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41745-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

ARTHUR E. SHAW
Appellant

41745-6

On Appeal from the Superior Court of Grays Harbor County

10-1-00271-8

The Honorable Gordon Godfrey

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The warrantless search of Appellant's home violated Wash. Const. art. 1, § 7 and the Fourth and Fourteenth Amendments.
2. The warrantless search of Appellant's truck violated Const. art. 1, § 7 and the Fourth Amendment.
3. The police seized Appellant without probable cause.
4. Prejudicial dog-tracking evidence was admitted without proper foundation.
5. Appellant's arrest for trespassing rendered the statute unconstitutionally vague as applied to these facts.
6. Appellant was subjected to a pretextual arrest.
7. Photographs of Appellant were fruits of his unlawful arrest.
8. Police witnesses gave impermissible opinions of guilt.
9. Defense counsel was ineffective in failing to challenge the search and seizure violations.
10. The evidence is insufficient to support the conviction.
11. The prosecutor encouraged the jury to base its verdict upon an impermissible inference.

B. Issues Pertaining to Assignments of Error

1. Do arson investigators need a search warrant absent exigent circumstances?
2. Did any exception to the warrant requirement justify the search of Appellant's truck?
3. Did the police lack sufficient grounds to seize Appellant and arrest him for trespassing?
4. Did the State fail to establish the prerequisite foundation for the reliability of the dog tracking evidence?
5. Is the trespassing statute impermissibly vague as applied to Appellant?
6. Was Appellant subjected to a was pretextual arrest?
7. Were the police photos of Appellant inadmissible as poisoned fruit of his unlawful seizure?
8. Did the characterization of the evidence by two police witnesses constitute opinions of guilt?
9. Did defense counsel's failure to object to numerous due process violations constitute ineffective assistance of counsel?
10. Accepting the truth of the State's evidence, did the State fail to prove Appellant's guilt beyond a reasonable doubt
11. Was Appellant entitled to a missing witness instruction regarding alleged 911 evidence, and was counsel ineffective for failing to request that instruction?

III. STATEMENT OF THE CASE

Appellant Arthur E. Shaw's house in Ocean Shores was set for a foreclosure sale June 11, 2010. RP 47. Some time that morning, between 6:30 and 8:00 a.m., the house burned to the ground.¹ The day before the fire, the primary lender toured the house and observed a great deal of trash and empty paint cans. RP 277-78. Another investor, Grant Gibson, held a second mortgage on the property. RP 266.

Mr. Shaw vacated the house in February of 2011, when the power was disconnected (RP 125), but remained in the neighborhood as an occasional guest of his ex-wife and her new domestic partner. RP 282, 294. Perhaps because he was not in the habit of locking his door (RP 293, 306), strangers had been known to enter Shaw's empty house. RP 52, 337.

Shaw had visited his ex-wife in the neighborhood the night before the fire. RP 281, 287-88. He made a few trips to his house to remove his belongings in anticipation of the sale, but just after daybreak, his truck's engine failed. RP 325. This truck was a notorious junk heap that frequently broke down. RP 283, 289. Shaw coasted his stalled truck to the safety of a vacant lot a few hundred yards away from the house, then lay down to rest at the rear of the vacant lot. He had been wearing the

^{1 1} The State failed to fix the time. Please see Issue 8.

same clothes for three days. RP 328. When he awoke, his truck was marked off with police crime-scene tape. Curious, but wary of trouble, he climbed a tree to peer over a fence and saw that his house had burned to the ground. RP 329. Shaw did not go to the house because he was afraid of Ocean Shores Police Officer Jeff Elmore, who had recently threatened to “get” him. RP 100, 330, 342.

Officer Elmore testified that he responded to the reported fire sometime before 7:00 a.m. by which time the structure was fully ablaze. By 7:00, though, he was already engaged in traffic control. RP 88, 90. At some point, Elmore spotted Shaw’s truck in the nearby lot and conducted a warrantless search. RP 102, 257. The search revealed several gasoline containers. RP 91. After Elmore’s initial search, the police obtained a search warrant for the truck and continued the search at the police station. RP 238.

At around 11:30 a.m., Officer Elmore spotted Mr. Shaw in the tree. RP 94. He and another officer with a tracking dog approached Shaw. Both officers had guns drawn. RP 330. Elmore ordered Shaw to get down from the tree. RP 25. The trial court ruled that Shaw was seized at that point. RP 35. Elmore testified that Shaw appeared “singed,” and smelled of “accelerant” and smoke. RP 113, 238. Elmore arrested Shaw for trespassing. RP 27. Officer Dan Wertanen photographed Shaw’s singed

hair and eyebrows. RP 15, 68. When asked by the prosecutor to define the word “singed” for the jury, Wertanen testified: “[It’s] like if you light a barbecue and it explodes in your face with the vapors.” Defense counsel did not object. RP 68.

Mr. Shaw had a yard maintenance business, and frequently transported gasoline in containers to service his lawn mower and weed whacker. RP 54, 283, 292. Shaw bought gas in the early morning hours of June 11. RP 319-20. A store surveillance video showed Shaw filling one of his gas containers. RP 224-27. His clothes typically were dirty, and he often smelled like gasoline. RP 285. Shaw also had a sideline collecting residential trash and burning it. RP 284, 291, 294, 335. In the course of his work, he frequently singed himself and spilled gasoline on his boots. RP 336-37, 351.

The firefighters arrived just in time to see the burning house collapse. They recognized that it could not be saved and never considered going in. RP115-16. Instead, they focused their efforts on saving the house next door. RP 117.

The next day, June 12, ATF² agent Dane Whetsel entered the property to investigate the cause of the fire. RP 158. On June 14, ATF investigator David Johnson conducted a second on-site investigation. RP 140. Agent Whetsel thought an oil lamp had caused the fire. RP 190.

Whetsel opined that the particulars of the damage was typical of a relatively heavy hydrocarbon gas explosion (i.e., not natural gas), but he conceded that the poor construction of the house also could have resulted in the same type of explosion regardless. RP 195, 198.

Mr. Shaw's ex-girlfriend was interviewed by officers while she was in jail on unrelated criminal charges. She reported that Shaw once fantasized about blowing up the house for the insurance money. RP 307. It was undisputed, however, that the insurance had long since lapsed and the house was not insured at the time of the fire. RP 271, 337, 376.

The State charged Shaw with a single count of first degree arson. CP 1. He was convicted after a jury trial. Mr. Shaw, aged 50, had no criminal history except for a single drug offense in 2010. CP 38. The standard range for the current offense was 31 to 41 months. CP 38. The court sentenced him to the top of the standard range, 41 months. CP 39.

Shaw filed this timely appeal. CP 48.

IV. **ARGUMENT**

1. THE WARRANTLESS SEARCH OF SHAW'S HOME VIOLATED WASH. CONST. ART. 1, § 7 AND THE FOURTH AND FOURTEENTH AMENDMENTS.

Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution prohibit a non-consensual

warrantless entry into a home except under exigent circumstances. *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987), citing *Payton v. New York*, 445 U.S. 573, 587-88, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980). The Fourth Amendment was extended to the States through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

The idea underlying the exigent circumstances exception is that the police do not have time to get a warrant. *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). The State bears the heavy burden of showing that “an immediate major crisis” required swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or to prevent the destruction of evidence. *Dorman v. United States*, 140 U.S. App. D.C. 313, 319, 435 F.2d 385 (1970); *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The State must show why it was not feasible to take the time to get a warrant. *State v. Wolters*, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.” *McDonald v. United States*, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Constitutional protections against unwarranted search and seizure apply with equal force to searches by firefighters. *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 56 L. Ed. 2d. 486 (1978). The reasonable expectation of privacy in one's home is not diminished "simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately." *Id.* Firefighters may remain for a reasonable time after the fire is out to investigate the cause of the fire, and they may seize any evidence in plain view. RCW 43.44.010; *Tyler*, 436 U.S. at 506; *State v. Picard*, 90 Wn. App. 890, 895, 954 P.2d 336 (1998). But once the firefighters leave the scene, all subsequent post-fire searches are encompassed by the Fourth Amendment just as are searches for evidence of crime. *Id.*

The fire on Shaw's property was extinguished on June 11, but government agents continued to conduct warrantless investigations for several days. RP 14. ATF agent Whetsel did not arrive until the day after the fire was out, yet he entered with his dog and collected evidence. RP 158,181. Local police investigator Chris Iverson claimed to have collected and put into evidence an oil lamp on June 13, but ATF Agent David Johnsen arrived three days after the fire, on June 14, and claimed to

have seen the same lamp in situ during his own warrantless search of the scene. RP 75; 140, 154. Ocean Shores Fire Investigator Kurt Begley also entered without a warrant and collected evidence on June 14. RP 219.

These warrantless searches were unlawful.

The Sole Remedy is Suppression: Suppression will be granted whenever there is a meaningful causal connection between the State's unlawful activity and the acquisition of evidence. That is, if the evidence is "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). In addition to evidence seized directly during an illegal incursion, the suppression rule also applies to evidence that was subsequently derived from evidence seized in the illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

In the prosecution of Mr. Shaw, all evidence collected in searches subsequent to extinguishing the fire on June 11th should have been suppressed. This Court should reverse Shaw's conviction and vacate the judgment and sentence. Moreover, since all of the State's substantive evidence was obtained in violation of art. 1, § 7 and the Fourth Amendment, insufficient evidence remains to support the convictions, and the Court should dismiss the prosecution.

2. THE WARRANTLESS SEARCH OF SHAW'S TRUCK VIOLATED WASH. CONST. ART 1, § 7 AND THE FOURTH AMENDMENT.

Under both the Fourth Amendment and Wash. Const. art. 1, § 7, warrantless searches are *per se* unreasonable unless they fall within “a few specifically established and well-delineated exceptions.” *State v. Myers*, 117 Wn.2d 332, 337, 815 P.2d 761 (1991), quoting *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). Const. art. 1, § 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision differs from the Fourth Amendment and provides greater protection of a person’s right to privacy. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999); *see also State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998) (art. 1, § 7 clearly recognizes an individual’s right to privacy with no express limitations). Thus, art. 1, § 7 encompasses the subjective and reasonable expectations of privacy protected by the Fourth Amendment, but also protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Parker*, 139 Wn.2d at 494, quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

Officer Elmore conducted a warrantless search of Mr. Shaw's truck. RP 101-02. Later, Deputy Police Chief Russell Fitts arrived with a search warrant and impounded the truck. RP 236, 238. Elmore gave Fitts the vehicle registration, which he had already removed from the glove compartment before the warrant was obtained. RP 239-40. The officers seized clothing and a couple of gasoline containers which Elmore had observed earlier. RP 101-02.

The State exploited this unlawfully-seized evidence to convict Mr. Shaw. The Court should reverse the convictions.

3. THE POLICE SEIZED SHAW WITHOUT PROBABLE CAUSE.

At 11:30 a.m., three and a half hours after their arrival at the scene, Officers Elmore and Crawford used a tracking dog to search for Mr. Shaw. CrR 3.5 Finding 1, CP 8. The record does not show what material Officer Crawford used to prime the search dog, or that the dog actually tracked Shaw from the burned home to his hiding place in the tree. It appears the dog was merely tracking an odor of burning or gasoline. RP 21, 330. But it is unrefuted that Shaw's boots perpetually carried traces of gasoline from his lawn care business and that olfactory evidence of his garbage-burning sideline generally clung to his clothes.

The Fourth Amendment to the United States Constitution and art. 1, § 7 of the Washington State Constitution prohibit unreasonable searches and seizures. *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001). Warrantless searches are *per se* unreasonable, subject to a few narrowly drawn exceptions. *Id.* The State has the burden of proving that one of these exceptions applies. *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). Generally, warrantless searches and seizures are *per se* unreasonable. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Investigatory stops constitute an exception to this rule. *Id.* at 71. But to justify the intrusion of an investigatory stop, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Detention without probable cause is unlawful under the Fourth and Fourteenth Amendments. *Johnson*, 128 Wn.2d at 451; *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979). The probable cause analysis is essentially the same under Const. art.1, § 7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008).

Shaw Was Seized: Whenever the police restrain an individual’s freedom to walk away, that person is ‘seized.’ *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); *Terry*, 392 U.S. at 16. Under the

Washington Constitution, a seizure occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave due to the law enforcement officer's use of force or display of authority. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This is a purely objective standard that focuses solely on the actions of the police. *O'Neill*, 148 Wn.2d at 574, quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). The officer need not make a formal declaration of arrest. *State v. Sullivan*, 65 Wn.2d 47, 51, 395 P.2d 745 (1964); *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984).

Commanding a person to stop is a seizure. *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

Mr. Shaw was seized, because a reasonable person under these circumstances would have believed he was restrained and not free to resist the display of police authority when Officer Elmore ordered Shaw down from the tree and handcuffed him. *See, Rankin*, 151 Wn.2d at 695, citing *O'Neill*, 148 Wn.2d at 574.

Because the police had insufficient grounds to seize Shaw, any evidence obtained in the course of his seizure and detention or derived from it was fruit of the poisonous tree and inadmissible.

4. THE TRACKING DOG EVIDENCE
WAS INADMISSIBLE.

The State introduced evidence strongly implying that a tracking dog led the police directly from the crime scene to Shaw. RP 21, 330. This evidence was inadmissible for lack of foundation, and defense counsel was ineffective for allowing the jury to hear it. (Ineffective Assistance of Counsel is discussed at Issue 9 below.)

Dog-tracking evidence is inadmissible in Washington courts unless the State establishes a proper foundation showing the qualifications of the dog and the handler. *State v. Loucks*, 98 Wn.2d 563, 566, 656 P.2d 480 (1983). The State must make an affirmative showing that: (1) the handler is qualified by training and experience to use the dog; (2) the dog is adequately trained in tracking humans; (3) the dog has been found by experience in actual cases to be reliable in tracking humans; (4) the dog was placed on track where circumstances indicated the guilty party to have been; and (5) the trail had not become so contaminated as to be beyond the dog's competency to follow. *Loucks*, 98 Wn.2d at 566. In addition, dog tracking must be supported by corroborating evidence that clearly connects the accused with crime. *Loucks*, 98 Wn.2d at 567.

That did not happen here. ATF Agent Dane Whetsel testified as an expert that tracking dogs used to find accelerants in the debris were trained

by the ATF. RP 181. But no evidence was offered regarding the dog and handler who supposedly tracked Mr. Shaw to the tree. With no foundation whatsoever, the State was permitted to imply that a dog followed Shaw's scent from the fire to the tree. But, given the usual condition of Mr. Shaw's clothes in the matter of the odors of gasoline and burning, the requisite foundation for the dog evidence was particularly crucial.

Moreover, this impermissible evidence is highly prejudicial. Evidence that a dog tracked Shaw based on material at the fire-scene had no conceivable purpose other than to create a highly prejudicial inference that he must be guilty.

Admitting it is grounds for reversal.

**5. THE TRESPASSING STATUTE IS
UNCONSTITUTIONALLY VAGUE AS
APPLIED TO THESE FACTS.**

Lacking probable cause to detain Shaw an arson suspect, Elmore arrested him for trespassing. RP 27. To justify seizing Shaw for the purpose of an unrelated investigation, Elmore applied the trespassing statute in a manner that rendered the statute subject to arbitrary enforcement and in a way that would prevent an ordinary citizen from knowing when his conduct was unlawful.

This Court evaluates a vagueness challenge to a statute that does not involve First Amendment rights by examining how the statute was applied under the particular facts of the case. *State v. Sigman*, 118 Wn.2d 442, 445, 826 P.2d 144, 145-146 (1992); *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992), citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). A statute is presumed to be constitutional, and a party challenging it on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. *Id.*

The fundamental principle underlying the vagueness doctrine is that the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct. *Id.*, citing *Douglass*, 115 Wn.2d at 178. The challenger must show beyond a reasonable doubt that either (1) the statute does not define the criminal offense with sufficient definiteness that an ordinary person can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Id.*

The trespassing statute is unconstitutionally vague as applied to the arrest of Shaw, because the police were able to enforce it arbitrarily.

A person is guilty of second degree criminal trespass if he knowingly enters or remains unlawfully in or upon premises of another other than a building. RCW 9A.52.080(1); 9A.52.070(1). But mere

presence does not constitute criminal trespass if the person reasonably believes the owner would not have objected to his entering the property. RCW 9A.52.090(3).

Here, the police had no reason to suppose that Shaw did not have permission to be in the neighboring yard. In fact, Shaw informed Elmore that the owners of the vacant property did not object to his being there because he did yard work for them. RP 326.

Therefore, because the premises were a neighbor's yard and the police had received no complaint of an unauthorized entry, they lacked any grounds supporting an articulable suspicion that the entry was not permissive. Therefore, Shaw was entitled to the benefit of the doubt as to permissive entry. To hold otherwise would permit the police to enforce the trespassing statute to arbitrarily to arrest people virtually in their own back yard any time they wished to detain them for any reason. That is to say, in a manner that is unconstitutionally vague.

All evidence derived from the unconstitutional seizure of Shaw should have been suppressed, and a conviction resting on such evidence cannot stand. The Court should reverse the conviction and dismiss the prosecution.

6. ARRESTING SHAW FOR TRESPASSING
WAS PRETEXTUAL.

When the police observe a person engaged in unlawful behavior, probable cause exists to stop the individual. *State v. Larson*, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). But when an officer stops an individual, not to enforce the law cited as grounds for the stop, but to conduct an unrelated criminal investigation, the stop is pretextual. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Pretextual stops violate art. 1, § 7 because they constitute seizures without “authority of law.”

When a stop is challenged as pretextual, the reviewing Court considers the totality of the circumstances, including the officer’s subjective intent as well as the objective reasonableness of the officer’s conduct. *Ladson*, 138 Wn.2d at 358-59.

Elmore testified that he arrested Shaw for trespassing on the neighboring lot. RP 27. But the record suggests no justification for this. Elmore had no reason to suppose that Shaw was trespassing. People living on the same street enter each other’s yards all the time. Between close neighbors, this does not constitute criminal trespass unless the neighbor objects.

Elmore had no basis to seize Shaw for trespassing and lacked probable cause to arrest him for any crime. Elmore arrested Shaw solely for the purpose of investigating him for the unrelated crime of arson. This violated art. 1, § 7 and the Fourth Amendment and requires reversal.

7. PHOTOGRAPHS OBTAINED IN THE COURSE OF SHAW'S UNLAWFUL SEIZURE WERE INADMISSIBLE.

For Fourth Amendment purposes, it is generally not an unlawful invasion of privacy to photograph a person in a public place. *Jeffers v. City of Seattle*, 23 Wn. App. 301, 315, 597 P.2d 899 (1979).

By way of an exception to this rule, however, evidence that is “fruit of the poisonous tree,” even though otherwise admissible, must be suppressed if it was obtained as the result of unlawful police conduct that violated Const. art. 1, § 7 or the Fourth Amendment. “In a Washington criminal prosecution, the State may not use evidence unlawfully obtained.” *State v. Turpin*, 94 Wn.2d 820, 826, 620 P.2d 990 (1980); *State v. Miles*, 29 Wn.2d 921, 927, 190 P.2d 740 (1948). Art 1, § 7 mandates that all evidence derived from the government’s illegality be excluded from our courts for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *Wong Sun*, 371 U.S. at 487-88.

That is the case here.

Had this been a lawful stop, photographing Shaw would not have violated Washington search and seizure law. But, as discussed above, the officers had no grounds to impede Mr. Shaw's freedom of movement. Absent some tangible indication that Mr. Shaw knew he was no longer welcome in his neighbor's yard, the police had no grounds to arrest him for trespassing. Therefore, Officer Wertanen's photographs of Mr. Shaw were fruit of the poisonous tree and should have been suppressed.

This error was not harmless, because the State offered the photographs to prove Mr. Shaw's guilt by showing that his hands, face, hair and clothing were singed.

The remedy is to reverse Shaw's convictions.

8. THE TESTIMONY OF TWO POLICE WITNESSES CONSTITUTED IMPERMISSIBLE OPINION OF GUILT.

First, Officer Elmore testified that Mr. Shaw smelled not of any particular substance, such as gasoline, but of "accelerant." RP 113. Then, Officer Wertanen testified that he photographed Shaw's singed hair and clothing after Elmore took him into custody as a trespassing suspect. RP 67-68. The prosecutor asked Wertanen to tell the jury what he meant by the term "singed." Wertanen replied that it was "like if you light a barbecue and it explodes in your face with the vapors." RP 68.

The testimony of Elmore and Wertanen conveyed to the jury impermissible opinions of guilt.

A defendant has a constitutional right to an unbiased jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). As quasi-judicial officers representing the people, prosecutors have a duty to act impartially in the interest only of justice. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The Prosecutor must ensure that an accused receives a fair trial by avoiding the risk of a verdict tainted by prejudice rather than based on reason. *State v. Belgarde*, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). Prosecutorial misconduct is “a term of art referring to prejudicial errors committed by the prosecuting attorney that deny the defendant a fair trial.” *State v. Fisher*, 165 Wn.2d 727, 757, 202 P.3d 937 (2009). “Impermissible opinion testimony regarding [a] 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.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Opinion testimony is testimony based on one’s belief or idea rather than on direct knowledge of the facts. *Demery*, 144 Wn.2d at 760, quoting Black’s Law Dictionary 1486 (7th ed. 1999).

Even if defense counsel does not object to a prosecutor’s improper remark, the Court will review the error and reverse if the remark is

flagrant and ill intentioned. *Belgarde*, 110 Wn.2d at 507; *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). Testimony that conveys an opinion on guilt violates a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3); *Demery*, 144 Wn.2d at 759.

To determine whether a witness's statement is impermissible opinion testimony, the Court considers: (1) the particular circumstances of the case, (2) the type of witness involved, (3) the nature of the testimony and charges, (4) the types of defenses, and (5) the other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Here, Elmore's testimony constituted an opinion of guilt. Gasoline used to power lawn mowers is referred to as "gas." It is only an "accelerant" when it is used to start a fire — specifically, to commit arson. The prosecutor's question and Wertanen's answer were a transparent and gratuitous solicitation of an opinion of guilt that constituted misconduct by the prosecutor. The word "singed" had been used throughout the proceedings, and there was no reason to think the jury needed the word to be defined. Moreover, Wertanen could have defined the word in a thousand ways that did not include vapors blowing up in one's face.

The question and answer had a single purpose: to induce the jury to conclude that Mr. Shaw had been exposed to vapors in an explosion when he blew up his house, and not merely in routine contact with open flames in the course of legitimate employment.

These opinions of guilt were particularly prejudicial because they came from police officers, whose opinions are particularly likely to influence the jury and thus violate the right to a jury trial. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003), citing *Demery*, 144 Wn.2d at 759. The Wertanen testimony was particularly gratuitous given the nature of the charge concerning an alleged explosion, not merely a fire. The testimony of both officers was particularly prejudicial because it discredited Shaw's claim that he frequently singed himself, his clothes generally smelled of fire, and there was commonly gas on his boots resulting from his legitimate garbage-burning activities.

This evidence was flagrantly ill-intentioned and prejudicial. Moreover, the failure of defense counsel to object was reasonable, because an objection would have served merely to exacerbate the harm by impressing the image of exploding vapors on the minds of the jury.

Reversal is required.

9. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE SEARCH AND SEIZURE VIOLATIONS.

This Court will review a challenge to the constitutionality of a search that is raised for the first time on appeal in the context of an ineffective assistance claim. *See, State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

Wash. Const. art 1, § 22 and the Sixth Amendment guarantee the right to effective counsel. Counsel's performance must meet the standards of the profession. Effectiveness is measured by the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether counsel's performance was deficient, and whether the appellant was actually prejudiced. *Strickland*, 466 U.S. at 690-692. The Court evaluates an ineffectiveness claim against a strong presumption that counsel performed adequately and that strategic or tactical decisions justify counsels conduct. *Id.* at 689-691.

Nevertheless, counsel's performance is *per se* deficient where, as here, counsel fails to bring a viable motion to suppress and there exists no reasonable basis or strategic reason not to challenge unlawfully obtained evidence. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Klinger*, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999).

Mr. Shaw's defense counsel failed to seek suppression of physical evidence seized by the police in the course of a warrantless intrusion into Shaw's home (Issue 1). Counsel also failed to object to the warrantless search of Shaw's vehicle (Issue 2). Counsel failed to challenge the seizure of Shaw's person without probable cause. (Issue 3). Counsel did not challenge the admission of the tracking dog evidence. (Issue 4). Counsel failed to object to the arbitrary, pretextual, and unconstitutional use of the trespassing statute and the evidence resulting therefrom. (Issue 5, 6). Counsel failed to object to the admission of incriminating photographs obtained in the course of official misconduct in the course of a stop that was pretextual and unconstitutional and for which no probable cause existed. (Issue 7). And counsel did not object to the opinions of guilt implicit in the testimony of Officers Elmore and Wertanen. (Issue 8).

It cannot be argued that legitimate strategy was the basis for so many omissions. Counsel's "strategic" decisions must also be reasonable. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Counsel's decisions here are indefensible.

The cumulative error doctrine applies when the effect of several errors denied the defendant a fair trial, even if no single error warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003),

review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004). Here, the prejudicial effect of each error is apparent when considered by itself. The cumulative prejudicial effect of the errors overwhelming satisfies both prongs of *Strickland*.

The appropriate remedy is to reverse the convictions.

10. THE EVIDENCE IS INSUFFICIENT
TO SUPPORT THE CONVICTION.

Sufficiency of the evidence is a question of constitutional magnitude that can be raised for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995); *State v. Colquitt*, 133 Wn. App. 789, 795-96, 137 P.3d 892 (2006).

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). “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). In determining whether the necessary quantum of proof exists, the Court need not be convinced of the defendant’s guilt beyond a reasonable doubt, so long as it is convinced that substantial evidence supports the State’s

case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). The Court defers to the trier of fact on matters involving “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). And the Court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Jackson*, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). That is, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *Jackson*, 129 Wn. App. at 109.

Nevertheless, the State must prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The State must produce enough evidence to permit the jury to find a factual basis for each element. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Neither the jury nor the reviewing court can rely on guesswork, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Here, the State presented abundant evidence that Shaw’s house was destroyed by fire, and arguably sufficient evidence from which the

jury could conclude the fire was deliberately set.² But the State did not produce any substantial evidence that Mr. Shaw was the arsonist. An abundance of evidence proving one element of an offense cannot compensate for the absence of evidence on another element.

The prosecutor argued that Shaw harbored anger and vengefulness toward those who were foreclosing on his house. RP 362. But the State produced no substantial evidence of this. Further, people commonly in Mr. Shaw's company (his ex-wife, her new husband, and Shaw's former live-in girlfriend), who would have likely witnessed any expression of such an evil intent by Shaw, all testified. But no witness claimed ever to have heard such an expression of vengefulness, nor did the prosecutor inquire whether they did.

The State also tried to suggest that Shaw torched the house to collect insurance proceeds. RP 307. But the evidence was overwhelming that Mr. Shaw was well aware that there was no insurance. RP 270-71, 337.

The State did not refute that Shaw habitually kept gas containers in his truck, that his clothes and boots usually were redolent of gasoline, and that his skin and hair frequently bore evidence of exposure to smoke and fire.

² If the Court is considering this issue, then evidence obtained during the warrantless entries into the burned house has been deemed admissible.

Time of Fire: The State failed to establish the time the fire started. Officer Elmore testified that he arrived some time before 7:00 a.m. RP 19, 90. Allowing time for him to receive the report and drive to the scene, the fire could not have started later than 6:45 a.m. State's witness James Dillinger claimed to have heard the fire start from several streets away, but he was not asked what time that was. RP 78. Fire department paramedic Brian Ritter arrived while the house was fully engulfed in flames, but he did not testify what time that was. RP 114. Paul Griffith testified that he saw someone climbing a fence some distance away between 7:15 and 7:20 a.m. RP 62, 65. If the fence-climber was the arsonist, the fire must have started no later than 7:00 a.m. But Mr. Shaw's next door neighbor, Todd Parrish, said he did not witness the start of the fire until 7:25 a.m., which he claimed was a mere five minutes before he and his children would have been in their driveway on their way to school. RP 47.

The timeline described by the State's witnesses does not make sense. Further, no reasonable jury could have accepted the State's hypothesis of why the perpetrator would still be in the immediate vicinity at 11:30 a.m., four hours after the crime. RP 92. The prosecutor suggested that Shaw was trying to climb over the fence to the next street

so he could run away. RP 367. But Elmore testified that Shaw was asleep when the officers tracked him to the tree. RP 20, 28, 100.

When the defense pointed out the four-hour disparity between the onset of the fire and Mr. Shaw's capture, the prosecutor proposed that Shaw must have fled the scene earlier but could not resist coming back to see how the fire was progressing. But the only evidence for this was Mr. Griffith's equivocal identification of the fence-climber. Griffith could not positively identify this person in a photomontage of bare-headed men, because the climber's head was partially hidden under both a hat and a hooded sweatshirt. RP 78, 81. Besides that, the trial court ruled as a matter of law that a photomontage consisting entirely of booking photos was too unreliable to be shown to the jury. RP 83. This inherent unreliability further diminishes confidence in Griffith's identification.

Manifest Danger to Life: In addition to the alleged danger to Parrish's children, the State argued in closing an alternative manifest danger to life theory involving inherent danger to the firefighters. RP 363. Like the Parrish theory, this is not supported either by the facts or the law.

The firefighters testified that there was no possibility they would have attempted to enter the building or even to get close because the fire was too fierce. The firefighters instantly perceived that the structure was not savable. Indeed, it began to collapse within minutes of their arrival.

RP 114-17. There was no question of trying to enter and they were never in danger from doing so. RP 119-20. Power lines were arcing some distance away, but electrical power to the house had been cut off for months. RP 125. No fire personnel were injured. RP 122. The fire was completely extinguished within 45 minutes of the firefighters' arrival. RP 118.

The sole element distinguishing first and second degree arson is the essential element that a first degree fire constitutes manifest danger to human life, while a second degree fire does not. RCW 9A.48.020(1)(a); RCW9A.48.030. But if human life is manifestly endangered every time the fire department responds to a fire, regardless of whether the firefighters approach the fire, then there is no such thing as second degree arson.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The Court should reverse the convictions and dismiss with prejudice.

11. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A MISSING WITNESS INSTRUCTION.

Mr. Parrish said he immediately called 911 when he saw the smoke from next door. RP 49. But the State did not introduce evidence from either the 911 operator or the 911 tape that would have constituted reliable evidence fixing the time of the fire.

Under the “missing witness” doctrine, whenever evidence is properly part of a case and is within the control of a party in whose interest it would naturally be to produce it and that party fails to do so, the jury may infer that the evidence would be unfavorable. *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968).

Establishing the time of the fire was essential for the State to prove beyond a reasonable doubt the first of its two theories of manifest danger to human life: that the fire started at 7:25 a.m., within minutes of the time Todd Parrish would have been in the driveway with his children. RP 363. If the fire started closer to 6:45 a.m., as suggested by the other evidence, particularly Officer Elmore’s, then the State failed to prove beyond a reasonable doubt that the fire was a manifest danger to the lives of the Parrish family.

In addition to the instances of ineffective assistance discussed in Issue 9, failing to request this critical instruction cannot be justified as

legitimate trial strategy. The favorable presumption could only have benefited Mr. Shaw. Failing to notice that Shaw was entitled to the instruction constituted deficient performance that was clearly prejudicial.

V. **CONCLUSION**

For the foregoing reasons, the Court should reverse Mr. Shaw's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 4th day of August, 2011.

A handwritten signature in black ink that reads "Jordan McCabe". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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