAL VERDICTS SHOULD STAND WHERE THE JURY RETURNED UNANIMOUS DECISIONS REGARDING WHETHER DEFENDANT ALEXANDER COMMITTED THE CRIMES WHILE ARMED WITH A FIREARM AND WITHIN 1000 FEET OF A SCHOOL ZONE.

Generally, courts will not review an alleged error raised for the first time on appeal, unless the defendant demonstrates a "manifest error affecting a constitutional right." RAP 2.5(a). A challenge to the court's instruction to the jury raised for the first time on appeal must also be based on constitutional grounds in order to be preserved. See *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996).

“To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.” *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009). The Washington State constitution protects a criminal defendant’s right to a unanimous jury verdict. Const. art. I §§3, 21, 22; *State v. Depaz*, 165 Wn.2d 842, 852-53, 204 P.3d 217 (2009). The unanimity requirement has been applied to the finding of aggravating factors in a murder trial. See *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003). The unanimity requirement under a general verdict extends to that of a special verdict. See *State v. Bashaw*, 144 Wn. App. 196, 202, 182 P.3d 451 (2008), *review granted*, 165 Wn.2d 1002 (2008).

The right to a unanimous verdict is not compromised by instructional error if the record establishes the concurrence of all jurors. See *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963), *see also*, *State v. Davis*, 141 Wn.2d 798, 870 n. 388, 10 P.3d 977 (2000) (error without prejudice is not grounds for reversal).

In *Goldberg*, the defendant was found guilty of murder in the first degree by a unanimous verdict. 149 Wn.2d at 891. The jury answered “no” to a special verdict regarding an aggravating factor. *Id.* The court polled the jury and discovered that only three jurors had answered “no.” *Id.* The court ordered the jury to continue deliberations on the aggravating factor. *Id.* On review, the Supreme Court held that, while a trial court has the authority to instruct a jury to continue deliberations when it is

deadlocked on a verdict it has no such authority with regard to a special verdict. *Id.* at 894. The Court concluded that a special verdict need not be unanimous in order to be final. *Id.* at 895. Therefore; a unanimous “no” special verdict and a blank, or non-unanimous special verdict, have the same effect.

Here, the jurors were instructed to act impartially in reaching a verdict, not to change their minds only in order to reach a verdict, and that their verdict must be unanimous. Appendix A (Jury Instructions 1, 42, 43). The jury also received instructions relating to the special verdicts. Appendix A (Jury Instructions 44, 45, 48). In the special instruction, the jury was again reminded, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Appendix A (Jury Instructions 44, 45).

Defendant Alexander contends that the instructions were erroneous because it required the jury to unanimously answer “no” to the special verdict question of whether the crimes occurred while either defendant was armed with a firearm or that they occurred within 1,000 feet of a school bus stop. *See* Appellant Alexander’s Opening Brief at 29-33. Relying on *Goldberg*, defendant Alexander argues that the instruction misstates the law because a jury is allowed to answer a special verdict question with a “no” that is not unanimous. Yet, defendant Alexander did not object to this instruction below, nor does he provide any authority as to whether the requirement of a non-unanimous special verdict is an issue of

constitutional magnitude. This court should decline to consider this issue as it was not properly preserved below.

In addition, defendant Alexander suffered no prejudice as a result of the instruction. The special verdict forms show that the jury was unanimously satisfied beyond a reasonable doubt that defendant Alexander possessed marijuana with intent to deliver within 1,000 feet of a school bus stop. CP 166. The jury was also unanimously satisfied beyond a reasonable doubt that defendant Alexander, or an accomplice, was armed with a firearm during the commission of the crime of unlawful possession of controlled substance (Ecstasy). CP 166. The jury unanimously agreed that the State failed to prove beyond a reasonable doubt that defendant Alexander, or an accomplice, was armed with a firearm during the commission of the crime of unlawful possession of a controlled substance with intent to deliver. CP 166. The jury properly declined to fill out the special verdict forms for the greater offense under Count I, when it returned a guilty verdict of the lesser offense. CP 165, 168.

Because defendant Alexander received his constitutional right to a unanimous jury verdict, he has failed to show he suffered any harm as a result of the instruction. Accordingly, the sentence enhancements based on the unanimous special verdicts are valid.

3. DEFENDANTS ALEXANDER AND HARRISON
RECEIVED EFFECTIVE ASSISTANCE OF
COUNSEL WHERE COUNSEL DID NOT
OBJECT TO PROPER TESTIMONY.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “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 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An

attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Here, both defendants allege ineffective assistance of counsel for counsels' failure to object to improper opinion testimony. Neither defendant can show deficient performance or prejudice.

- a. Defendant Alexander's counsel was not required to object to testimony which did not express a personal opinion as to defendant's guilt.

Defendant Alexander claims he received ineffective assistance of counsel for counsel's failure to object to the alleged opinion testimony as outlined above. As argued above, the challenged testimony did not constitute any of the officers' personal opinion as to defendant Alexander's guilt or veracity, or the veracity of any witness.

- b. Both defendant Alexander's counsel and defendant Harrison's counsel provided effective representation where both did not object to Deputy Darby's expert testimony.

It has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses

an opinion on the ultimate fact to be found by the trier of fact. *Kirkman*, 159 Wn.2d at 929 (citing *Gerberg v. Crosby*, 52 Wn.2d 792, 795-96, 329 P.2d 184 (1958)). *See also* ER 704 (testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact), ER 702 (if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise). The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion. *Kirkman*, 159 Wn.2d at 929. A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Kirkman*, 159 Wn.2d at 927.

Deputy Darby's training and experience was sufficient to qualify him as an expert in drug investigations. The average juror would not be familiar with how drug dealers package or repackage controlled substances. Plastic baggies serve numerous innocuous purposes. The presence of baggies in several different sizes as being used for drug transactions is specialized knowledge that an expert would know, but the average juror would not. As Deputy Darby's testimony helped the jury understand the evidence, it was not improper.

As counsel was not required to object to proper testimony, he cannot show counsel's failure to object was deficient performance.

In addition, defendant Alexander cannot show prejudice by counsel's failure to object to the testimony. As the testimony was proper, counsel's objection would have been overruled by the court. Even if counsel had objected, the result of the trial would have been the same.

Considering the evidence presented at trial, it is unlikely that counsel's performance affected the outcome of the case. Defendant Alexander was arrested in an apartment strewn with 55 grams of marijuana stashed in various places, three digital scales, empty plastic baggies with marijuana residue, and hundreds of Ecstasy pills. He attempted to obstruct the officers' efforts to place him under arrest in a bathroom where 600 Ecstasy pills were melting in the toilet. He admitted to Deputy Darby that he resided at the apartment, and the officers' surveillance confirmed his residence. Defendant Alexander admitted there was a firearm in the apartment and informed Deputy Darby that he purchased the gun off the street after a home invasion robbery where someone had broken in to steal the drugs he kept there. Defendant Alexander admitted that he sometimes sold marijuana to his friends. He also stipulated that the apartment was within 1,000 feet of a school bus stop. RP 857. Also, the jury acquitted defendant Alexander of the greater charge of possession of Ecstasy with intent to deliver, and convicted him of the lesser offense of possession of Ecstasy. CP (verdict forms).

Based on the evidence presented at trial and the jury's verdicts, there is no reasonable likelihood that the outcome would have been different but for counsel's performance.

- c. Defendant Harrison's counsel's failure to object to proper testimony was not deficient performance nor can she show prejudice.

A witness may testify in terms that include inferences or conclusions only if the inferences and conclusions are based on personal knowledge. See ER 701; *State v. Wigley*, 5 Wn. App. 465, 468, 488 P.2d 766 (1971); *United States v. Guzzino*, 810 F.2d 687, 699 (7th Cir.1987).

Deputy Darby testified that, in his training and experience, co-conspirators to a crime can include boyfriends, girlfriends, husbands, wives, and roommates. RP 656. Co-conspirators can assist a drug seller by selling for the dealer, acting as the dealer's source, or conducting other crimes, such as fraud, forgery, computer theft, or identity theft to generate money. RP 656. When asked how these other crimes could further the sale of narcotics, Deputy Darby responded:

Several times users as well as sellers will not only trade money, but they will trade possessions. They will trade stolen merchandise. They will trade credit cards. They will trade anything that they can - - that has a monetary value that they can get in exchange for their drugs. Dealers will often accept this as payment for narcotics.

RP 656-57.

Deputy Darby's expert testimony was not objectionable. Deputy Darby, a ten-year veteran of the Pierce County Sheriff's department, had been involved in hundreds of narcotics investigations where warrants were issued. RP 561-62. He has been in the role of case officer approximately 50 times. RP 562. Deputy Darby's experience has given him specialized knowledge relating to drug investigations. Credit cards and a passport, all with different names, were found in the defendants' bedroom closet. RP 614. That credit cards are exchanged for drugs is a fact that would not be known to the general public and Deputy Darby's testimony was helpful to the trier of fact.

Moreover, Deputy Darby's testimony was in direct response to the defendants' questions on cross-examination. On cross-examination, defendants pointed out that the pictures on all credit cards and passports looked nothing like either defendant, implying that defendants would have to attempt to pass the cards off as their own in order to perform a criminal act. *See* RP 632, 640-44. Defendant Harrison also queried Deputy Darby about anything that she or defendant Alexander might have said that implicated her in the sale of drugs from the apartment. *See* RP 652-55. Deputy Darby's testimony of how credit cards could be used in a drug transaction countered the defendants' implication that only an attempt to utilize a stolen credit card as one's own can be considered a criminal act.

Finally, Deputy Darby's testimony was not speculative, nor was it an impermissible expression of his personal opinion. Deputy Darby's

expert testimony was properly based on his personal experience and related to the practices of drug dealers in general. He did not suggest that defendant Harrison was assisting defendant Alexander. He did not claim that the credit cards found in the defendants' closet were acquired through drug sales; such a claim would have been speculation. He also never claimed that he believed defendant Harrison acquired the credit cards and passports through drug sales. As the deputy did not speculate as to the use of the stolen items in this case, nor did he express a personal opinion, counsel's performance was not deficient when he did not object to proper testimony.

Defendant Harrison also cannot show prejudice. As the testimony was proper, the court would have overruled an objection. Counsel's failure to object did not affect the verdict.

Even if court would have sustained an objection, it is unlikely that counsel's failure to raise one affected the verdict. Officers found a credit card, two debit cards, a passport, and a checkbook, all with different names and belonging to neither defendant. RP 614. All of these items were found in a purse containing receipts and mail in defendant Harrison's name. RP 614. Defendant Harrison stipulated that all of the items with other peoples' names on them were stolen and that she was not authorized to possess them. CP 38-39, 42-43. While defendant Harrison claimed that the items belonged to defendant Alexander's cousin, jury was free to find her explanation not credible and to infer that she possessed the items with

the intent to commit a crime. Defendant Harrison cannot show prejudice as she has failed to show that, but for counsel's deficiency, the outcome of the trial would have been different.

4. DEFENDANT HARRISON'S SENTENCE IS NOT INDETERMINATE WHERE IT COMPORTS WITH THE SUPREME COURT'S HOLDING IN ***IN RE BROOKS***, 166 Wn.2d 664, 211 P.3d 1023 (2009).

"A court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime." RCW 9.94A.505(5). Nor may a court impose a firearm enhancement that increases the sentence to exceed the statutory maximum. RCW 9.94A.533(3)(g).

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence. If the addition of a firearm or deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

RCW 9.94A.599. Firearm and school zone sentence enhancements shall run consecutively to all other sentencing provisions. RCW 9.94A.533(3), (6).

When a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory

maximum for the crime, the judgment and sentence must explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. *In re Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

In *Brooks*, the defendant was sentenced to 120 months confinement plus 18 to 36 months of community custody for a class B felony. 166 Wn.2d at 666-67. The State included language in the judgment and sentence, clarifying that Brooks' period of total confinement and community custody together could not exceed the 120-month statutory maximum term for a class B felony. *Id.* at 667. Brooks challenged the sentence on several grounds, including an argument that the sentence was indeterminate under *State v. Linderud*, 147 Wn. App. 944, 197 P.3d 1224 (2008). 166 Wn.2d at 673-74. The Court held that Brooks' sentence was not indeterminate and that when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence to explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. *Id.* at 674-75.

Here, defendant Harrison was convicted of one count of unlawful possession of Ecstasy (Count III), one count of unlawful possession of marijuana with intent to deliver (Count IV), two counts of possession of stolen property in the second degree (Counts V, VIII), one count of

identity theft in the second degree (Count VI), and one count of unlawful possession of a payment instrument (Count VII). CPH 208-222. Each crime carries a five-year statutory maximum term. *See* RCW's.

Defendant Harrison also received a firearm sentence enhancement on Count III, a school zone enhancement on Count IV, and nine to twelve months of community custody on Counts III and IV. CPH 208-222.

Defendant Harrison had an offender score of five. CPH 208-222.

With an offender score of five, the following standard ranges applied:

Count III	68+ – 100 months (+ 18 months firearm)
Count IV	6+ – 18 months (+ 24 months school zone)
Count V	4 – 12 months
Count VI	4 – 12 months
Count VI	4 – 12 months
Count VII	4 – 12 months
Count VIII	4 – 12 months

CPH 208-222. The court imposed 18 months on count III, 12+ months on count IV, and four months on the remaining counts, all to run concurrent.

CPH 208-222. Paragraph 4.6 of the judgment and sentence states, in relevant part: “That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.” CPH 208-222. On page eight of the judgment and sentence, the court added:

Standard sentencing range adjusted to comply with the statutory maximum. Defendant is not to serve, including community custody, that [sic] exceeds the five years.

CPH 208-222. Defendant Harrison's sentence complies with the requirements as set forth in **Brooks**.

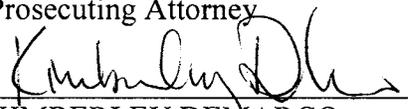
Defendant Harrison contends that her term of confinement combined with community custody represents an indeterminate sentence as it places the burden on the Department of Corrections to ensure that the statutory maximum is not violated. *See* Appellant's Brief (Harrison) at 21. Defendant Harrison relies on **Linerud** to support her argument. As the Supreme Court has already rejected this argument in **Brooks**, her contention is without merit.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm the defendants' convictions and sentences.

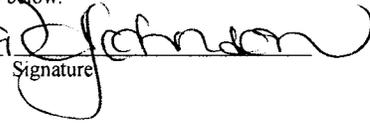
DATED: DECEMBER 10, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

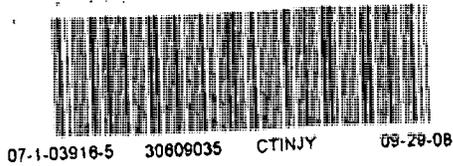
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/17/09 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

APPENDIX “A”

Court's Instructions to the Jury



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

v.

LANCE THOMAS ALEXANDER, JR.

TIFFANY NICOLE HARRISON

Defendants.

NO. 07-1-03915-7

NO. 07-1-03916-5 ✓

COURT'S INSTRUCTIONS TO THE JURY

DATED: September ²³ ~~22~~, 2007. *BEL*

Bryan Chushcoff
BRYAN CHUSHCOFF, JUDGE

10700 3/2/2000 11000

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the

things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him or her in any way.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 7

Evidence that a defendant has previously been convicted of a crime is not evidence of that defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of that defendant and for no other purpose.

INSTRUCTION NO. 8

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 9

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. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 10

It is a crime for any person to possess with intent to deliver a controlled substance.

INSTRUCTION NO. 11

Methylenedioxymethamphetamine (MDMA/Ecstasy) is a controlled substance.

INSTRUCTION NO. 12

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

INSTRUCTION NO. 13

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 14

Deliver means the actual or constructive transfer of a controlled substance from one person to another.

INSTRUCTION NO. 15

To convict the defendant, Lance Alexander of the crime of possession with intent to deliver a controlled substance as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit, - Methylenedioxyamphetamine (MDMA/Ecstasy);
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance to wit, - Methylenedioxyamphetamine (MDMA/Ecstasy); and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant, Tiffany Harrison of the crime of possession with intent to deliver a controlled substance as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit, - Methylenedioxymethamphetamine (MDMA/Ecstasy);
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance to wit, - Methylenedioxymethamphetamine (MDMA/Ecstasy); and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

The defendants are charged with Unlawful Possession of a Controlled Substance with Intent to Deliver, to-wit: Ecstasy (MDMA). If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Unlawful Possession of a Controlled Substance.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 18

It is a crime for any person to possess a controlled substance.

INSTRUCTION NO. 19

To convict the defendant, Lance Thomas Alexander, of the crime of possession of a controlled substance to wit: Methylenedioxymethamphetamine, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit: Methylenedioxymethamphetamine; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant, Tiffany Harrison, of the crime of possession of a controlled substance to wit: Methylenedioxymethamphetamine, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit: Methylenedioxymethamphetamine; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

Marijuana is a controlled substance.

INSTRUCTION NO. 22

To convict the defendant, Lance Alexander of the crime of possession with intent to deliver a controlled substance as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit, - Marijuana;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance to wit, - Marijuana; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant, Tiffany Harrison of the crime of possession with intent to deliver a controlled substance as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit, - Marijuana;

(2) That the defendant possessed the substance with the intent to deliver a controlled substance to wit, - Marijuana; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

The defendants are charged with Unlawful Possession of a Controlled Substance with Intent to Deliver, to-wit: Marijuana. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Unlawful Possession of a Controlled Substance.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 25

To convict the defendant, Lance Thomas Alexander, of the crime of possession of a controlled substance to wit: Marijuana, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit: Marijuana; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

To convict the defendant, Tiffany Harrison, of the crime of possession of a controlled substance to wit: Marijuana, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of July, 2007, the defendant possessed a controlled substance to wit: Marijuana; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

A person commits the crime of possessing a stolen firearm when he or she possesses, carries, delivers, sells, or is in control of a stolen firearm.

Possessing a stolen firearm means knowingly to receive, retain, possess, conceal, or dispose of a stolen firearm knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 28

A "firearm" is a weapon or device from which a projectile may be ~~fire~~ fired by an explosive such as gunpowder.

*fired
BCC*

INSTRUCTION NO. 29

To convict the defendant Lance ALEXANDER of the crime of possessing a stolen firearm in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007 the defendant possessed, carried, delivered, sold or was in control of a stolen firearm;
- (2) That the defendant acted with knowledge that the firearm had been stolen;
- (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses a stolen access device.

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 31

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 32

Stolen means obtained by theft.

INSTRUCTION NO. 33

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

INSTRUCTION NO. 34

To convict the defendant Tiffany HARRISON of the crime of possessing stolen property in the second degree in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant knowingly received, retained, possessed, concealed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property was an access device belonging to Brad Goodwin and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

To convict the defendant Tiffany HARRISON of the crime of possessing stolen property in the second degree in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July, 2007, the defendant knowingly received, retained, possessed, concealed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property was an access device belonging to Shallen Green and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

A person commits the crime of Identity Theft in the Second Degree when he or she knowingly obtains, possesses, uses or transfers a means of identification of another person, living or dead, with the intent to commit, or to aid or abet, any crime and did not obtain credit, money, goods, services or anything of value.

"Means of identification" means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

INSTRUCTION NO. 37

To convict the defendant Tiffany Nicole Harrison of the crime of Identity Theft in the Second Degree as charged in Count VI, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of July 2007, the defendant knowingly obtained, possessed, used or transferred a means of identification or financial information of another person, living or dead, to-wit: In Suk Goodwin; and
- (2) That the defendant acted with the intent to commit, or to aid or abet, any crime; and
- (3) That the defendant did not obtain any credit, money, goods, services or anything of value; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 38

A person commits the crime of Unlawful Possession of Payment Instruments when he or she knowingly possesses two or more checks in the name of a person, or the routing number, or account number of a person, without permission of the person to possess such check and with the intent to either deprive the person of possession of such check or to commit theft, forgery, or identity theft.

INSTRUCTION NO. 39

A check means an order, payable on demand and drawn on a bank, a cashier's check, or teller's check.

INSTRUCTION NO. 40

"Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession.

INSTRUCTION NO. 41

To convict the defendant, Tiffany Harrison of Unlawful Possession of Payment Instruments in Count VII each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the 25th of July, 2007, the defendant, Ms Harrison possessed two or more checks, alone or in combination, in the name of a person or with routing or account numbers of a person;
- 2) Without the permission of the person to possess such payment instruments;
- 3) With intent to either deprive that person of its possession or commit theft, forgery, or identity theft.
- 4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 42

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 43

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and several verdict forms for each defendant. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Unlawful

Possession of a Controlled Substance with Intent to Deliver as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A for that count, the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A for that crime.

If you find the defendant guilty on verdict form A, do not use verdict form B for that count. If you find the defendant not guilty of the crime of Unlawful Possession of a Controlled Substance with Intent to Deliver, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Unlawful Possession of a Controlled Substance. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B for that count, the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Thereafter, consider the charged crimes for each ~~of~~ defendant using the corresponding verdict forms. *BEC*

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 44

If you find a defendant guilty of possessing with the intent to deliver a controlled substance, it will then be your duty to determine whether or not the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose.

all If you find a defendant not guilty of Unlawful Possession of a Controlled Substance, to wit ~~MDMA~~ methylenedioxymethamphetamine (MDMA/Ecstasy), do not use the special verdict form as to that defendant. If you find that defendant guilty, you will complete the special verdict form. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant delivered or possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict "yes" as to that defendant.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered or possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict "no."

INSTRUCTION NO. 45

If you find a defendant guilty of possessing with the intent to deliver a controlled substance, it will then be your duty to determine whether or not the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose.

If you find a defendant not guilty of Unlawful Possession of a Controlled Substance, to wit, marijuana, do not use the special verdict form as to that defendant. If you find that defendant guilty, you will complete the special verdict form. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that a defendant delivered or possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict "yes" as to that defendant.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that a defendant delivered or possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the special verdict "no."

INSTRUCTION NO. 46

"School bus route stop" means a school bus stop as designated by a school district.

INSTRUCTION NO. 47

It is a defense to an allegation that the defendant possessed with the intent to deliver a controlled substance within one thousand feet of a school bus route stop designated by a school district that:

- (1) the defendant's conduct took place entirely within a private residence; and
- (2) no person under eighteen years of age was present in the private residence at any time during the commission of the offense; and
- (3) the defendant's conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance for profit.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that the defense is more probably true than not true. If you find that this defense has been established, it will be your duty to answer the special verdict "no".

INSTRUCTION NO. 48

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the commission of the crime of Unlawful Possession of a Controlled Substance With Intent to Deliver (Methylenedioxymethamphetamine MDMA/Ecstasy).

The State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the commission of the crime of Unlawful Possession of a Controlled Substance ^(Methylenedioxymethamphetamine) ~~and~~ ^{OR} Unlawful Possession of a Controlled Substance With Intent to Deliver (Marijuana). ^{BCC} ^{IFEC}

If you convict a defendant of the lesser included offense of the charge Unlawful Possession of a Controlled Substance, (Methylenedioxymethamphetamine MDMA/Ecstasy) you must also determine if that defendant or an accomplice was armed at the time of that offense.

The State must also prove beyond a reasonable doubt that there is a connection between the firearm and defendant or an accomplice and between the firearm and the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes. *If one participant in a crime is armed with a firearm, all accomplices are deemed to be so armed, even if only one firearm is involved.*

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.