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Division II
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NO. 51919-4-11

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY SEXTON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable Jack Nevin, Judge

OPENING BRIEF OF APPELLANT (CORRECTED)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence seized pursuant to a search warrant where the supporting affidavit failed to establish probable cause that evidence of a crime would be found in the location to be searched.

2. Trial court erred when it denied the defendant's motion to suppress evidence the police obtained in violation of the "knock and announce" rule under RCW 10.31.040 and in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

3. The trial court erred in entering "disputed" finding of fact number 5 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

PCSD Deputies knocked and announced their presence twice prior to making entry into the defendant's residence.
Clerk's Papers (CP) 179.

4. The trial court erred in entering "disputed" finding of fact number 6 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Deputies noted that individuals inside the defendant's residence appeared to be awake and active at the time they approached the defendant's residence.
CP 179.

5. The trial court erred in entering "disputed" finding of fact

number 7 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Deputies received no response from their two, separate knockings on the door to the residence, stating identity and purpose, and demands for entry.

CP 179.

6. The trial court erred in entering “disputed” finding of fact number 8 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Deputies waited seven to ten seconds from the time of their initial knock and announce procedure before forcing entry into defendant’s residence.

CP 179.

7. The trial court erred in entering “reason” number 1 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

The Court has reviewed a copy of the search warrant affidavit and search warrant granted by Judge Blinn on July 25, 2017, and finds that it is a valid search warrant for a search of the defendant’s residence located at 20114 69th Avenue East in Pierce County, Washington State.

CP 180.

8. The trial court erred in entering “reason” number 2 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

The search warrant affidavit contained sufficient facts and circumstances to establish that there was probable cause to believe that the defendant was involved in the criminal activity of unlawful possession of a controlled substance with intent to deliver and that evidence of that criminal activity may be found in the defendant’s residence.

CP 180.

9. The trial court erred in entering “reasons” number 5 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Information contained in the search warrant affidavit suggested that the criminal activity suspected at the defendant’s residence may be part of an ongoing criminal enterprise.

CP 180.

10. The trial court erred in entering “reasons” number 6 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Considering the totality of circumstances surrounding the nature and scope of the criminal activity being investigated, the facts and circumstances included in the affidavit establishing probable cause for the issuance of the search warrant, and the limited time elapsed between issuance and service of the search warrant in this case, the search warrant was neither stale at the time of its issuance nor the time of its service

CP 180.

11. The trial court erred in entering “reasons” number 8 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Deputies in this case knocked and announced their presence at the door of the defendant’s residence on two separate occasions to inform occupants of the defendant’s residence of their presence and identity, their purpose for being there, and to demand admittance.

CP 181.

12. The trial court erred in entering “reasons” number 9 in the CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Despite noting that individuals inside the defendant’s residence appeared to be awake and active at the time of their arrival, Deputies received no response to their knocking and demands for entry.

CP 181.

13. The trial court erred in entering “reasons” number 10 in the

CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

Approximately seven to ten seconds elapsed between the time Deputies began their knock and announce procedure and the time that the door to the defendant's residence was breached.

CP 181.

14. The trial court erred in entering "reason" number 11 in the

CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

In considering the nature of the evidence being sought, and the each with which controlled substances may be destroyed and/or disposed of, in addition to information known to Deputies that the defendant may be armed, the delay in time between the Deputies' announcements to the occupants of the defendant's residence and their forced entry was reasonable and did not violate RCW 10.31.040.

CP 181.

15. The trial court erred in entering "reasons" number 12 in the

CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

The actions of Deputies in searching this search warrant complied with RCW 10.31.040.

CP 181.

16. The trial court erred in entering "reasons" number 13 in the

CrR 3.6 suppression motion Findings of Fact and Conclusions of Law:

The search warrant in this case is valid and was properly issued and served.

CP 181.

17. The trial court erred in denying Mr. Sexton's timely, unequivocal request to discharge trial counsel and to proceed pro se.

18. The trial court erred in entering Conclusion of Law number 6 regarding Mr. Sexton's request to discharge trial counsel and to proceed pro

se:

The defendant's request to discharge his counsel and proceed pro se in this case was neither unequivocal nor timely.
CP 183, 186.

19. Prosecutorial misconduct during closing argument violated appellant's right to a fair trial.

20. Appellant received ineffective assistance of counsel.

21. There was insufficient evidence to support appellant's conviction for possession of methamphetamine.

22. The \$200.00 criminal filing fee should be reversed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred in failing to suppress evidence because the affidavit in support of the search warrant failed to establish timely probable cause that evidence of the crime would be found in the location to be searched.
Assignment of Error 1.

2. Did the trial court err in denying appellant's motion to suppress all evidence seized pursuant to the search warrant, where the affidavit upon which the search warrant was based relied upon stale information, and thus failed to establish probable cause that the methamphetamine whose search was authorized by the warrant was present in the residence listed in the warrant. Assignments of Error 1, 8, 9, and 10.

3. Whether the Application and Affidavit for Search Warrant failed to establish probable because the information was stale? Assignments of

Error 8, 9, and 10.

4. Does a trial court err if when it refuses to suppress evidence the police obtained after violating the “knock and announce” rule under RCW 10.31.040, in violation of a defendant’s right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment? Assignments of Error 3, 4, 5, 6, 11, 12, 13, 14, 15, and 16.

5. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. A defendant’s timely, unequivocal request to proceed pro se must be granted as a matter of law unless the trial court has determined that the defendant is incompetent to stand trial or that his waiver of counsel is not knowing, intelligent and voluntary. In a previous cause number (Pierce County Cause No. 17-1-00988-3), in which Mr. Sexton was represented by the same trial counsel as in the present cause and which involved similar facts and circumstances, Mr. Sexton moved to proceed pro se. The motion to represent himself was denied and Mr. Sexton proceeded to trial.¹ Mr. Sexton, again represented by the same trial counsel, moved in this case to proceed pro se. Did the trial court err by denying Mr. Sexton’s request to proceed pro se on the basis that that the request was not timely and was equivocal? Assignments of Error 17 and 18.

¹Direct appeal of cause no. 17-1-00988-3 is pending before this Court in cause no. 52401-5-II.

6. Did the prosecutor flagrantly misstate the law regarding “actual possession” during closing argument? Assignment of Error 19.

7. If defense counsel failed to preserve the issue of prosecutorial misconduct for review, was Mr. Sexton denied the effective assistance of counsel? Assignment of Error 20.

8. Did the State prove beyond a reasonable doubt that the appellant possessed methamphetamine? Assignment of Error 21.

9. Recent changes to Washington's statutory scheme prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. The Supreme Court recently held in *State v. Ramirez*² that these statutory changes apply retroactively to cases that were pending on direct appeal when the statutes were amended. Here, the appellant was previously found to be indigent. Should the \$200.00 criminal filing fee be reversed and the matter remanded for resentencing? Assignment of Error 22.

C. STATEMENT OF THE CASE

1. Procedural facts:

Police executed a search warrant for a house located at 20114 69th Avenue East in Spanaway, Washington, on March 9, 2017. During the search police allegedly found 1.25 pounds of methamphetamine, scales, a stolen handgun, and over \$5000.00 in cash. Clerk’s Papers (CP) 3; (Declaration for Determination of Probable Cause, August 4, 2017).

²191 Wn.2d 732, 426 P.3d 714 (2018).

Appellant Ricky Sexton was charged with possession of methamphetamine with intent to deliver in Pierce County Cause No. 17-1-00988-3. Mr. Sexton was released on bail. CP 3.

During the early morning hours of July 31, 2017, a police Special Weapons and Tactical (SWAT) team executed a second search of the house at 20114 69th Avenue East and arrested six individuals in the house, again including Mr. Sexton. CP 3. Police alleged that a total of one pound of methamphetamine, scales, packaging material, and approximately \$1600.00 were found in the house during the early morning search. CP 3.

On August 4, 2017, Mr. Sexton was charged in Pierce County Superior Court cause no. 17-1-02934-5 with possession of a controlled substance with intent to deliver—methamphetamine, contrary to RCW 69.50.401(1), (2)(b). The State also charged an aggravating factor under RCW 9.94A.535(e) that the offense was a “major violation” of the Uniform Controlled Substances Act. CP 1-2.

a. CrR 3.6 suppression hearing (cause no. 17-1-00988-3, February 13, 2018).

Defense counsel filed a motion to suppress evidence obtained from the March 9, 2017 search. CP 14-42. The case came on for CrR 3.6 suppression motion on February 13, 2018. 1Report of Proceedings³ (RP) at

³ The record of proceedings consists of the following transcribed hearings: 1RP - February 13, 2018 (CrR 3.5/3.6 motion cause no. 17-1-00988-3); February 14, 2018; 2RP - March 1, 2018, March 5, 2018 (suppression motion hearing), and March 6, 2018 (ruling regarding suppression motion);

36-114. The defense alleged, *inter alia*, that the police violated the “knock and announce” rule contained in RCW 10.31.040. 1RP at 5-82. The court denied the motion to suppress evidence obtained during the March 9, 2017 search. CP 176-82.

b. CrR 3.6 suppression hearing (cause no. 17-1-02934-5, March 5, 2018)

Defense counsel filed a CrR 3.6 motion on January 2, 2018 to suppress evidence obtained by police during the second search of the house, which took place on July 31, 2017. CP 14-42. The motion sought to invalidate the search warrant used by police to enter the house based on (1) lack of probable cause for issuance of the warrant, (2) the staleness of the warrant, and (3) violation of the “knock and announce” rule. CP 15-23. A copy of the warrant and a copy of the affidavit of Pierce County Deputy Sheriff Vance Tjossem in support of the warrant were attached to the motion as “Exhibit A.” CP 25-33.

The affidavit describes the items found by police while executing the search warrant on March 9, 2017, including 1.25 pounds of methamphetamine, comprised of one pound of methamphetamine valued at \$4000.00 and three ounces of meth found in what the affidavit termed “Sexton’s desk,” an amount which the affidavit valued at \$1100.00, and

3RP – March 26, 2018 (motion to proceed pro se; jury trial, day 1); 4RP – March 27, 2018 (*voir dire*); 5RP – March 28, 2018 (jury trial, day 3); 6RP – April 2, 2018 (jury trial, day 4) April 3, 2018, April 4, 2018 (verdict); and 7RP – April 13, 2018 (sentencing), May 4, 2018, and May 16, 2018.

digital scales. CP 30; (Affidavit at 3). The affidavit also described 102 Schedule II or Schedule III opiate and methamphetamine-based pills, a stolen handgun, “crib notes,” over \$5000.00 in cash, and a working surveillance system and DVR and multiple cameras. CP 30; (Affidavit at 3). The affidavit states that a confidential informant was in the house at 20114 69th Avenue E., and that while inside the house “he/she saw Sexton holding a large amount of methamphetamine packaged in a large Ziplock type baggie.” CP 32; (Affidavit at 5). The affidavit also stated that the confidential informant saw “Sexton sell an amount of methamphetamine to another subject.” CP 32; (Affidavit at 5).

On March 5, 2018, the court heard the suppression motion in cause no. 17-1-02934-5. 2RP (3/5/18) at 41, 43-140. Pierce County Deputy Sheriff Jesse Hotz testified that a (SWAT) team assisted in the search of the house at 20114 69th Avenue E. on July 31, 2017, which was deemed a “high risk search warrant.” 2RP (3/5/18) at 47, 50, 54, 55.

Deputy Hotz stated that his role with the SWAT team was as “mechanical breacher,” and that he pounded on the door two times and yelled “police, search warrant, [and] open the door.” 2RP (3/5/18) at 58. He stated that he did not receive a response from inside the residence, but heard a female “start screaming from inside of the house” during the “second knock and announce.” 2RP (3/5/18) at 58. He stated that he paused one second between the first knock and announce and the second. 2RP (3/5/18)

at 59. He stated that he then forced open the front door using the metal breaching tool and testified that seven to ten seconds elapsed from the first knock to forcing open the door. 2RP (3/5/18) at 60. After entering the residence police “cleared” the house and detained six people including Mr. Sexton. 2RP (3/5/18) at 61.

Douglas Thompson stated that he and his fiancé Michell Stecker were at the house during the early morning hours of July 31, 2017 when police served the search warrant. 2RP (3/5/18) at 76-77. He stated he was sleeping on a couch in the living room approximately five to ten feet from the front door. RP (3/5/18) at 78. He stated that he did not hear knocking on the door, did not hear police “knock and announce” from outside the house, and that he “would have heard that if that was spoken at all.” 2RP (3/5/18) at 80, 81. He stated that it was the sound of breaking glass that woke him up. 2RP (3/5/18) at 81. Mr. Thompson stated that he was also present during execution of the first search warrant at the house on March 9, 2017. 2RP (3/5/18) at 84. He acknowledged using methamphetamine, but denied that he received methamphetamine from Mr. Sexton and stated that he did not see drug use while at the house. RP (3/5/18) at 84.

Ms. Stecker stated that she was staying in the house with Mr. Thompson on July 31. RP (3/5/18) at 87. She stated that she was sleeping on a couch five to six feet away from the front door of the house. 2RP (3/5/18) at 88-89. Several other people, including Mr. Thompson, were also

sleeping in the living room. 2RP (3/5/18) at 89. She stated that she woke up after hearing a banging sound in the back of the house and heard windows breaking in the living room. 2RP (3/5/18) at 89. She stated that before hearing the breaking glass she did not hear anyone banging on the door and did not know that it was law enforcement until “there was a gun to my head saying Pierce County Sheriff.” 2RP (3/5/18) at 90. Ms. Stecker stated that although several people were in the living room, a total four people lived in the house at the time: Dana Rolfe, Mr. Sexton, Mr. Thompson and herself. RP (3/5/18) at 95. She stated that she had lived at the house for approximately a month and a half and did not see drug usage in the house. RP (3/5/18) at 95.

Ms. Rolfe testified that she is the girlfriend of Mr. Sexton and that she was present at the time of the search on July 31. RP (3/5/18) at 104. She stated that she heard glass breaking, which woke her up. RP (3/5/18) at 106. She did not hear banging on the front door and did not hear police announce their presence or that they had a search warrant. RP (3/5/18) at 106-07.

Karen Smith, a friend of Ms. Rolfe’s, was at the house at the time of the search. RP (3/5/18) at 121-30. She stated that she was in the living room and about to fall asleep when she heard “somebody bash through the door” and at the time “they broke through the window.” RP (3/5/18) at 121, 122. She stated that before police entered the house, she did not hear any sound from outside the house. 2RP (3/5/18) at 122.

Deputy Hotz testified that he did not see any lights on in the house, did not hear the sound of toilets being flushed or persons running inside the house, and did not see any persons outside the house when police were outside the house. RP (3/5/18) at 63-64, 68.

Defense counsel argued that there was a nine day delay between gathering information and issuing the warrant on July 25, 2017 and execution of the warrant on July 31. 2RP (3/5/18) at 154. Defense counsel also argued that the police failed to comply with the RCW 10.31.040 knock and announce rule. 2RP (3/5/18) at 154-55.

The court found that probable cause existed to support issuance of the search warrant. 2RP (3/6/18) at 166-67. Regarding staleness, the court noted that the defense argued that the warrant was executed nine days after receiving the information and that the State argued that the warrant was executed six days later. 2RP (3/6/18) at 167. The court chose to use the six day time line argued by the State at the hearing. 2RP (3/6/18) at 167. The court, referring to the totality of the information, found that the information supporting the warrant was not stale and that the police did not violate the knock and announce rule. 2RP (3/6/18) at 173-74.

The court entered findings of fact and conclusions of law regarding admissibility of evidence on May 4, 2018. CP 176-82.

c. Motion to discharge counsel and proceed pro se:

The matter came on for jury trial on March 26, 2018, the Honorable

Jack Nevin presiding. On the morning of trial before *voir dire* and motions in *limine*, defense counsel James Short told the court that Mr. Sexton had “discharged me again,” and that Mr. Sexton had told him during a jail meeting the previous week that he did not want Mr. Short to represent him, and that Mr. Sexton had told him the same thing that morning. 3RP at 3. Mr. Short stated that Mr. Sexton refused to listen to a plea offer made by the State and that he walked out of the room. 3RP at 4. Mr. Short stated that he believed the attorney/client relationship was broken and moved to withdraw from representation. 3RP at 4.

The prosecution opposed the motion, noting that Mr. Sexton had made an identical request in cause no. 17-1-00988-3. 3RP at 4. The court had denied Mr. Sexton’s motion to discharge counsel and request to exercise his right to self-representation in the first case and the State argued that the court should deny the second motion for self-representation on the same grounds. 3RP at 4-5. Mr. Sexton addressed the court and stated that he wanted to represent himself. 3RP at 9, 15-16, 22. Mr. Sexton stated that he was “putting in a motion for a new trial and I want to proceed thus far on my own pro se.” 3RP at 9. Mr. Sexton also stated that he asked for reconsideration of the court’s decision regarding the “knock and announce” issue, and stated that he intended to move for “disqualification” of Judge Nevin. 3RP at 20-21.

Pursuant to *Faretta v. California*,⁴ the court asked Mr. Sexton a series of questions in order to assess Mr. Sexton's ability to represent himself, including if he understood the consequences of being convicted, whether he had previously represented himself in a criminal matter, whether he had legal training, and if he understood the rules of evidence and criminal procedure, the difference between consecutive and concurrent sentences. 3RP at 22-27. When asked if he was asking to represent himself or for appointment of new counsel, Mr. Sexton stated that he would request an attorney "[i]f I could get a competent one, yes." 3RP at 28. After the colloquy with Mr. Sexton, the court denied his motion. 3RP at 43-53.

d. Jury instructions:

The court gave an instruction which stated in part:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with the possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

CP 146 (Instruction No. 10).

e. Closing argument and jury question:

⁴422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

During closing argument, the prosecutor made the following argument:

The first manner in which you can find possession is what the court has defined as actual possession.

The first manner which you can find possession is what the Court has defined as actual possession. Did the defendant, being in his home on the morning of July 31st, 2017, in his master bedroom, where the vast majority of methamphetamine, approximately 430 grams, were in one baggie secreted between folded pairs of men's pants, place him in actual possession of the methamphetamine, that is, did he have physical custody of that methamphetamine. Yes. Now, you may ask yourself during deliberation, doesn't he have to have it on his person, doesn't he have to have it in his pocket. I would submit to you that based on the instruction you're being given right now, I am in actual possession of the legal pad I'm holding in my hand. The fact I set it down a short distance away does not abrogate my possession of that item.

6RP at 126.

The jury submitted the following question:

As pertains to possession, instruction No. 10, can the judge elaborate on factors to determine dominion and control, particularly what constitutes a person's ability to take actual possession and what constitutes the capacity to exclude others.

6RP at 151; CP 156.

f. Verdict and sentencing:

The jury left the verdict form blank for the charge of possession of methamphetamine with intent to deliver and found Mr. Sexton guilty of the lesser included offense of possession of methamphetamine. 6RP at 153; CP

154, 155.

Mr. Sexton was previously convicted of unlawful possession of a controlled substance with intent to deliver, unlawful possession of a controlled substance with intent to deliver methylphenidate, unlawful possession of oxycodone, first degree unlawful possession of a firearm in Cause No. 17-1-00988-3 on February 28, 2018. Both cause numbers came on for sentencing on May 4, 2018. 7RP at 3-38.

The State argued that Mr. Sexton had an offender score of “8” and standard range of 366 days to 24 months. 7RP at 23. The State argued for 24 months, to be served concurrently with the sentence in cause no. 17-1-00988-3. 7RP at 23. Defense counsel argued for imposition of a sentence under the Drug Offender Sentencing Alternative (DOSA) and argued that Count I and Count II in Cause No. 17-1-00988-3 are the same criminal conduct and that the offender score should be “7”. 7RP at 27-28. The prosecution stipulated to the same criminal conduct and an offender score of “7”, arguing that it would affect the offender score for Count IV in cause no. 17-1-00988-3 only. 7RP at 29.

The court denied the defense request for DOSA, finding that the quantities involved in the two cases were greater than the quantities contemplated in the statutory scheme. 7RP at 34. The court found that Counts I and II in Cause No. 17-1-00988-3 are the same criminal conduct and imposed 85 months, followed by one year of community custody. 7RP

at 35. The court sentenced Mr. Sexton to 24 months in cause no. 17-1-02934-5, to be served concurrent to the sentence in cause no. 17-1-00988-3, followed by 12 months of community custody. 7RP at 35; CP 164-75. The court imposed legal financial obligations including a \$500.00 crime victim penalty assessment and \$200.00 criminal filing fee. 7RP at 36.

Timely notice of appeal was filed on June 1, 2018. CP 195-207. This appeal follows.

2. Trial testimony:

The matter came on for trial on March 26, 27, 28, April 2, 3, and 4 2018, the Honorable Jack Nevin presiding. 3RP at 3-94; 4RP at 2-111; 5RP 4-189; and 6RP 3-160.

Pierce County Deputy Sheriff Kristian Nordstrom testified that a division of the Sheriff's Office called the Special Investigations Unit (SIU) investigates all drug cases and vice cases. 5RP at 66. Deputy Sheriff Robert Tjossem, who worked in the SIU of the Pierce County Sheriff's Office, testified that he obtained a warrant to search a residence at 20114 69th Avenue East in Pierce County in the course of a drug investigation. 5RP at 34-35, 37, 68. Law enforcement executed the search warrant at approximately 5:00 a.m. on July 31, 2017. 5RP at 38, 59, 68, 107.

Deputy Tjossem testified that Mr. Sexton was present in the living room of the house when police served the warrant. 5RP at 39-40. A total of six people were in the residence when police entered. 5RP at 60. Police

obtained a total of 481 grams of suspected methamphetamine and approximately \$1600.00 in the search of the residence. 5RP at 46, 55. Deputy Tjossem testified that Mr. Sexton experienced chest pains during the search and was transported to the hospital. 3RP at 63.

Deputy Elizabeth Reigle took place in the search of the house on July 31, 2017. 5RP at 105-08. She testified that in the master bedroom of the residence police found items including “crib notes, ” a small amount of currency, and digital scales. 5RP at 125, 132. Police also found two baggies of white crystalline material in a black toiletry bag located under folded pants in the closet in the master bedroom. 5RP at 139, 147. (Exhibits 35A and 36A). Deputy Reigle stated that a piece of paper from Les Schwab dated July 24, 2017, listing the name Rick Sexton in Thrift, Washington was on a bed located in the bedroom. 5RP at 156.

Deputy Sheriff Makana Punohu, a member of the SUI, also participated in execution of the search warrant at the house on July 31, 2017. 5RP at 162, 6RP at 5. He testified that he searched the master bedroom and found currency in clothing in the bedroom, documents and “ledger notes” in the bedroom. 5RP at 170-184. Police also found a digital scale on top of the desk. 6RP at 6, 11, 12.

Deputy Punohu testified that he located documents in the master bedroom including mail addressed to Mr. Sexton pinned to a wall in the room. 5RP at 168, 172-73. He testified that an application for concealed weapon

from Virginia by Mr. Sexton was found in the bedroom. 6RP at 29. Exhibit 5A. Deputy Punohu testified that police also found a Puget Sound Energy check with the name Rick Sexton and a document from the Washington Department of Licensing with the name Rick Sexton and listed the address of the house searched by police. 6RP at 30-31.

Maureena Dudschus, a forensic scientist at the Washington State Patrol Crime Lab, tested material seized by police from the house during the search, including Exhibit 14, which weighed 3.6 grams, Exhibit 17 (1.3 grams), Exhibit 25 (11.2 grams), Exhibit 35 (431 grams) and Exhibit 42 (2.8 grams). 6RP at 47, 50, 54, 55, 58, 61, 66. Ms. Dudschus testified that substances in each of the exhibits tested positive for the presence of methamphetamine. 6RP at 47, 54, 55, 56, 58, 61, and 66.

Following the conclusion of the State's case in chief, defense counsel moved to dismiss the "major VUCSA violation" aggravating circumstance alleged pursuant to RCW 9.94A.535(3)(e). 6RP at 70-92. After hearing argument, the court granted the motion to strike the "major violation" aggravating factor. 6RP at 92.

The defense rested without calling witnesses. 6RP at 94.

D. ARGUMENT

- 1. MR. SEXTON'S RIGHTS WERE VIOLATED WHEN THE HOUSE WAS SEARCHED AND ITEMS SEIZED BASED UPON A SEARCH WARRANT NOT SUPPORTED BY PROBABLE CAUSE**

a. A search warrant must be supported by facts and circumstances that establish probable cause to believe that evidence of the crime will be found at the location to be searched

A warrant to search a person or his home must be based upon probable cause that the defendant is involved in criminal activity and that evidence of criminal activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). This requires a nexus between criminal activity and the item to be seized and between the item to be seized and the place to be searched. Here, a warrant was issued for the house even though the supporting affidavit did not establish a nexus between the house and the suspected methamphetamine. The warrant to search the residence fails for lack of nexus.

The federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Washington Const. art. I, § 7.

Article 1, § 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A search warrant may issue only upon a showing of probable cause, commonly established by facts asserted in an affidavit in support of the warrant. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause exists if a reasonable, prudent person would understand from the facts asserted in the affidavit that criminal activity is taking place and that

evidence of the activity will be found at the place to be searched when the warrant is executed. *Thein*, 138 Wn.2d at 140. The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause so that the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. *Thein*, 138 Wn.2d at 140. Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence of the crime can be found in the place to be searched when the search occurs. *Id.* at 140. The affidavit must contain more than mere conclusions, general statements, suspicions, or personal belief; otherwise the magistrate becomes no more than a rubber stamp for the police. *Thein*, 138 Wn.2d at 148; *State v. Jackson*, 102 Wn.2d 432, 436-37, 688 P.2d 136 (1984).

b. The affidavit in support of the search warrant did not contain information to establish a nexus between the items to be seized and the home.

As noted above, in order to establish probable cause to search a location, the affidavit must demonstrate “a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*,

88 Wn.App. 503, 509, 945 P.2d 263 (1997)).

In this case, Deputy Tjossem used a confidential informant, who reported that he or she saw Mr. Sexton sell suspected methamphetamine to another person. CP 15, 31. (Defendant's Motion, Declaration and Memorandum in Support of Motion to Suppress, Affidavit at 4). No specific details were provided: the informant does not name the person who allegedly bought methamphetamine, nor does the affidavit provide details regarding the amount involved other than to state it is a "large amount." CP 31-32. (Affidavit at 4-5). The affidavit fails to demonstrate that the methamphetamine could be expected to be found in the house in the days following the alleged drug deal, given that a more specific amount was not listed in the affidavit.

A trial court's review of a search warrant is limited to the four corners of the affidavit asserting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The trial court's determination regarding the sufficiency of the affidavit is a conclusion of law that is reviewed de novo. *Id.*; *State v. Chamberlin*, 161 W.2d 30, 40-41, 162 P.3d 389 (2007).

The affidavit did not establish probable cause that evidence of continuing drug dealing was taking place at the residence. The standard is whether there is probable cause to believe contraband will be found in the

specific place to be searched. *Thein*, 138 Wn.2d at 140. The search warrant was therefore not based upon probable cause, and the methamphetamine and other items seized should have been suppressed.

c. The warrant was stale

Even if the affidavit somehow demonstrates a nexus between the alleged crime and the residence, probable cause is still lacking because the warrant was stale. Probable cause must be timely. *State v. Lyons*, 174 Wn.2d 354, 357, 275 P.3d 314 (2012). Information is not stale for probable cause purposes if the facts and circumstances in the affidavit support a commonsense determination that there is a continuing and contemporaneous possession of the evidence intended to be seized. *State v. Maddox*, 152 Wn.2d 499, 505-06, 98 P.3d 1199 (2004). Here, the affidavit for search warrant was made “[w]ithin the last 72 hours” after the informant saw the alleged drug deal. CP 32. (Affidavit at 5). This allegation contained in the affidavit, however, does not support a commonsense determination that Mr. Sexton was likely to be in continuing and contemporaneous possession of methamphetamine described in the warrant. Given the fact that methamphetamine is easily consumed and easily transferable undermines the probability that the drugs described by the informant will be present as long as nine days after the informant allegedly saw the drugs in the house.

The critical time frame for establishing timely probable cause is when the criminal activity is observed. *Lyons*, 174 Wn.2d at 361. As the Washington Supreme Court recognized in *Lyons*, a “magistrate cannot determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations.” *Id.* In this case, the court found that six days passed between the occurrence of the incident involving the alleged drug deal and execution of the search warrant. RP (3/6/18) at 167; CP 180.

In determining staleness, the tabulation of the number of days is not the sole factor, but is one circumstance to be considered in determining staleness. *Lyons*, 174 Wn.2d at 361; *State v. Hall*, 53 Wn.App. 296, 300, 766 P.2d 512, rev. denied, 112 Wn.2d 1016 (1989). The affidavit for search warrant did not detail an ongoing investigation of a methamphetamine operation or that a series of “controlled buys” were made by the informant, but was instead limited to a single contact with Mr. Sexton. The affidavit provides no assertion that the methamphetamine allegedly seen by the informant would be present nine days later (as argued by the defense), or six days later (as found by the court), or that there was reason to suspect ongoing criminal activity at the house, and is therefore insufficient information from which to reasonably infer the continued presence of the drugs listed in the

search warrant. The trial court erred in concluding the warrant was not stale.

c. Mr. Sexton's conviction must be reversed and dismissed

Based on the foregoing, the information did not provide current probable cause to search the premises. The trial court erred by denying Mr. Sexton's motion to suppress all of the evidence seized pursuant to the search warrant. This Court must reverse Mr. Sexton's conviction for possession of a controlled substance.

2. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF THE "KNOCK AND ANNOUNCE" RULE UNDER RCW 10.31.040.

The knock and announce rule has both constitutional and statutory components. *State v. Ortiz*, 196 Wn. App. 301, 307, 383 P.3d 586 (2016). Both the Fourth Amendment of the United States Constitution and article I, § 7 of the Washington Constitution require that "a nonconsensual entry by the police 'be preceded by an announcement of identity and purpose on the part of the officers.'" *State v. Coyle*, 95 Wn.2d 1, 6, 621 P.2d 1256 (1980) (quoting *State v. Young*, 76 Wn.2d 212, 214, 455 P.2d 595 (1969)); *Ortiz*, 196 Wn. App. at 307.

RCW 10.31.040 allows officers making an arrest to "break open any outer or inner door, or windows of a dwelling house or other building"

if “after notice of [their] office and purpose, [they] be refused admittance.” RCW 10.31.040. The police do not comply with the rule merely by announcing their identity and purpose as they enter. *State v. Ellis*, 21 Wn. App. 123, 589 P.2d, 428 (1978). In order to comply with this “knock and announce” rule, police officers “prior to a nonconsensual entry must (1) announce their identity, (2) announce their purpose, (3) demand admittance, (4) announce the purpose of their demand, and (5) be explicitly or implicitly denied admittance.” *State v. Richards*, 136 Wn.2d 361, 369, 962 P.2d 118 (1998). “The remedy for an unexcused failure to comply with the ‘knock and wait’ rule is suppression of the evidence obtained after the entry.” *Richards*, 136 Wn.2d at 371. Absent exigent circumstances, an officer’s failure to comply with this statute during the execution of a search warrant requires suppression of the evidence seized. *State v. Hartnell*, 15 Wn.App. 410, 550 P.2d 63 (1976).

In addition, the “knock and announce” rule as set out in RCW 10.31.040 is not merely a rule of statutory creation. Rather, it derives from the common law and constitutes a legislative statement of privacy rights also guaranteed under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Coyle*, 95 Wn.2d 1, 621 P.2d 1256 (1980); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

The “knock and announce” rule has three main purposes: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent destruction of property; and (3) to protect the occupants’ right to privacy. *Coyle*, 95 Wn.2d at 5. The remedy for an unexcused failure to comply with these requirements is the suppression of any physical evidence or statements obtained by means of the entry. *Coyle*, 95 Wn.2d at 14; *State v. Edwards*, 20 Wn. App. 648, 581 P.2d 154 (1978); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

In the case at bar, the police did not comply with the statute. The question presented by these facts is whether the officers knocked first before using the mechanical breaching tool, and whether they were impliedly “denied admittance,” where the officers waited, at most, seven to ten seconds before breaking into the house.

“The police need not wait for an actual refusal following their announcement; denial of admittance may be implied from the occupant's lack of response.” *State v. Garcia–Hernandez*, 67 Wn. App. 492, 495, 837 P.2d 624 (1992) (citations omitted). The length of time that officers must wait before using force to enter a residence depends upon the circumstances of each case. *State v. Schmidt*, 48 Wn. App. 639, 644, 740 P.2d 351, review denied, 109 Wn.2d 1013 (1987) (citing *State v. Edwards*, 20 Wn. App. 648, 651, 581 P.2d 154 (1978)).

Exigent circumstances shorten the length of time that officers must wait. *Garcia–Hernandez*, 67 Wash.App. at 496. (holding that five second delay was reasonable when commotion may have alerted defendant to the officers' presence, and open door indicated that apartment was occupied and that it was unlikely occupants were asleep); *Schmidt*, 48 Wn. App. at 646 (holding that three second delay was reasonable when barking dog may have alerted occupants to officers' presence, occupants became quiet after announcement, police had reason to believe the defendant may have been armed and that drug lab could have been destroyed, and size of structure indicated that response time should have been brief).

The facts in the present case, however, indicate that a longer waiting period was required. Here, the SWAT team executed the search warrant at 5:00 a.m., when the occupants were asleep. RP (3/6/18) at 62, 63, 73. The search warrant team consisted of an armed SWAT team. The court found that the entry team knocked on the door twice, announced police and search warrant, and waited seven to ten seconds before entering the house. CP 177, 179. (Finding of Fact 6, Findings as to Disputed Facts 5, 7, and 8). All but one of the occupants of the house testified that they were asleep. RP (3/6/18) at 77, 88, 89, 94, 106, 108, 113, 121. Moreover, Deputy Hotz stated that he did not see any lights on inside the house, did not see any persons

outside the house when the SWAT team approached, and did not hearing the sound of persons running inside the house or the sound of toilets being flushed. RP (3/6/18) at 63-64, 68. Considering these circumstances, the police failed to comply with the “knock and announce rule” by not waiting a reasonable amount of time to for the occupants to voluntarily open the door.

In *Ortiz*, Division Three found that six to nine seconds was not a reasonable amount of time for sleeping occupants to respond to police. *Ortiz*, 191 Wn.App. at 309. The Court found that because no denial of admittance could be inferred, police failed to comply with the reasonableness requirement of the knock-and-announce rule when executing search warrant. *Id.* In *Ortiz*, officers executed search warrant at approximately 6:47 a.m., knocked on the door three times, announced “police search warrant,” waited one or two seconds, repeated the process twice more and then breached the front door. *Id.*

Here, the entry took place even earlier in the morning— in this case the entry was at 5:00 a.m. As was the case in *Ortiz*, there was no sign of activity inside the house. RP (3/6/18) at 63-64, 68. The SWAT team’s entry after seven to ten seconds was not a reasonable amount of time for sleeping occupants to respond to police. Therefore, no denial of admittance could be inferred. Accordingly, the evidence seized during the search was

inadmissible. *Coyle*, 95 Wn.2d at 5; *Ortiz*, 196 Wn.App. at 312.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. SEXTON'S REQUEST TO REPRESENT HIMSELF, WHERE THE REQUEST WAS UNEQUIVOCAL AND TIMELY UNDER THE CIRCUMSTANCES

a. The state and federal constitutions guarantee criminal defendants the right to self-representation

Under both Washington Constitution, Article I, § 22, and United States Constitution, Sixth Amendment, a defendant in a criminal proceeding is guaranteed the right to self-representation. The Sixth Amendment to the United States Constitution⁵ implicitly provides the right to proceed pro se. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001).

The Washington Constitution expressly guarantees the right of self-representation: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” Wash. Const. art. 1, § 22; see *State v. Breedlove*, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995).

The right is rooted in respect for autonomy. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although the constitution includes safeguards— like the right to counsel – designed to protect the accused, “to deny the accused in the exercise of his free choice the right to dispense with

⁵The amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. 6.

some of these safeguards is to imprison a man in his privileges and call it the Constitution.” *Faretta*, 422 U.S. at 815 (internal citations omitted). Thus, “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” *Id.* at 834 (internal citations omitted).

Courts regard this right as “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). An improper denial of the right requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

b. A timely, unequivocal request to proceed pro se must be granted as a matter of law.

Where a defendant timely asserts this right, the court's duty is solely to determine whether the request is knowing, intelligent, and unequivocal and not made for an improper purpose such as delay. *State v. Breedlove*, 79 Wn. App. 101, 900 P.2d 586 (1995); see also *State v. Fritz*, 21 Wn. App. 354, 585 P.2d 173 (1978). A defendant's request to proceed pro se must be (1) timely made and (2) stated unequivocally. *Madsen*, 168 Wn.2d at 503; *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001); *Faretta*, 422 U.S. at 835.

A request to proceed pro se is valid even if combined with an alternative request for new counsel. *State v. Stenson*, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997). If the demand for self-representation is made well

before the trial and unaccompanied by a motion for a continuance, the trial court must grant the request as a matter of law. *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). The trial court does not have the discretion to deny the request unless it is made just before or during trial. *Id.*

Even if the request is made just before trial, the trial court may deny the request only if (1) the motion is made for improper purposes, i.e., for the purpose of unjustifiably delaying the trial, or (2) granting the request would obstruct the orderly administration of justice. *Madsen*, 168 Wn.2d at 509; *Breedlove*, 79 Wn. App. at 107-08. Once the accused makes a timely, unequivocal request to represent himself, the court must engage in a colloquy to determine whether the defendant is waiving his right to counsel knowingly, intelligently, and voluntarily. *Faretta*, 422 U.S. at 835; *Madsen*, Wn.2d 168 at 504; *Breedlove*, 79 Wn. App. at 111.

A trial court's decision whether or not to grant a defendant's request for self-representation is reviewed under an abuse of discretion standard. *Madsen*, 168 Wn.2d at 505. An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

A defendant's ability to represent himself has no bearing on whether or not he should be allowed to assert this right; rather, the issue is whether or not the waiver of the right to counsel is knowing, intelligent and unequivocal.

State v. Canedo-Astorga, 79 Wn.App. 518, 903 P.2d 500 (1995); *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed2d 32 (1993). Erroneous deprivation of this constitutional right is conclusively prejudicial thus compelling automatic reversal. *Breedlove*, 79 Wn. App. At 110; *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed.2d 122 (1984).

c. The trial court improperly denied Mr. Sexton's timely, unequivocal request to proceed pro se.

Mr. Sexton's request to proceed pro se was timely and unequivocal. The trial court failed to grant the request, and therefore Mr. Sexton's conviction must be reversed and his case remanded for a new trial.

The court concluded that Mr. Sexton's motion to discharge counsel was not timely. CP 185. (Conclusion of Law 6). Although Mr. Sexton moved for self-representation at the time of trial in this cause number, Mr. Sexton made an identical motion in cause no. 17-1-00988-3, which involved the same attorney in a case involving nearly identical facts and circumstances. 3RP at 4-5, 17. Therefore, Mr. Sexton's dissatisfaction with his trial counsel, for the same reasons as he asserted in the previous case, was known to the court and to the prosecution well before he made his second request—albeit in the earlier cause number.

Mr. Sexton's request was also unequivocal. After Mr. Sexton's communication with his trial attorney had deteriorated to the point of non-existence. 3RP at 3-4, 7-8.

Mr. Sexton's request to proceed pro se, although made in conjunction

with his dissatisfaction with his counsel, was nonetheless unequivocal. *Madsen*, 168 Wn.2d at 507; *Stenson*, 132 Wn.2d at 741. Courts have even deemed requests to proceed pro se unequivocal where the trial court denied the defendant's request for new counsel and limited the defendant's choices to current counsel or self-representation. See, e.g., *Barker*, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new counsel); *DeWeese*, 117 Wn.2d at 372. In this case, Mr. Sexton made clear that he wanted to represent himself did not qualify his request other than to say the he wanted an attorney "if he could get a competent one." 3RP at 9, 28. Thus, his request to proceed pro se was unequivocal. In this case, Mr. Sexton's request was timely and unequivocal, and he therefore was entitled to represent himself as a matter of law. *Madsen*, 168 Wn.2d at 504.

d. The proper remedy for the violation of Mr. Sexton's constitutional right to self-representation is reversal of the conviction and remand for a new trial

In denying a timely, unequivocal request to proceed pro se, the trial court violated Mr. Sexton's constitutional right to self-representation. Mr. Sexton clearly expressed his desire to proceed without counsel rather than with the counsel assigned to represent him. 3RP at 9, 28. The trial court erred in denying Mr. Sexton the right to represent himself. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. *Madsen*, 168 Wn.2d at 504; *Breedlove*, 79

Wn.App. at 110; *State v. Estabrook*, 68 Wn.App. 309, 317, 842 P.2d 1001, rev. denied, 121 Wn.2d 1024, 854 P.2d 1084 (1993). Denial of the constitutional right is prejudicial in itself. *Breedlove*, 79 Wn.App. at 110.

Mr. Sexton respectfully asks the Court to reverse his conviction and order a new trial, at which he may assert the right to self-representation.

4. MR. SEXTON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

a. The prosecutor misstated the law in a manner prejudicial to Mr. Sexton

A prosecutor's misstatement regarding the law is "a serious irregularity having the grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Wash. Const. art. I §§ 3, 21, 22. The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531,

159 L.Ed.2d 403 (2000); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties which limit their advocacy.

A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” *State v. Reed*, 102 Wash.2d 140, 145, 684 P.2d 699 (1984). The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. *State v. Sith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction).

c. The prosecutor misstated the law during closing argument, requiring a new trial.

The court provided the following instruction to the jury regarding possession:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with the possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

CP 146. (Instruction 10).

The prosecutor committed misconduct by misstating the meaning of "actual possession." During closing argument, the prosecutor told the jury

The first manner which you can find possession is what the Court has defined as actual possession. Did the defendant, being in his home on the morning of July 31st, 2017, in his master bedroom, where the vast majority of methamphetamine, approximately 430 grams, were in one baggie secreted between folded pairs of men's pants, place him in actual possession of the methamphetamine, that is, did he have physical custody of that methamphetamine. Yes. Now, you may ask yourself during deliberation, doesn't he have to have it on his person, doesn't he have to have it in his pocket. I would submit to you that based on the instruction you're being given right now, I am in actual possession of the legal pad I'm holding in my hand. The fact I set it down a short distance away does not abrogate my possession of that item.

7RP at 126.

The State continued its argument:

The evidence in this case, ladies and gentlemen, establishes not only the Defendant had actual possession over the methamphetamine in this case, it was in his home, it was in his bedroom. It establishes that he clearly had dominion and control based on where those items were recovered within his residence.

7RP at 129-30.

Statements by the prosecution or defense to the jury upon the law must be

confined to the law as set forth in the instructions given by the court. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). It is misconduct for the prosecutor to misstate the law. *State v. Davenport*, 100 Wn.2d 757, 760-61,75 P.2d 1213 (1984); *State v. Huckins*, 66 Wn. App. 213, 217, 836 P.2d 230 n(1992), rev. denied, 120 Wn.2d 1020 (1993).

Mr. Sexton was not in actual possession of the methamphetamine. To find him guilty, the jury necessarily had to find he was in constructive possession of the drugs. Constructive possession occurs when the defendant has dominion and control over the substance. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The law does not make it a crime to have dominion and control over the premises where a substance is found. *Cantabrana*, 83 Wn. App. at 208.

The court here correctly instructed the jury regarding actual possession and that constructive possession required dominion and control over the drugs. CP 146. (Instruction No. 10). Nonetheless, the prosecutor argued to the jury that it was only required to prove Mr. Sexton had actual possession even if not in physical possession of the drugs. That was a clear misstatement of the law and contrary to the court's instructions.

d. Prosecutorial misconduct is properly before this Court.

Generally, an objection to prosecutorial misconduct is waived by the

failure to timely object and request a curative instruction. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting was a substantial likelihood the prosecutor’s comments affected the verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 576, 79 P.3d 432 (2003). Although the misconduct discussed above was not objected to by defense counsel when made, the issue is nonetheless properly presented for the first time on appeal, since the misstatement of law regarding actual possession was so “flagrant and ill intentioned” as to irrevocably prejudice the jury by misstating the definition of “actual” possession, impacting the verdict in this case – thus affecting Mr. Sexton’s constitutional right to due process. RAP 2.5(a)(3).

The prejudice resulting from the misconduct is demonstrated by the jury’s clear confusion regarding the proof needed to prove actual or constructive possession. The jury submitted the following inquiry:

As pertains to possession: Inst #10. Can the judge elaborate on factors to determine dominion and control, particularly what constitutes a person’s ability to take actual possession and what constitutes the capacity to exclude others.

CP 156.

A prosecutor’s closing argument is likely to have significant persuasive effect on a jury. *In re Glasmann*, 175 Wash.2d 696, 286 P.3d 673 (2012). Jurors

will often give special weight to the prosecutor's arguments. *Id.* Because of "the prestige associated with the prosecutor's office,"⁶ some jurors may well believe that prosecutors have a better understanding of the law than defense attorneys. Based on the foregoing, and in particular the jury question regarding actual possession and dominion and control, there is a substantial likelihood that the misconduct affected the jury's verdict regarding possession of methamphetamine. The conviction must be reversed and the charge remanded for a new trial.

5. MR. SEXTON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A conviction must be reversed for ineffective assistance if counsel's deficient performance at trial prejudiced the accused person. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Sexton's possession conviction must be reversed because his attorney failed to failed to object to prosecutorial misconduct, as argued in section 4 of this brief, *supra*.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland*, 466 U.S. at 685-86; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was

⁶*Id.*, internal quotation marks and citations omitted.

deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Should this court find that trial counsel waived or invited the error claimed and argued in the preceding section of this brief by failing to object to the misstatement of law during the prosecutor’s closing argument, then both elements of ineffective assistance of counsel have been established.

a. Defense counsel unreasonably failed to object to prosecutorial misconduct in closing.

Defense counsel should have objected when the prosecutor misstated the law of actual possession. Counsel’s failure to object cannot be characterized as a tactical decision. The defense gained no benefit from allowing the prosecution to

misrepresent the law in a manner unfavorable to Mr. Sexton.

b. Counsel's deficient performance prejudiced Mr. Sexton

The prosecutor's misconduct went directly to Mr. Sexton's defense that he did not constructively possess the methamphetamine found during the search of the residence. There is a reasonable likelihood that some jurors voted to convict because they believed the prosecutor's misstatement of the law regarding actual possession, particularly in light of the jury inquiry regarding the meaning of actual possession. CP 156. Counsel's failure to object to the State's argument about actual possession deprived Mr. Sexton of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). The conviction must be reversed and the case remanded for a new trial. *A.N.J.*, 168 Wn.2d 91.

6. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SEXTON OF UNLAWFUL POSSESSION OF METHAMPHETAMINE BECAUSE THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution and the 14th Amendment of the federal constitution. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Possession of property can be either actual or constructive. Actual possession occurs when the goods at issue are in the personal custody of the person charged with possession. On the other hand, constructive possession can be shown if the person charged has dominion and control over the goods in question or of the premises in which they are located. *State v. Amezola*, 49 Wash.App. 78, 741 P.2d 1024 (1987). Constructive possession is defined as the exercise of dominion and control over an item. *State v. Callahan*, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. *State v. Turner*, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence

for the fact finder to reasonably infer the defendant had dominion and control. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. *Id.*

Although exclusive control is not a prerequisite to establishing constructive possession, mere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or knowledge of the presence of the drug, without more, are also insufficient. *State v. Hystad*, 36 Wash.App. 42, 671 P.2d 793 (1983). Whether an individual has dominion and control over a controlled substance is determined by considering the various indicia of dominion and control and their cumulative effect—that is, the totality of the situation. *State v. Partin*, 88 Wash.2d 899, 567 P.2d 1136 (1977) overruled on other grounds *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

b. In order to prove that Mr. Sexton was guilty of unlawful possession of methamphetamine, the prosecution was required to show constructive possession.

In establishing dominion and control over the premises, the totality of the circumstances must be considered. No single factor is dispositive. *State v. Collins*, 76 Wash.App. 496, 501, 886 P.2d 243 (1995). Evidence of temporary residence or the mere presence of personal possessions on the premises is not enough. *Partin*, 88 Wash.2d at 906, 567 P.2d 1136; *Collins*, 76 Wash.App. at 501, 886 P.2d 243.

In *Callahan, supra*, two books, two guns and a broken scale belonging

to the defendant, plus evidence the defendant had been staying on the premises for two or three days was not enough to support dominion and control. Even evidence that a person received some mail at a residence and lived there off and on was not sufficient to show constructive possession. *State v. Hagen*, 55 Wash.App. 494, 500, 781 P.2d 892 (1989). Some evidence of participation in paying rent is generally required. *Callahan*, 77 Wash.2d at 31. “The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient” to support a conclusion of dominion and control. *Id.*

In *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), the defendant was arrested in the kitchen of a home in which officers found cocaine and marijuana, along with paraphernalia associated with drug manufacturing. From outside the home, they also heard what sounded like a plate hitting the back door from inside the home. Once inside, they found cocaine along the door and doorjamb and a plate on the floor located within a few feet of the door. The defendant's fingerprint was on that plate. *Spruell*, 57 Wn. App. at 384-85. Still, the evidence - which suggested at least temporary control over the drugs - was not sufficiently substantial to support a finding of constructive possession. *Id.* at 387-89.

In this case, during a search of what was designated as the “master bedroom” at the house, police found methamphetamine, as well as mail addressed to Mr. Sexton and documents with his name. While dominion and control over

the contraband may establish constructive possession, without such dominion and control over the contraband, constructive possession requires dominion and control over the room, space, or area where police find contraband. *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001). Here, the evidence supports a finding that Mr. Sexton occupied the house, but does not support a contention that he had exclusive control over the master bedroom or its contents. In *Alvarez*, this Court reversed the conviction for unlawful possession of a handgun discovered in a back bedroom closet during a search of a teenage hangout. *Alvarez*, 105 Wn. App. at 217-218, 223. The Court held that even though the police found Alvarez's clothes, savings deposit books, book bag and pictures inside the bedroom door, that evidence did "not meet the threshold requirement for constructive possession." *Alvarez*, 105 Wn. app. at 217.

In this case there was even less evidence of constructive possession than in *Callahan* and *Spruell*. Those cases are most analogous on the issue of dominion and control over the contraband. In each of those cases, the defendant was either next to or had admitted handling the contraband which the courts held did not establish constructive possession. In Mr. Sexton's case there were no admission of handling or being near the contraband. There were no fingerprints and no admissions of "passing control." The record shows that even if he occupied the master bedroom, many other persons were present in the house, leading to the logical conclusion that he did not have exclusive control over the bedroom.

Alvarez is analogous on the issue of dominion and control over the premises. Here, Mr. Sexton was not the sole occupant of the house; the evidence shows five other adults were present in the house at the time of the execution of the warrant on July 31. The evidence does not show that he had the ability to exclude others from the bedroom. Following *Alvarez*, the evidence here cannot establish dominion and control over the premises in which the drugs were found. For this reason, the conviction should be reversed and the matter remanded for dismissal with prejudice.

**7. THIS COURT SHOULD REVERSE THE \$200
CRIMINAL FILING FEE FOLLOWING *STATE
V. RAMIREZ***

In late 2018, the legislature passed amendments to the state's legal financial obligation system to prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. See Laws of 2018, ch. 269, §§ 6(3), 17(2)(h). Generally, RCW 10.01.160 discusses a court's authority to impose legal financial obligations (LFOs) on criminal defendants. Subsection .160(3) provides: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3).

In this case the trial court imposed a \$200.00 criminal filing fee pursuant to RCW 36.18.020(2)(h).⁷ RCW 36.18.020(2)(h) states that "this fee shall not

⁷The court imposed a \$100 DNA fee in cause no. 17-1-00988-3, but waived the fee in cause no. 17-1-02934-5.

be imposed on a defendant who is indigent.”

In *State v. Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018). The *Ramirez* Court noted that the financial statement section of a motion for indigency asks defendants questions relating to five categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. 191 Wn.2d at 744. The Court held that “[t]o satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs.” *Id.* The Supreme Court held that these statutory changes apply retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *Ramirez*, 191 Wn.2d at 747.

Sentencing courts are required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. *Ramirez*, 191 Wn.2d at 742; *Blazina*, 182 Wn.2d at 839. “State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *Ramirez*, 191 Wn.2d at 738-39 (citing former RCW 10.01.160 (3)(2015)); *Blazina*. 182 Wn.2d at 839.

In this case, the filing fee should be reversed. The court made no inquiry into Mr. Sexton's ability to pay. The record shows, however, that Mr. Sexton is indigent and that he qualified for court appointed trial and appellate counsel. 3 RP at 4; CP 211.

Pursuant to *Ramirez*, this Court should reverse the imposition of the \$200 filing fee, and remand to the trial court for resentencing.

E. CONCLUSION

For the foregoing reasons, Mr. Sexton respectfully requests this Court reverse his conviction and remand for dismissal, or alternatively, reverse and remand for new trial.

Last, Mr. Sexton is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. Moreover, the sentencing court failed to conduct an adequate *Blazina* inquiry.

Mr. Sexton respectfully requests this Court remand to the sentencing court with instructions to reverse the criminal filing fee.

DATED: January 24, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

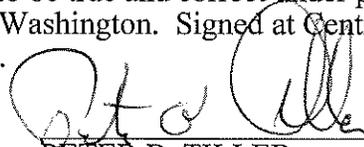
The undersigned certifies that on January 24, 2019, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Michele Hyer, Pierce County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 24, 2019.



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