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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Bowen his constitutional right to an open public trial by conducting portions of voir dire in chambers without engaging in a Bone –Club analysis on the record.
2. The trial court erred in permitting Bowen to be represented by counsel who provided ineffective assistance by failing to object to the court conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record.
3. The trial court erred in not taking count I from the jury for lack of sufficiency of the evidence that Bowen possessed the methamphetamine found in the pickup truck.
4. The trial court erred in not taking count II from the jury for lack of sufficiency of the evidence that Bowen possessed the firearm found in the pickup truck.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Bowen denied an open, public trial after he waived objection and made a Bone-Club analysis unnecessary under the rationale of Momah when, as a tactical decision, he agreed to and actively participated in limited in-chambers voir dire to select a jury that he felt was impartial?
2. Did Bowen receive ineffective assistance of counsel when his court-appointed attorney did not object to limited voir dire in chambers, actively participated in it and where his assignment of this error constitutes invited error?
3. Did the trial court did err by not taking either charge from the jury for lack of sufficient evidence when:
 - (a) both the drugs and gun were found in a truck registered to Bowen;
 - (b) the spoon and scale with methamphetamine were found behind the driver's seat;

- (c) the handgun was found in a nylon bag stuffed down between the driver and passenger's bucket seats; and
- (d) Bowen was the driver and sole occupant in his truck at the time of his arrest?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Supplemental Report of Proceedings will be referred to as "SUPP RP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Bowen's recitation of the procedural history and facts and adds the following:

On June 12, 2008, Deputy Drogmund of the Mason County Sheriff's Department (MCSO) was on routine patrol in the area of Trail's Road in rural Belfair, WA. RP Vol.II 46: 18-24. While on patrol, he stopped a black, Dodge pickup truck. RP Vol.II 60: 1-8. A truck with a camper attached to it had been driving ahead of Bowen in the black, Dodge pickup truck. RP Vol.II 59: 22-25; 60: 1. Deputy Drogmund noted that when he saw both the truck with the camper attached to it and the black truck moving, that there were "at least two drivers." RP Vol.II 59: 6-7. The deputy checked the registration of the trucks, and found that

“Mr. Bowen” was the “registered owner” of both. RP Vol.II 60: 25; 61: 1-11.

When the black truck stopped, Deputy Drogmund saw that a door “had just opened and out walked Mr. Bowen.” RP Vol.II 60: 11-12. To Deputy Drogmund, it appeared that Bowen “was trying to run and get back in his [black] truck,” and he (Drogmund) “had to order [Bowen] several times not to do that.” RP Vol.II 60: 14-16.

Officer Steve Valley of the Department of Corrections (DOC), who at that time was filling in with the MCSO special operations group, was present and saw Bowen “getting out of” the “driver’s side” of the black pickup.” RP Vol.II 38: 2-3, 21-24. Officer Valley also saw that “two young girls¹” were in the truck ahead of the black truck, and told them to “stay inside.” RP Vol.II 37: 5, 14-15. There was “no one else” in the truck with the camper except for the “two juvenile females,” one of whom was driving. RP Vol.II 42: 25; 43: 1-9.

When Officer Valley discovered that Bowen was on active DOC supervision and not supposed to be in Mason County, he detained him and searched Bowen’s black pickup truck. RP Vol.II 40: 13-24. Officer Valley began his search with the inside area of the “single cab” black truck where Bowen had come from and found, behind the driver’s seat, “a

spoon that had white residue on it” and “a scale inside a glove that also had white residue on it.” RP Vol.II 41: 11-13, 14-16, 21. The white substance ultimately tested positive for methamphetamine. RP Vol.II 87: 14. Deputy Drogmund also searched the inside of Bowen’s black pickup and found “a firearm between the seats” and “inside of a nylon bag.” RP Vol.II 68: 3-5, 9. The firearm was, “a chrome double barrel small Derringer with black plastic handles.” RP Vol.II 69: 11-12. When Deputy Drogmund found the Derringer, “[i]t was unloaded.” RP Vol.II 71: 11-15.

Kathy Fultz testified that she purchased the Derringer from Brian Downs on June 10, 2008, and that the last time she had it, the gun was loaded and in “a little holster”; “[a] little black nylon-the barrel fit into it and then it Velcroed across the back.” RP Vol.II 103: 3-8; 108: 2-4; 12-13. Ms. Fultz stated that although she lost this firearm in June, 2008, that she did not tell anyone about her loss until mid-August, 2008. RP Vol.II 107: 16-19. Ms. Fultz explained that that she purchased the Derringer because:

I have a pit bull and I keep him on a chain to let him go outside. And a pit bull from down the road comes up and attacks him on his leash. So I called the owner of the pit bull and told him to please keep his dog tied up so he didn’t attack my dog anymore or I was gonna shoot him [the dog].

¹ Patience K. and Morticia A., juveniles. RP Vol.II 74: 11-12.

RP Vol.II 104: 12-17; 105: 12.

Brian Downs testified that had not sold Ms. Fultz a firearm of any kind.

RP Vol.II 132: 4-5.

3. Summary of Argument

The State respectfully requests the Court to affirm Bowen's convictions for unlawful possession of a firearm in the first degree and unlawful possession of a controlled substance-methamphetamine because:

(a) Bowen waived objection to the in-chambers voir dire, actively participated in it, and in the process made a Bone-Club analysis unnecessary; (b) received effective assistance of counsel; and (c) the evidence was sufficient for a jury to convict him as charged.

As the Supreme Court reasoned in State v. Momah, to ensure that a criminal defendant receives fundamentally fair trial, the accused is permitted to make "tactical choices" to advance his [her] own interests and ensure what he [or she] perceives as the fairest result. State v. Momah, 217 P.3d 321, 328 (2009). That Bowen's attorney agreed to and actively participated in voir dire in-chambers was a tactical choice on his part that made a Bone-Club analysis unnecessary under the rationale of Momah. For Bowen to first agree to in-chamber voir dire and then assign error to it on appeal constitutes invited error as the Supreme Court discussed in

Momah, for Bowen should not be allowed to mislead the trial court and receive a windfall, namely a new trial. Momah, 217 P.3d at 328.

The trial court also did not err by not taking either charge from the jury for lack of sufficient evidence because, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of either crime beyond a reasonable doubt.

Both the methamphetamine and the firearm were found in the driver's seat area of the black truck registered to Bowen, and in which he was the driver and sole occupant at the time of his arrest. Specifically, the spoon and scale with methamphetamine were found behind the driver's seat, and the handgun stuffed-down in a nylon bag between the driver and passenger's bucket seats.

Under the rationale of State v. Dodd, if someone is driving a car and is the sole occupant, he [she] has the necessary dominion and control of the "premises" to support the inference that he [or she] has constructive possession of any drugs inside. State v. Dodd, 8 Wash.App. 269, 274-275, 505 P.2d 830 (1973). This same rationale should apply to the firearm, as it too is an object, just as much as spoon or scale with methamphetamine on it is. While two juveniles, Patience K. and Morticia A., were with Bowen in the black truck immediately before his arrest, Bowen was alone

when law enforcement stopped him driving it. There is nothing to indicate that either juvenile had anything to do with the methamphetamine or handgun.

Although Kathy Fultz testified that she, Laverne Whitfield and another individual used Bowen's truck around the time of his arrest and that she accidentally left her holstered handgun in it, this testimony was not uncontested. While Ms. Fultz said she purchased the handgun from one Brian Downs, Downs testified that he never sold her any kind of firearm. On rebuttal, Deputy Drogmund also stated that Ms. Fultz's description of how she last had the handgun set-up before she lost it was inconsistent with the way he found it, in that he (Drogmund) found the handgun unloaded in a nylon bag or container, and not loaded in a Velcro holster, as she testified.

Because deference is given to the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence, the trial court acted within its discretion by allowing the jury to sift through this testimony and determine the facts. Error did not occur in Bowen's case, and the State respectfully requests the Court to affirm.

E. ARGUMENT

1. BOWEN WAS NOT DENIED AN OPEN PUBLIC TRIAL WAIVED OBJECTION AND MADE A BONE-CLUB ANALYSIS UNNECESSARY UNDER THE RATIONALE OF MOMAH WHEN AS A TACTICAL DECISION HE AGREED TO AND ACTIVELY PARTICIPATED IN LIMITED IN-CHAMBERS VOIR DIRE TO SELECT A JURY THAT HE FELT WAS IMPARTIAL.

Bowen was not denied an open, public trial, waived objection and made a Bone-Club analysis unnecessary under the rationale of Momah when, as a tactical decision, he agreed to and actively participated in limited in-chambers voir dire to select a jury that he felt was impartial.

Article I, sections 10 and 22 of the Washington State Constitution serve complementary and interdependent functions in assuring fairness of our judicial system, particularly in the context of a criminal proceeding. Momah, 217 P.3d at 325. Thus, the requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to the sense of the responsibility and to the importance of their functions. For these reasons, under article I, sections 10 and 22, a strong presumption exists that courts are to be open at all trial stages. Whether the right to a public trial has been violated is a question of law subject to de novo review.

Where article I, sections 10 and 22 are in conflict, the right to a public trial must be harmonized with the right to an impartial jury. Momah, 217 P.3d at 327. To achieve the proper balance, those rights are construed in light of the central aim of a criminal proceeding: to try the accused fairly. Further, to ensure that a criminal defendant receives a fundamentally fair trial, the accused is permitted to make tactical choices to advance his [or her] own interests and ensure what he perceives as the fairest result. Momah, 217 P.3d at 327-328. In our adversarial system, these are the basic rights of the accused. Momah, 217 P.3d at 328.

The right to a public trial can be waived only in a knowing, voluntary and intelligent manner. State v. Strode, 217 P.3d 310, 315 (2009); see City of Bellevue v. Acrey, 103 Wash.2d 203, 207-208, 691 P.2d 957 (1984)(waiver of the jury trial right must be affirmative and unequivocal).

When the prospect of in-chambers voir dire arose, the trial court judge, in consultation with counsel for both sides in Bowen's case inquired:

The Court: Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?

Mr. Dorcy: The State doesn't object.

Mr. Foley: Defense has no objection...SUPP RP 1: 3-8.

Although Bowen had the opportunity to object to in-chambers voir dire, there is no record that he attempted to do so, either through his attorney or on his own.

From the start of the trial, Bowen's attorney was clearly concerned with potential jury bias given the nature of the charges:

We would ask that general questions-this case involves unlawful possession of a firearm and VUCSA, meth-so we would ask-I would ask the Court to ask during general questions, if you're willing, does anybody have any strong feelings about guns that would make them unable to be fair in this case and any strong feelings about illegal-or drugs. SUPP RP 1: 8-14.

Following this exchange, the trial court then presented the following question to the courtroom at large:

The Court: ...are there any members of the public that would object to our taking up questions in the privacy of chambers? The record should reflect that there is nobody present in the courtroom to object and there no objections being noted. SUPP RP 2: 9-13.

During the in-chambers voir dire, defense counsel was present, and asked that Juror No. 41 be excused for cause. SUPP RP 18: 21-23.

Under the rationale of Momah, Bowen waived his right to an open, public trial and made a Bone-Club analysis unnecessary by agreeing to limited, in-chambers voir dire. Both Bowen and his attorney were present,

and succeeded in having Juror No. 41 excused for cause during the in-chambers voir dire; the same type of activity that defendant Momah's attorney actively engaged in by agreeing to the private questioning of potential jurors. See: Momah, 217 P.3d at 324, 329. Bowen benefited from the in-chambers voir dire in selecting an impartial jury because Juror No. 41, in-chambers, stated that she had concerns about her:

Niece [who] was killed by- in a car accident – by her then-husband who was on drugs...And I sit there and I said, you know, I despise drugs, but I'm not sure that I'm gonna be impartial about anything to do with a drug case. SUPP RP 18: 1-7.

This was precisely the sort of bias that Bowen's attorney sought to uncover, if possible, at the outset of voir dire. See: SUPP RP 1: 8-14. It was also determined through the in-chambers voir dire that Juror No. 9 had a "certain amount of prejudgment for people that would use" methamphetamine, that Juror No. 21's son had been "convicted of the exact same offense," and that Juror No. 5 knew Bowen from when he (Bowen) had been "hiding in the attic – in Bremerton..." SUPP RP 9-13.

Strode is not analogous here because the record in Bowen's case shows that: (a) the public was afforded the opportunity to object to the closure, and (b) proper consideration was given to the public's right to an open courtroom. See: Strode, 217 P.3d at 315. Adhering to the rationale of Momah, Bowen had the right to make tactical decisions during voir dire

to select a jury that he felt was impartial, but in doing so he made a Bone-Club analysis unnecessary.

2. BOWEN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE:
 - (a) HIS COURT-APPOINTED ATTORNEY DID NOT OBJECT TO LIMITED VOIR DIRE IN CHAMBERS BUT INSTEAD ACTIVELY PARTICIPATED IN IT; AND
 - (b) HIS ASSIGNMENT OF THIS ERROR ON APPEAL CONSTITUTES INVITED ERROR.

Bowen did not receive ineffective assistance of counsel because:

(a) his court-appointed attorney did not object to limited voir dire in chambers but instead actively participated in it; and (b) assignment of this error on appeal constitutes invited error.

The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. Momah, 217 P.3d at 328. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so.

In order to show ineffective assistance of counsel, the defendant must show that his attorney's performance was deficient, and that the deficiency prejudiced him. State v. Jensen, 203 P.3d 393, 396 (2009); see

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A defendant is prejudiced when he can show that but for his counsel's errors, there was a reasonable probability that the trial result would have differed. State v. McFarland, 127 Wash.2d 322, 337, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it will not be deemed ineffective. State v. Day, 51 Wn.App. 544, 553, 754 P.2d 1021 (1988).

The record in Bowen's case shows that not only did his attorney agree to in-chambers voir dire, but that he actively participated in it and selected a jury that he felt was impartial; a tactical decision that the Court in Momah permits. Under the rationale of Day, this conduct by Bowen's attorney of engaging in in-chambers voir dire is legitimate strategy, and severs his ineffective assistance of counsel claim. For Bowen to assign error here that the in-chambers voir dire, which he agreed to, was a structural error in fact constitutes invited error. The "windfall" that Bowen hopes to reap is a new trial following his being properly convicted, and this Court should deem this assignment to be without merit.

3. THE TRIAL COURT DID NOT ERR BY NOT TAKING EITHER CHARGE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:
- (a) BOTH THE DRUGS AND GUN WERE FOUND IN A TRUCK REGISTERED TO BOWEN;
 - (b) THE SPOON AND SCALE WITH METHAMPHETAMINE WERE FOUND BEHIND THE DRIVER'S SEAT;
 - (c) THE HANDGUN WAS FOUND IN A NYLON BAG STUFFED DOWN BETWEEN THE DRIVER AND PASSENGER'S BUCKET SEATS; AND
 - (d) BOWEN WAS THE DRIVER AND SOLE OCCUPANT IN HIS TRUCK AT THE TIME OF HIS ARREST.

The trial court did not err by not taking either charge from the jury for lack of sufficient evidence because: (a) both the drugs and gun were found in a truck registered to Bowen; (b) the spoon and scale with methamphetamine were found behind the driver's seat; (c) the handgun was found in a nylon bag stuffed down between the driver and passenger's bucket seats; and (d) Bowen was the driver and sole occupant in his truck at the time of his arrest.

Role of Jury

The role of the jury is to be held "inviolable" under Washington's constitution. State v. Montgomery, 163 Wash.2d 577, 590, 183 P.3d 267 (2008); see U.S. Const. Amend. VII; WA Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. Montgomery, 163 Wash.2d at 590; see Sofie v. Fireboard Corp., 112 Wash.2d 636, 656, 771 P.2d 711 (1989).

To the jury is consigned under the constitution “the ultimate power to weigh the evidence and determine the facts.” Montgomery, 163 Wash.2d at 590; see James v. Robeck, 79 Wash.2d 864, 869, 490 P.2d 878 (1971). In virtually every jury trial, the jury itself is instructed that “[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court.” Montgomery, 163 Wash.2d at 590; see: Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 9 (2d ed. 1994)(WPIC).

Sufficiency of the Evidence

A reviewing court must affirm a conviction if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. State v. Pedro, 148 Wash.App. 932, 951, 201 P.3d 398 (2009)

Factual and credibility determinations are decided by the trier of fact and are not reviewable on appeal. State v. Buzzell, 148 Wash.App. 592, 605, 200 P.3d 287, 294 (2009). Deference is given to the trier of fact

who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. State v. Martinez, 123 Wash.App. 841, 845, 99 P.3d 418 (2004).

Actual and Constructive Possession

Possession of property may be either actual or constructive.

Actual possession means that the goods are in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see State v. Partin, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over them. Callahan, 77 Wn.2d at 29; see State v. Walcott, 72 Wn.2d 959, 967, 435 P.2d 994 (1967). Whether a person has dominion and control is determined by considering the totality of the situation. Partin, 88 Wash.2d at 906.

If someone is driving a car and is the sole occupant, he [she] has the necessary dominion and control of the “premises” to support the inference that he [or she] has constructive possession of any drugs inside. State v. Dodd, 8 Wash.App. 269, 274-275, 505 P.2d 830 (1973).

The facts of Callahan are partially analogous to Bowen’s case and allow the concept of constructive possession to be distinguished. In Callahan, officers executed a search warrant on Callahan, who lived on a

houseboat. Callahan, 77 Wn.2d at 28. When the officers entered the living room of the houseboat, they found the defendant and a co-defendant sitting at a desk on which were various pills and hypodermic syringes. A cigar box filled with various drugs was on the floor between the two men. Other drugs were found in the kitchen and bedroom of the premises. The defendant admitted that he had handled the drugs that day, and that he had stayed on the houseboat for 2 or 3 days prior to his arrest.

The Court in Callahan found that in order for the jury to find the defendant guilty of actual possession of the drugs, they had to find that they were in his personal custody. No evidence was introduced at trial that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that she had handled the drugs earlier. The Callahan court did not find that the defendant could have constructively possessed the drugs because possession entails actual control, and not a passing control that involves only a momentary handling.

In Bowen's case, not only were the methamphetamine and handgun found in close proximity to where he was sitting in the driver's seat, but at the time of his arrest, he was both the driver and sole occupant of the vehicle that was registered to him. Under the rationale of Dodd,

Bowen had the necessary dominion and control of the “premises,” here his own truck, to support the inference that had constructive possession of any drugs inside. This same reasoning should be applied to the handgun as well, as a firearm is no less of an object than drugs found on a spoon and scale.

The facts of Bowen’s case can be distinguished from Callahan because in Callahan, the defendant was neither owner of the houseboat or a resident on it. By contrast, Bowen was the registered owner of the black pickup and driving alone when Deputy Drogmund and Officer Valley arrested him. That the jury heard conflicting testimony about the ownership of the gun only reinforces the validity of the trial court’s decision to let both charges go to the jury, as it was their job, and not the trial court’s, to determine the facts in Bowen’s case.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 20TH day of November, 2009

Respectfully submitted by

 Edward P. Lombardo, WSBA #34591

Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 39096-5-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
KEVIN R. BOWEN,)	
)	
Appellant,)	
_____)	

FILED
COURT OF APPEALS
DIVISION II
NOV 23 AM 10:01
STATE OF WASHINGTON
DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, NOVEMBER 20, 2009, I deposited in the U.S. Mail,

postage properly prepaid, the documents related to the above cause number

and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 20th day of November, 2009, at Shelton, Washington.

Edward P. Lombardo #34591

 Edward P. Lombardo, WSBA #34591