

FILED  
Court of Appeals  
Division II  
State of Washington  
3/5/2018 1:28 PM  
NO. 49724-7

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN S. STONE, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Gretchen Leanderson

No. 15-1-04941-2

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 47838

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether defendant failed to demonstrate a manifest constitutional error from officer Conlon's testimony or that any error from detective Martin's testimony was not harmless beyond a reasonable doubt when the jury was instructed that they were the sole judges of credibility and there was overwhelming evidence of his guilt?..... 1

2. Whether the defendant fails to demonstrate ineffective assistance of counsel where he fails to satisfy either prong of the Strickland test?..... 1

3. Whether the defendant fails to demonstrate a double jeopardy violation where none of the crimes are the same in law or fact?..... 1

4. Whether the defendant both waived his right to challenge the imposition of LFOs and fails to demonstrate that the trial Court failed to make an individualized inquiry into his ability to pay where it did so explicitly on the record?..... 1

B. STATEMENT OF THE CASE..... 2

1. PROCEDURE..... 2

2. FACTS..... 3

C. ARGUMENT..... 5

1. DEFENDANT IS UNABLE TO SHOW A MANIFEST CONSTITUTIONAL ERROR RESULTING FROM OFFICER CONLON'S TESTIMONY AND ANY ERROR BY DETECTIVE MARTIN'S TESTIMONY WAS HARMLESS WHEN THERE WAS OVERWHELMING EVIDENCE OF HIS GUILT..... 5

2.	DEFENDANT IS UNABLE TO SATISFY EITHER PRONG OF THE STRICKLAND TEST AND SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.....	18
3.	PETITIONER HAS FAILED TO DEMONSTRATE THAT HIS MULTIPLE CONVICTIONS VIOLATE DOUBLE JEOPARDY AS EACH CRIME IS DIFFERENT IN BOTH FACT AND LAW.....	27
4.	DEFENDANT HAS WAIVED ANY ISSUE REGARDING LEGAL FINANCIAL OBLIGATIONS BY FAILING TO OBJECT.....	33
D.	CONCLUSION.....	36

## Table of Authorities

### State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 577, 854 P.2d 658 (1993).....	6
<i>State v. Adel</i> , 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) .....	28, 32
<i>State v. Barr</i> , 123 Wn. App. 373, 384, 98 P.3d 518 (2004) .....	12-13
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	19
<i>State v. Black</i> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987) .....	6
<i>State v. Blazina</i> , 182 Wn.2d 827, 839, 344 P.3d 680, 685 (2015) .....	34
<i>State v. Calle</i> , 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).....	29
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	20
<i>State v. Ciskie</i> , 110 Wn.2d 263, 284, 751 P.2d 1165 (1988).....	20
<i>State v. Clark</i> , 191 Wn. App. 369, 374, 362 P.3d 309 (2015).....	34
<i>State v. Demery</i> , 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).....	6, 10
<i>State v. Easter</i> 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) .....	15
<i>State v. Elmore</i> , 154 Wn. App. 885, 897-98, 228 P.3d 760 (2010).....	12, 13
<i>State v. Freeman</i> , 153 Wn.2d 765, 771, 108 P.3d 753 (2005).....	28, 29
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	19
<i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) .....	27, 28
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011) .....	34
<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990) .....	7

<i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) .....	8
<i>State v. Guloy</i> , 104 Wn. 2d 425-426, 705 P.2d 1182 (1985).....	15, 33
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) .....	19
<i>State v. Hettich</i> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).....	33
<i>State v. Jones</i> , 71 Wn. App. 798, 808, P.2d 85 (1993) .....	7, 8
<i>State v. Kirkman</i> , 159 Wn.2d 918, 927, 155 P.3d 125 (2007) .....	12, 14
<i>State v. Lindsey</i> , 177 Wn. App. 233, 247, 311 P.3d 61 (2013).....	33
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992) .....	34
<i>State v. Mathers</i> , 193 Wn. App. 913, 918, 376 P.3d 1163, 1166, review denied, 186 Wn.2d 1015, 380 P.3d 482 (2016).....	34
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	34
<i>State v. McFarland</i> , 189 Wn.2d 47 111, 399 P.3d 1106 (2017).....	25
<i>State v. Montgomery</i> , 163 Wn.2d 577, 595, 183 P.3d 267 (2008).....	13, 14
<i>State v. O’Neal</i> , 126 Wn. App. 395, 416, 109 P.3d 429 (2005) .....	32
<i>State v. Pittman</i> , 54 Wn. App. 58, 772 P.2d 516 (1989).....	22
<i>State v. Quaale</i> , 182 Wn.2d 191, 202, 340 P.3d 213 (2014).....	12
<i>State v. Russell</i> , 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) .....	7, 8
<i>State v. Saunders</i> , 120 Wn. App. 800, 813, 86 P.3d 232 (2004) .....	15
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 509, 157 P.3d 901 (2007).....	22, 25
<i>State v. Smith</i> , 104 Wn.2d 497, 510, 707 P.2d 1306 (1985) .....	7
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	8

<i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987) .....	33
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987) .....	19, 21
<i>State v. Vreen</i> , 143 Wn.2d 923, 932, 26 P.3d 236 (2001).....	21
<i>State v. Warren</i> , 165 Wn.2d 17, 30, 195 P.3d 940 (2008), <i>cert. denied</i> , 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).....	8
<i>State v. Zumwalt</i> , 119 Wn. App. 126, 129, 82 P.3d 672 (2003), <i>aff'd sub nom. State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	28
Federal and Other Jurisdictions	
<i>Benton v. Maryland</i> , 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).....	28
<i>Blockburger v. United States</i> , 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	29
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990).....	21
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (C.A. 9, 1995).....	20
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).....	18, 21
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	1, 18, 19, 20, 21, 26

<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	18
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <i>cert. denied</i> , 488 U.S. 948 (1988).....	20
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991) .....	21
 Constitutional Provisions	
Article I, § 9, Washington State Constitution.....	27
Fifth Amendment, United States Constitution.....	27
Fourteenth Amendment, United States Constitution .....	27
Sixth Amendment, United States Constitution .....	18
 Statutes	
RCW 10.01.160(1).....	34
RCW 10.01.160(3).....	34
RCW 69.50.206 .....	30
RCW 69.50.206(b)(1)(xi) .....	32
RCW 69.50.206(b)(1)(xvi) .....	32
RCW 69.50.206(d)(2) .....	32
RCW 69.50.401 .....	30
RCW 69.50.401(1)(2)(a).....	29, 30, 32
RCW 69.50.401(1)(2)(b) .....	29, 32
RCW 9.94A.533(e).....	25, 26
RCW 9.94A.760.....	34

RCW 9.94A.777.....	33
RCW 9.94A.777(1).....	33
RCW 9A.52.050.....	28
 Rules and Regulations	
ER 103(a)(1) .....	22
ER 401 .....	21
ER 402 .....	21
ER 403 .....	21
RAP 2.5(a) .....	33, 35
RAP 2.5(a)(3).....	12, 14
 Other Authorities	
Bryan A. Garner, Black’s Law Dictionary, 1514, Thompson West, 8 <sup>th</sup> Ed. 2004.....	10

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

1. Whether defendant failed to demonstrate a manifest constitutional error from officer Conlon's testimony or that any error from detective Martin's testimony was not harmless beyond a reasonable doubt when the jury was instructed that they were the sole judges of credibility and there was overwhelming evidence of his guilt?
2. Whether the defendant fails to demonstrate ineffective assistance of counsel where he fails to satisfy either prong of the *Strickland* test?
3. Whether the defendant fails to demonstrate a double jeopardy violation where none of the crimes are the same in law or fact?
4. Whether the defendant both waived his right to challenge the imposition of LFOs and fails to demonstrate that the trial Court failed to make an individualized inquiry into his ability to pay where it did so explicitly on the record?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 7, 2016, the State charged Justin Stone, hereinafter referred to as “the defendant” by way of amended information with one count of unlawful possession of a controlled substance with intent to deliver – methamphetamine (Count I), one count of unlawful possession of a controlled substance with intent to deliver – oxycodone (Count II), one count of unlawful possession of a controlled substance with intent to deliver – hydrocodone (Count III), one count of unlawful possession of a firearm in the first degree (Count IV), one count of unlawful possession of a controlled substance with intent to deliver – alprazolam (Count V). CP 40-43. Counts I-III and V had school bus zone as well as firearm enhancements. *Id.*

On September 9, 2016, jury trial was held before the Honorable Judge Gretchen Leanderson. RP 1. The jury found the defendant guilty beyond a reasonable doubt as charged on Counts I, II, III and IV. CP 182 - 205, RP 488-493. On Count V, the jury found the defendant guilty of the lesser included offense of unlawful possession of a controlled substance – alprazolam. CP 195-196, RP 488-493. The jury also returned a special verdict finding defendant guilty of the firearm and school bus zone enhancements on Counts I-III. CP 184-198, RP 488-493.

Sentencing was held on December 2, 2016. CP 377-392, RP 541-543. The Court sentenced the defendant within the standard range to 60 months in custody on Counts I-III, 116 months in custody on Count IV and 24 months in custody on Count V all to be run concurrently. CP 377-392. The defendant was also sentenced to 36 months in custody for the school bus zone enhancements and 24 months in custody for the firearm sentencing enhancements on counts I-III to be served consecutively with the time on Counts I-III and V for a total of 248 months in custody. CP 377-392.

The defendant timely filed a Notice of Appeal. CP 402.

## 2. FACTS

On December 4, 2015, the Lakewood Police Department (LPD) executed a search warrant for narcotics at the defendant's home. RP 138-142, 185-190, 220-221. Officers contacted the defendant, detained him and informed him about the search warrant. RP 199-200. During a search of the defendant's person, officers found \$400 and a set of keys. RP 223. When asked if officers would find narcotics in the house, the defendant admitted that they would find methamphetamine inside a safe. RP 203-204. The defendant also admitted that there was a gun in that safe, that he'd gotten the gun from Hector, his Mexican methamphetamine supplier, because he was robbed earlier that week. RP 204-205. The defendant

explained that he was selling drugs to get out of the \$4,000 of debt that he owed his methamphetamine supplier. RP 204-205. The defendant later admitted that he actually owed \$20,000 as opposed to \$4,000. RP 211.

Officers found the safe containing several items including methamphetamine. RP 203-204. Officers used the keys found on the defendant's person to unlock the safe. RP 204-205. The safe contained the following items: a large baggie containing 307 grams of methamphetamine, documents indicating that the safe belonged to the defendant, money, a loaded and fully operational .22 caliber handgun, a single shot handgun, a BB gun, an SD card, a ledger documenting drug transactions, and four prescription pill bottles containing a total of nearly 50 hydrocodone pills and over 200 oxycodone pills. RP 206, 227-229, 231, 237, 242-243, 300-302.

The prescription pill bottles either had their labels removed, covered or scratched off and there were no prescriptions found for any of them. RP 250-260. This was indicative of illegal drug dealing of these narcotics. RP 240-241.

Officers also found two ledgers, the contents of which were consistent with that of narcotics dealing. RP 246. The first ledger documented the sales of narcotics on November 26<sup>th</sup> and 27<sup>th</sup> indicating the following: Shawna bought 2 grams of methamphetamine and 30

milligrams of Percocet pills, Mike Blanchard paid off his \$10 debt, Sean increased his debt from \$40 to \$60 and Tim owes money for 7 grams of methamphetamine and \$20 for marijuana. RP 245-246. The second ledger listed clothing. RP 245-246. That type of list, often referred to as “wish lists,” are common to narcotics dealers who accept personal items in lieu of money for narcotics. RP 245-247.

Officers found even more items consistent with narcotics dealing in the defendant’s bedroom dresser. The defendant’s dresser contained the following: a digital scale, a plastic container with methamphetamine residue, a Crown Royal bag containing 13 grams of methamphetamine, 10 Alprazolam pills and 2 Oxycontin pills, and a small video camera. RP 179-180. Officers also found surveillance cameras on the interior and exterior of the defendant’s home as well as a DVR system all of which is common to and indicative of narcotics dealing. RP 171-174, 176.

C. ARGUMENT.

1. DEFENDANT IS UNABLE TO SHOW A MANIFEST CONSTITUTIONAL ERROR RESULTING FROM OFFICER CONLON’S TESTIMONY AND ANY ERROR BY DETECTIVE MARTIN’S TESTIMONY WAS HARMLESS WHEN THERE WAS OVERWHELMING EVIDENCE OF HIS GUILT.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the

defendant; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). “Opinion testimony” means evidence that is given at trial while the witness is under oath and is based on one’s belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*, 144 Wn.2d at 760 (*quoting Heatley*, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59. “[T]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony.” *Heatley*, 70 Wn. App. at 578.

In the present case, defendant argues that improper opinion testimony was elicited during the testimonies of (1) LPD detective Jeff

Martin, (2) LPD officer Patrick Conlon, and (3) that State during opening and closing arguments. Appellant's Opening Brief at 12-13. The defendant did not object to the testimony of LPD Officer Conlon or the State during opening or closing arguments, and therefore must demonstrate a manifest constitutional error. However, the defendant is unable to show any of the statements he cites to constitute a manifest constitutional error.

- a. Statements by the State during opening and closing arguments did not constitute improper opinion testimony where it was not testimony, supported by the evidence, and the jury was properly instructed that they were the sole judges of credibility.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). In closing arguments, attorneys have latitude to argue the facts in evidence and any reasonable inferences therefrom. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). However, they may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. “Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718.

Here, the defendant claims that the State made several statements during both opening and closing statements that constituted improper opinion testimony. Brief of Appellant at 12-13. This claim fails as the

State's arguments were not testimony, supported by the evidence and the jury was instructed that none of counsel's arguments were to be considered evidence or the law.

State said the following during opening statements:

During the course of this trial, you're going to hear from a number of State's witnesses, many of them police officers, investigators, detectives, some with quite a bit of expertise and history of working narcotics cases. You're going to hear from them how on December 4, 2015, they had a search warrant for the defendant's home and how on that day, a tactical team did, in fact, serve that warrant on his home in order – as they believed there were items of contraband, narcotics, at that house that he possessed in order to sell them to other individuals.

RP 124.

At the end of trial, the State argued the following during closing arguments:

You heard first – well, not first, but very – at the beginning of the trial, you heard from Detective or Investigator Sean Conlon of the Lakewood Police Department, an individual with many years of experience in law enforcement, having worked with at least three other law enforcement agencies. His work with State agencies, Federal agencies, his expertise for which he was called to the stand is because of his expertise in the field of gangs and narcotics. What did he tell you? He had information that the defendant was engaged in the activity of illegal possess of drugs with intent to sell them at some point in the future.

RP 449-450.

You also heard from numerous other detectives. You heard from Detective Ryan Hamilton, Jeff Martin, as well as Noah Dier, all with extensive investigative experience, all within the special operations unit of the Lakewood Police Department, that involves – and works with other federal agencies regarding narcotics as well as gangs.

RP 451.

A scale can be used to weight flour or cookies. Pill boxes, bottles, to store your pills that a doctor has prescribed you. A Ziploc bag to store that leftovers from Thanksgiving. Firearm to maybe protect your home, your person. A wallet. Bags to store maybe your jewelry. But to a trained eye that the detectives are, together, to them, it shows one thing: Someone engaged in the activity of drug selling.

RP 452.

The State's arguments during opening and closing statements did not constitute improper opinion testimony, let alone testimony. Testimony is defined as "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Bryan A. Garner, *Black's Law Dictionary*, 1514, Thompson West, 8<sup>th</sup> Ed. 2004. Specifically in the context of opinion testimony, it is defined as "evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue." *Demery*, 144 Wn.2d at 759-760. By definition alone, the State's arguments did not constitute opinion testimony. The defendant cannot claim that the State's arguments constituted improper opinion testimony where the State did not testify.

All of the State's arguments were proper where they were amply supported by the evidence. LPD Officers Ryan Hamilton, Jeff Martin, and Noah Dier testified to their extensive training and experience with as narcotics detectives. RP 129-137, 184-189, 335-337. Sean Conlon testified that he was serving the search warrant because they believed that there was evidence that the defendant was engaged in drug dealing. RP 199-200, 203. The witnesses also testified to the items commonly associated with narcotics dealers and explained how they were used in the context of drug dealing. RP 136-137, 190-199, 241-242, 246-247.

The jury was properly instructed that none of the State's arguments or statements were evidence or the law. RP 113. The Court instructed the jury that "the lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law; however, the lawyers' statements are not evidence or the law." RP 113. There is nothing to indicate that the jurors did not follow this instruction. Thus, where the State's arguments did not constitute testimony, were properly supported by the evidence and the jury was properly instructed that they were not to consider these arguments are evidence or the law, none of the State's statements during opening and closing statements were improper opinion testimony.

- b. The defendant fails to demonstrate a manifest constitutional error resulted from Officer Conlon's testimony where the record only supports the conclusion that the jury properly followed instructions that that they were the sole judges of credibility.

When raised for the first time on appeal, a claim of improper opinion testimony will only be considered if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). "Manifest error" requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27. In regards to improper opinion testimony, a defendant can show manifest constitutional error only if the record contains "an explicit or almost explicit witness statement on an ultimate issue of fact." *State v. Elmore*, 154 Wn. App. 885, 897-98, 228 P.3d 760 (2010) (quoting *Kirkman*, 159 Wn.2d at 938). Courts construe the exception narrowly because the decision not to object to such testimony may be tactical. *Kirkman*, 159 Wn.2d at 934-35. Constitutional error is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Quaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). In other words, to determine whether opinion testimony constitutes harmless error, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. *State v. Barr*, 123 Wn. App. 373, 384, 98

P.3d 518 (2004). Also important in a court's determination whether opinion testimony prejudiced a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. *Elmore*, 154 Wn. App. at 898 (citing *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)).

In *Montgomery*, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine, two of the State's witnesses testified that the defendant made purchases of various items with intent to manufacture methamphetamine. *Montgomery*, 163 Wn.2d at 587-589. The Supreme Court held that the testimony concluding that the defendant had intended to manufacture methamphetamine were improper opinion testimony. *Id* at 595-596. However, the Court further held that the testimony was not manifest constitutional error because the jury had been properly instructed that the jurors were the sole judges of credibility and were not bound by expert witness opinions, and there was nothing demonstrating that the jury had failed to follow those instructions. *Id.*

Here, the defendant did not object at trial and thus failed to preserve the issue for appeal. Therefore, the defendant must demonstrate that the error was "manifest" and truly of constitutional dimension by identifying the constitutional error and showing how that error affected his

rights at trial. RAP 2.5(a)(3), *Kirkman*, 159 Wn.2d at 926-927. The Supreme Court described this exception to RAP 2.5(a)(3) as a “narrow one” stating that “we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences.” *Montgomery*, 163 Wn.2d at 595, citing *Kirkman*, 159 Wn.2d at 934-934.

*Montgomery* is instructive. Here, as in *Montgomery*, the jurors were instructed that they were “the sole judges of credibility of each witness,” that they were “also the sole judges of the value or weight to be given to each witness,” and that they were not “bound to accept” the opinion testimony presented by witnesses with special training, education, or experience.” CP 124-125, 151-152 (Jury instructions No. 1 and 27). There is no indication in the record demonstrating that the jury failed to follow these instructions. Thus, the defendant fails to demonstrate actual prejudice resulting from Officer Conlon’s testimony where there is nothing in the record such as a written jury inquiry or other evidence to indicate that this testimony affected his rights at trial.

- c. Testimony of LPD Detective Jeff Martin was harmless beyond a reasonable doubt where there was overwhelming evidence of the defendant's guilt and the jury was properly instructed that they were the sole judges of credibility.

Even a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error. *State v. Saunders*, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (citing *State v. Guloy*, 104 Wn. 2d 425-426, 705 P.2d 1182 (1985)). A constitutional error is harmless beyond a reasonable doubt if the untainted evidence of guilt is so overwhelming that it necessarily leads to a conclusion of guilt. *State v. Easter* 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

At trial, detective Martin testified to the following:

STATE: Given the items you had found inside the house, did you draw a conclusion as to what the defendant was doing?

DEFENSE: I object. Within the province of the jury.

STATE: Perhaps I could rephrase.

COURT: Would you rephrase, please?

STATE: Certainly. Given your numerous years of being involved in the narcotics division and your training and experience, the items you found in his home, based on that, did you

draw a conclusion as to what the defendant was doing?

DEFENSE: I object. That's giving an opinion as to the ultimate question for the jury.

COURT: You know, overruled.

WITNESS: Yes.

STATE: And what did you base that on?

WITNESS: It was based on the totality of the investigation, the items that I located, along with additional items that other officers/investigators located. I concluded that Mr. Stone was in possession of narcotics with intent to distribute.

The State concedes that this was improper opinion testimony.

However, any error was harmless given the overwhelming untainted evidence. Even setting aside detective Martin's challenged testimony, there was overwhelming evidence presented of the defendant's guilt.

The jury heard a tremendous amount of evidence, aside from detective Martin's testimony, about the defendant's guilt. Officers found \$400 and a set of keys to a safe, on the defendant's person, containing the following items: a large baggie containing 307 grams of methamphetamine, documents indicating that the safe belonged to the defendant, money, a loaded and fully operational .22 caliber handgun, a single shot handgun, a BB gun, an SD card, a ledger documenting drug

transactions, and four prescription pill bottles with tampered labels containing a total of nearly 50 hydrocodone pills and over 200 oxycodone pills. RP 223, 206, 227-229, 231, 237, 242-243, 300-302. Officers also found ledgers documenting the defendant's sale of various narcotics as well as "wish lists" of items he'd accept in lieu of cash for narcotics. RP 245-246. The defendant's bedroom dresser contained a digital scale, plastic container with methamphetamine residue, a crown royal bag containing 13 grams of methamphetamine, 10 alprazolam pills and 2 oxycontin pills, and a small video camera. RP 179-180. Officers also found surveillance cameras on the interior and exterior of the defendant's home as well as a DVR system. RP 171-174, 176.

Most importantly, the defendant admitted that he was engaged in illegal drug dealing to pay off his narcotics supplier which he owed \$20,000. RP 205, 211. He also admitted that there would be methamphetamine as well as a gun in the safe to which he had the keys. RP 203-205. Given the overwhelming evidence of guilt, any error was harmless.

The also defendant fails to demonstrate actual prejudice from the testimony where the trial court instructed the jury that they alone were to decide issues of credibility. The written jury instructions stated that "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.” CP 126. The court also read this aloud to the jury prior to the parties closing arguments. RP 644. Error was harmless given the overwhelming evidence and defendant is unable to show any improper opinion testimony amounting to a manifest constitutional error occurred in the present case. Thus, this Court should dismiss the defendant’s claim and affirm his conviction.

2. DEFENDANT IS UNABLE TO SATISFY  
EITHER PRONG OF THE *STRICKLAND* TEST  
AND SHOW HE RECEIVED INEFFECTIVE  
ASSISTANCE OF COUNSEL.

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. Cronic*, 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 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, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

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 (C.A. 9, 1995).

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, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). 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 was 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).

- a. Defendant fails to demonstrate that counsel was inefficient for failing to object to the admission of testimony regarding a BB gun or shoplifting where they were properly admitted and highly relevant to the case.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. The general rule is “all relevant evidence is admissible.” ER 402. Relevant evidence will not be admissible if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403. The trial court’s decision as to the admissibility of evidence is reviewed by an abuse of discretion standard. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001).

The defendant has a duty to make a timely, specific objection to the admission of evidence in order to preserve error for review. ER

103(a)(1); *State v. Pittman*, 54 Wn. App. 58, 772 P.2d 516 (1989). Failure to object at trial waives the ability to challenge the admission of evidence on appeal. *Id.*

To establish ineffective assistance of counsel for failing to object, a defendant must “show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.” *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007).

At trial, the State elicited testimony regarding an overwhelming amount of evidence linking the defendant to illegal narcotics dealing including, but not limited to a BB gun found inside a safe that contained the following items: a large baggie containing 307 grams of methamphetamine, documents indicating that the safe belonged to the defendant, money, a loaded and fully operational .22 caliber handgun, a single shot handgun, an SD card, a ledger documenting drug transactions, and four prescription pill bottles containing a total of nearly 50 hydrocodone pills and over 200 oxycodone pills. RP 223, 206, 227-229, 231, 237, 242-243, 300-302. LPD Detective Martin testified that firearms are commonly found close to narcotics for protection in drug dealing. RP 199.

In addition, officers found a ledger otherwise known as a “wish list” of items that the defendant would accept in lieu of cash for narcotics.

RP 245-246. LPD Detective Ryan Hamilton testified that,

A lot of times what we see is users will shoplift items because they have no source of income to support their habit. They will shoplift items from various stores, and they will trade those items for narcotics. And a lot of times the suppliers will have – basically tell them, “Hey I want this. I want this.” And these pages appear to be wish lists of different items that are wanted and where they’re at.”

RP 246

The defendant claims that evidence of the BB gun and testimony regarding shoplifting should not have been admitted and therefore counsel was ineffective for failing to object to the evidence. Brief of Appellant at 22. By not objecting to the evidence, defendant waived the right to raise this issue on appeal. Thus, defendant frames the issue in terms of ineffective assistance of counsel. This claim fails where the evidence was completely relevant and admissible, so counsel had no basis to object.

Evidence of the BB gun and testimony regarding shoplifting were completely relevant as they tended to show that the defendant was engaged in narcotics dealing. Testimony of the BB gun was relevant and admissible as it was among several items found inside the safe with narcotics and firearms. RP 223, 206, 227-229, 231, 237, 242-243, 300-302. Testimony of the context and content of these items tended to show

that the defendant was involved in narcotics dealing because as detective Martin testified, firearms are commonly found near narcotics for protection. RP 199.

Testimony regarding shoplifting was also relevant because it was necessary to provide context for the ledger of “wish list” items found in the defendant’s home. As detective Hamilton explained, what could otherwise be perceived as a list of household items in this context is actually a ledger of items that dealers will accept in lieu of cash in exchange for narcotics. RP 246-247. The defendant describes detective Hamilton’s testimony as highly prejudicial evidence of “uncharged crimes.” Brief of Appellant at 24. However, when viewed in the context as a whole, the State did not introduce this evidence to imply that the defendant was using drugs or encouraging shoplifting. The testimony was elicited for the purposes of explaining what the ledger of items meant and how it tended to show that the defendant was dealing drugs.

Thus, where evidence of the BB gun and testimony regarding shoplifting was relevant, defense counsel had no reason to object. To establish ineffective assistance of counsel for failing to object, a defendant must “show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.”

*State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). The evidence here was both relevant and admissible. Therefore, no attorney would have objected. Given that defendant is unable to show that an objection would have been sustained and/or the outcome of trial would have been different, his claim for ineffective assistance fails.

- b. Defendant fails to demonstrate ineffective assistance at sentencing where the record reflects that counsel was familiar with firearm sentencing guidelines.

RCW 9.94A.533(e) states that “Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, *and shall run consecutively to all other sentencing provisions*, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. (emphasis added). Only where the consecutive enhancements “result in a presumptive sentence that is clearly excessive in light of the purpose of” the sentencing reform act (SRA), a sentencing court has discretion to impose an exceptional mitigated sentence by imposing concurrent firearm enhancements. *State v. McFarland*, 189 Wn.2d 47 111, 399 P.3d 1106 (2017).

The Court sentenced the defendant within the standard range on all five counts with time to be served concurrently and ran the firearm

sentencing enhancements consecutive to each other in accordance with RCW 9.94A.533(e). CP 541-544.

The defendant claims that counsel was ineffective for allegedly being unaware that he could request an exceptional downward sentence. Brief of Appellant at 34. This claim fails because there is nothing in the record to support the claim that counsel was unfamiliar with the concept of an exceptional downward sentence. Counsel did not state or say anything to suggest that a downward sentence could not apply in this case. Rather, Counsel merely stated that “the weapon enhancements stack.” RP 516. In accordance with counsel’s statement, RCW 9.94A.533(e) clearly indicates that all firearm enhancements “shall run consecutively to all other sentencing provisions.” His statement was a wholly accurate statement of the law as applied in this case. Therefore, contrary to defendant’s claim, counsel’s statement actually indicated that he was well aware of the firearm sentencing guidelines. In the context of an ineffective assistance claim, counsel is in essence presumed to know the law. *Strickland*, 466 U.S. at 669 (A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance). Thus, the defendant fails to demonstrate that counsel’s performance was deficient.

Additionally, the defendant fails to demonstrate any prejudice resulting from the alleged error. There is nothing to indicate that the Court would have granted an exceptional downward sentence had it been requested. The defendant was far from the ideal candidate for an exceptional downward sentence given the facts of the case, defendant's criminal history and the nature of the charges. The Court sentenced the defendant to the high end of the sentencing range on two of five counts, Counts IV and V. CP 377-392. Where counsel is presumed to be an effective advocate, there is void of anything to suggest that he was unaware of the concept of an exceptional downward sentence, and his statements only reflect an accurate and strong grasp of the applicable law, defendant fails to demonstrate that counsel's performance was deficient.

3. PETITIONER HAS FAILED TO  
DEMONSTRATE THAT HIS MULTIPLE  
CONVICTIONS VIOLATE DOUBLE  
JEOPARDY AS EACH CRIME IS DIFFERENT  
IN BOTH FACT AND LAW.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v.*

*Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

*Gocken*, 127 Wn.2d at 100.

Appellate courts "review questions of law such as merger and double jeopardy de novo." *State v. Zumwalt*, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom. State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. *Freeman*, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. *Freeman*, 153 Wn.2d at 772

(citing *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

If the legislative intent is not clear, then the court will turn to the test from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant's multiple convictions. *Freeman*, 153 Wn.2d at 772. Under the *Blockburger* test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Freeman*, 153 Wn.2d at 772 (quoting *Blockburger*, 284 U.S. at 304). However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent.

The defendant was charged with three separate counts of unlawful possession of a controlled substance with intent to deliver, to wit: count I – Methamphetamine, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(b); count II – Oxycodone, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(a) – I and count III –

hydrocodone, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(a) – I. CP 40-43, 377-372.

RCW 69.50.401 states the following:

- (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, delivery or possess with intent to manufacture or deliver, a controlled substance.
- (2) Any person who violates this section with respect to:
  - a. A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years.

Methamphetamine, Oxycodone and Hydrocodone are schedule II narcotics classified separately within different subsections of RCW 69.50.206.

(a) The drugs and other substances listed in this section, by whatever official name, common or usual name, chemical name, or brand name designated, are included in Schedule II.

(b) Substances. (Vegetable origin or chemical synthesis.) Unless specifically excepted, any of the following substances, except those listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, thebaine-derived butorphanol, dextrorhan, nalbuphine, nalmefene, naloxone, and naltraexone, and their respective salts, but including the following:

(xi) Hydrocodone;

(xvi) Oxycodone

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(2) Methamphetamine, its salts, isomers, and salts of its isomers.

Double Jeopardy does not apply where crimes are neither the same in law for fact. To convict the defendant of each of the separate charges of unlawful possession of a controlled substance with intent to deliver, the State was required to prove that he possessed three different controlled substances: methamphetamine, oxycodone, and hydrocodone. Each conviction required proof of a different fact – the specific type of narcotic drug. Thus, the convictions are not the same “in fact.”

Additionally, the convictions are not the same “in law.” The State charged the defendant with separate violations of the criminal statute. Each of the charges was based on a separate subsection of Schedule II controlled substances. The defendant was charged with violating RCW

69.50.401(1)(2)(b) for count I and violating RCW 69.50.401(1)(2)(a) – I on counts II and III. CP 40-43. Thus, the offenses are neither the same “in law.”

The defendant argues that the “unit of prosecution” test, not the “same evidence” test, applies. This claim fails because the unit of prosecution analysis is not applicable where the defendant is charged with violating distinct statutory provisions. *State v. O’Neal*, 126 Wn. App. 395, 416, 109 P.3d 429 (2005). The unit of prosecution test is only applied when a defendant is convicted of multiple counts of the same criminal statute. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Here, the defendant possessed three distinct controlled substances. Hydrocodone, oxycodone, and methamphetamine are defined as controlled substances in three separate statutory provisions: RCW 69.50.206(b)(1)(xi), RCW 69.50.206(b)(1)(xvi), and RCW 69.50.206(d)(2). Thus, a unit of prosecution test is not necessary because the defendant was not convicted of violating a single statute multiple times.

4. DEFENDANT HAS WAIVED ANY ISSUE  
REGARDING LEGAL FINANCIAL  
OBLIGATIONS BY FAILING TO OBJECT.

RCW 9.94A.777 requires that prior to imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the crime victim penalty assessment, the court must first determine that the defendant, under the terms of the section, has the means to pay such additional sums. RCW 9.94A.777(1). The statute also explicitly details that:

Failure to object precludes raising an issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

An appellate court may grant discretionary review of three issues raised for the first time on appeal: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). To fall under the exceptions provided in RAP 2.5(a), defendant would need to claim there was a

manifest error—requiring actual prejudice—affecting a constitutional right. See *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The trial court must impose mandatory LFOs and may impose discretionary LFOs. RCW 9.94A.760; RCW 10.01.160(1); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (victim assessment, filing fee, and DNA collection fee are mandatory obligations not subject to defendant's ability to pay); *State v. Mathers*, 193 Wn. App. 913, 918, 376 P.3d 1163, 1166, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016) (a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees). In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. RCW 10.01.160(3). The sentencing judge must make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680, 685 (2015). This inquiry requires the court

to consider factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. *Id.*

Defendant in the present case did not preserve the issue regarding legal financial obligations at the trial level. On appeal, he has not shown the requisite manifest error affective a constitutional right to invoke discretionary review under RAP 2.5(a). The issue of whether the trial court erroneously imposed the legal financial obligations is not properly before this court and the court should decline to review it for the first time on appeal.

If however this court were to reach the issue, this claim fails where the Court made the proper inquiry prior to imposing LFOs. In fact, the parties explicitly discussed this prior to the Court imposing LFOs. Defense counsel stated, "The Court of Appeals will send it back if you do not make an inquiry regarding my client's ability to pay." RP 543. To which the Court responded, "And I'll do that right now" before discussing the defendant's ability to pay at length. RP 543. With regard to discretionary fines, the Court waived the \$1,000 drug fine and imposed the \$250 drug agency fund. RP 546. The Court did this after inquiring into the defendant's ability to pay and determining that it would waive all, but one non-mandatory fees that were being requested. RP 543-546. Thus, where the Court properly made in individualized inquiry into the defendant's

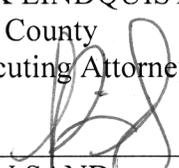
ability to pay before imposing all but one non-mandatory fine, this Court should dismiss his claim and affirm his conviction.

D. CONCLUSION.

For the foregoing reasons, this Court should dismiss the defendant's claims and affirm his convictions.

DATED: March 5, 2018

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 44108

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.

*efile*  
3/5/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**March 05, 2018 - 1:28 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49724-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Justin Stone, Appellant  
**Superior Court Case Number:** 15-1-04941-2

**The following documents have been uploaded:**

- 497247\_Briefs\_20180305132803D2473678\_5521.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Stone Response Brief.pdf*

**A copy of the uploaded files will be sent to:**

- KARSdroit@gmail.com
- valerie.kathryn russell selk@gmail.com

**Comments:**

---

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Robin Khou Sand - Email: rsand@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7875

**Note: The Filing Id is 20180305132803D2473678**