

FILED

JUL 09, 2012

Court of Appeals
Division III
State of Washington

COA NO. 30645-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MATZ,

Appellant.

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

The Honorable Allen Nielson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a unanimous jury verdict on count VI.

2. Appellant received ineffective assistance of counsel.

3. The court erred in admitting evidence of a drug overdose at appellant's residence.

4. Cumulative error denied appellant his constitutional right to a fair trial.

5. The judgment and sentence contains a clerical error regarding the amount of confinement time imposed under counts III, IV, V and VI.

6. The judgment and sentence contains a clerical error regarding the felony classification of count II.

Issues Pertaining To Assignments Of Error

1. Was appellant's right to jury unanimity violated where there was insufficient evidence to prove an alternative means of committing possession with intent to manufacture or deliver a controlled substance under count VI?

2. Did defense counsel render ineffective assistance of counsel in (1) requesting admission of the search warrant affidavit and (2) failing to properly object to evidence of prior drug sales under ER 404(b)?

3. Did the court err in overruling defense counsel's objection to the admission of evidence showing a drug overdose occurred at appellant's residence before the charging period, where such evidence was irrelevant? In the alternative, was defense counsel ineffective in failing to lodge an objection under ER 404(b)?

4. Where the record clearly shows the court intended to impose 100 months of confinement on counts III, IV, V and VI, should the clerical error in the judgment and sentence be corrected to reflect the court's intent?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Daniel Matz by amended information with delivery of hydromorphone hydrochloride and clonazepam on January 8, 2011 (counts I and II), delivery of heroin and hydromorphone hydrochloride on April 25, 2011 (counts III and IV), delivery of heroin on June 7, 2011 (count V), possession with intent to manufacture or deliver heroin on June 16, 2011 (count VI), possession of morphine, methamphetamine and cocaine on June 16, 2011 (counts VII, VIII, and IX), and unlawful use of a building for drug purposes from January 8, 2011 to June 16, 2011 (count X). CP 96-101.

Following a jury verdict of guilty on all counts, the court sentenced Matz to a total of 100 months confinement at the sentencing hearing. CP

148-57; RP¹ 715, 717-18. The judgment and sentence reflects the 100 month total but lists 120 months under the individual counts of III, IV, V and VI. CP 162. This appeal follows. CP 169.

2. Trial

Matz was a 63-year-old veteran of the Vietnam War. RP 555. He began using drugs during his tour of duty and became a drug addict. RP 555-56, 558-59. He took narcotics for pain and had a prescription for hydromorphone pills (4 mg dosage). RP 560, 593-94.

a. Background To Investigation

After overdosing on heroin, Jeremy Regan said he wanted to talk to somebody and came into contact with Deputy Venturo of the Ferry County Sheriff's Office. RP 151-52, 330, 363. Regan was facing drug charges. RP 152, 331, 363. Regan decided to work with the police to avoid those charges and entered into a confidential informant cooperation agreement with the police. RP 291-92, 331, 363-65. According to Regan, "It was the best thing to do. Friends were dying, people -- Just -- it was a big mess. It was time. When I was in the hospital dying everybody was laughing at me. You know? There was no kindness, no consideration, no nothing. You know?"

¹ The verbatim report of proceedings is referenced as follows: RP – six consecutively paginated volumes consisting of 1/4/12, 1/5/12, 1/6/12, and 2/10/12.

They, -- they were hoping I was going to die." RP 331. Regan was referring to Matz and Julie Meyer. RP 375-76, 378.

Matz and Regan had a history. RP 366, 567-68. Regan sold Matz some counterfeit "speed" a number of years ago. RP 568-69. Matz was angry, confronted Regan, and threatened to "kick his ass." RP 568-69. Regan cried and was so scared that he urinated on himself. RP 569, 583. The defense theorized Regan wanted to get back at Matz as a result of this incident. RP 683.

Facing a heroin possession charge, Regan offered the names of those he could buy drugs from, telling officers that he could buy Dilaudid or heroin from Matz. RP 15-53, 331-32. Regan also gave the name of Julie Meyer as a person he could buy drugs from. RP 293-94. Venturo provided a cell phone to Regan and told him to call whenever he could purchase from one of the people he had named. RP 154.

Regan signed a confidential informant contract. RP 357-61; Ex. 191. He entered into a second, modified contract after he was found in possession of tin foil with heroin residue on it. RP 361; Ex. 192. Regan denied using the heroin. RP 361. His explanation was that he picked up the foil and mistakenly put it in his pocket while cleaning up a friend's yard. RP 361-62.

b. January 8, 2011 (counts I and II)

On January 8, 2011, Regan called and met with Deputy Venturo and Deputy Rainer at an arranged location. RP 155-56. Regan was searched for money and contraband. RP 156-57. Regan did not take off his shoes or socks. RP 196-97. Venturo did not search inside Venturo's underwear or conduct a strip search. RP 196, 333-34. According to Regan, the search consisted of emptying his pockets. RP 333-34.

Regan received \$120 in pre-recorded funds. RP 157. The plan was for Regan to go to Matz's residence and purchase "Dilaudid." RP 157. Regan walked to Matz's house and went inside. RP 157. Matz, Julie Meyer, and John Nathan Howard were inside. RP 334, 369-70, 381. Regan testified that he gave Matz the money and received "Dilaudid" (8 mg) and a clonazepam pill as a "bonus." RP 335-36, 367.

Deputy Venturo and Deputy Rainer watched Regan from the time he left the house to the time they picked him up. RP 158, 214-15. Regan was driven to another location, where he handed Venturo three pills (4 mg) that later tested positive for hydromorphone hydrochloride (Dilaudid) and one pill that later tested positive for clonazepam. RP158-62, 198, 519. Prescription records for Matz showed he received a prescription for hydromorphone (4 mg) on January 7. RP 205.

c. April 25, 2011 (counts III and IV)

Regan contacted Venturo again on April 25, 2011. RP 164. Venturo obtained a wire order so that Regan could wear a recording device during the planned drug transaction. RP 164. Venturo and Agent Olson met Regan at an arranged location. RP 166. Venturo was searched for money and contraband. RP 166, 298. He was then given pre-recorded buy money and a recording device. RP 166. Venturo and Olson watched Regan as he walked to Matz's residence and went inside. RP 167, 299.

Matz, John Howard, Julie Meyer, Joseph Meyer (Julie's son), and Andy Pritchard were inside. RP 336-37, 342. Regan testified that he obtained "Dilaudid 4's" from Matz. RP 336. Regan gave conflicting answers over where the deal took place, first saying the bedroom but later saying the kitchen. RP 339, 345. On the wire recording, there is discussion of injecting epinephrine from a bee sting kit. RP 343-44. Matz is heard saying "Four Dilaudid." 4RP 347-48. Regan is later heard saying "thank you for hooking me up," to which Matz responds "No, thank you." RP 353.

The prosecutor asked Regan if he obtained any heroin from Matz on April 25. RP 336. Regan responded "No, sir." RP 336. He had a clear recollection of what he bought that day. RP 336. He also testified that he gave the deputies everything he purchased from Matz. RP 336, 348.

When asked on cross examination if he received any heroin from Matz on April 25, Regan responded "I didn't get any heroin from him." RP 367. Regan was positive he obtained Dilaudid. RP 368. When asked about sheriff's records showing Regan came back from the buy with heroin, Regan maintained "No, that's -- No, sir. We were also doing more investigations through other people." RP 368. Regan offered he could have made more than one buy that day with Matz. RP 368. When asked if he had bought anything from anybody else when he was there, Regan said he bought from John Nathan Howard "around the same time or date."² RP 368. He could have bought from Howard on April 25 "in two different buys." RP 369. "That was actually in the Sportsman's Roost when I made that deal with Jonathan. I didn't receive heroin; I got Dilaudid." RP 369. Regan did not believe he received heroin from Matz on April 25. RP 369.

On redirect, the prosecutor elicited from Regan that a debriefing was conducted after each drug buy in which Regan told Deputy Venturo what had just happened. RP 373-74. Venturo's affidavit in support of a search warrant request contained the debriefing for April 25, 2011. Ex. 18 at 6-7. According to the affidavit, Matz gave Regan "4 dilatuds" [sic] and 2.1 grams of heroin. Ex. 18 at 7.

² Regan had bought drugs from Howard before: "that was part of my bargain." RP 370.

Regan said Venturo's recollection would be better, but that his own was "good." RP 376. According to Venturo, Regan handed over four, 8 mg hydromorphone hydrochloride (Dilaudid) pills and 2.1 or 2.2 grams of heroin. RP 168-73, 203. The substances submitted to the lab subsequently tested positive for hydromorphone hydrochloride and heroin. RP 521-22. Matz's prescription records did not show any prescription for hydromorphone (Dilaudid) for 8 mg. RP 207-08.

d. June 7, 2011 (count V)

Venturo told Regan to set up another purchase. RP 174. The plan was for Regan to purchase one gram of heroin for \$120 on June 7, 2011. RP 175. The same protocol was followed as in the previous two transactions. RP 175-76, 301-02. Regan said the pre-buy search consisted of emptying pockets. RP 355.

Matz, John Howard, Julie Meyer and Joe Meyer were in the house. RP 356, 370-71. Regan had bought drugs from Julie Meyer before. RP 375. There was a bunch of people inside the Matz residence most of the time. RP 334. Regan testified he bought a gram of heroin from Matz. RP 354, 356. Regan said the heroin he bought from Matz was always pre-weighed. RP 357. After leaving Matz's house, Regan handed over a bag of what later tested positive for heroin to Venturo. RP 175-77, 524.

e. June 16, 2011 (Counts VI - IX)

A search warrant was executed on Matz's residence on June 16, 2011. RP 184. Officers detained Julie Meyer and two other adults in a pickup on the highway near Matz's house. RP 219. Meyer's RV trailer was on the property. RP 270-71, 418. Howard and Joseph Meyer were removed from the RV. RP 457-58. Joseph Meyer was hiding in a closet. RP 458. Contraband, including a spoon with a white substance on it, was found inside the RV. RP 276, 458.

Deputy Venturo encountered Lance Torres and Carrie Leslie outside. RP 453-54. Torres told Venturo that he was a drug user after a syringe was found on his person. RP 228, 270, 453-54. A bent spoon with burnt residue on it was also found on him. RP 454, 456. Pills and a syringe were recovered from Leslie. RP 229, 454-55.

Jeanette Thompson was detained in the living room of Matz's house. RP 220, 225-26. Her purse contained a smoking device and pills. RP 250-51. All told, about 12 or 13 people were detained. RP 458.

A large number of hypodermic needles were scattered throughout the house, primarily in the living room. RP 305-06. Smoking pipes and bent spoons with black residue were present. RP 306.

The following was found in Matz's bedroom: 1) a prescription pill bottle with seeds containing codeine, morphine, Papaverine, Noscapine and

Thebaine (not confirmed), which one would expect to find in an opium (RP 464, 531-32); 2) 0.4 grams of crack cocaine (RP 476, 528-30); 3) a prescription bottle belonging to Matz with a baggie inside containing an unknown substance (RP 463, 489); 4) two pill bottles filled with suspected marijuana (RP 460); 5) a prescription pill bottle belonging to Phillip Street containing two kinds of pills with an issue date of March 2008 (RP 461, 480); 6) a prescription bottle for Seroquel belonging to "Mannen" containing two kinds of pills (RP 462, 488); 7) a prescription pill bottle with white pills inside belonging to Kevin Weber, issued in October 2010 (RP 464, 481); 8) a prescription pill bottle belonging to Harry Heedhouse containing pills, with an issue date of March 2010 (RP 465, 480); 9) a baggie containing amitriptyline pills (RP 462, 489); 10) a prescription pill bottle and adjacent baggie containing empty capsules that could be used to hold a ground substance (RP 465-66); 11) a spoon with what appeared to be cocaine residue on it (RP 477); 12) four smoking devices (RP 460-61); and 13) a digital scale for weighing narcotics. RP 485.

Matz and another man were detained inside Matz's bedroom. RP 221, 226, 427-28. The following was seized from Matz's person: 1) a number of 4 mg Dilaudid pills (RP 472, 525);³ 2) 0.5 grams of methamphetamine in a baggie (RP 473, 526-27); 3) a loaded syringe from a

³ Vorturo counted 22, whereas the lab analyst counted 28. RP 472, 525.

jacket pocket (RP 474); 4) a baggie of suspected heroin labeled "1.2 grams" from Matz's wallet (not tested) (RP 253, 475-76); 5) 4.1 grams of suspected heroin (not tested) (RP 244-46, 472-73); 5) nine individually wrapped bags of heroin, one of which was tested in the lab.⁴ RP 245-48, 475, 527-28.

There was \$145 in Matz's wallet. RP 484. Matz's wallet also contained a list of phone numbers and a list of prescription costs and of people who owed money. RP 467-68. Regan's name and number were not on the list of phone numbers. RP 495-96, 499. On the piece of paper with names and dollar amounts on it, Regan's name and the number "30" (no dollar sign) were listed. RP 501. "Julie" and the number "205" were listed as well. RP 502.

Following arrest, Matz told Venturo that "he got his heroin from the Mexicans." RP 321-22. Matz also said, "he was going to be sick, being in jail and not being able to use, and he said he was." RP 322.

f. Additional Testimony

Julie Meyer was charged with delivery of a controlled substance. Ex. 193. She entered into a plea agreement that required her to testify for the State in Matz's case in exchange for a reduced charge. RP 387-88, 414, 422-23.

⁴ The lab analyst testified the contents of the bag he tested weighed 0.1 gram. RP 528.

Meyer resided on Matz's property for one or two weeks leading up to June 16. RP 380, 384-85, 420-21. She said the majority of people on Matz's property used drugs. RP 421. Deputy Ventura testified that Regan made a controlled buy from Julie Meyer on January 10. RP 191. Agent Olson testified that he was also involved with a drug buy involving Meyer. RP 316.

Meyer denied selling heroin or pills to Regan at Matz's house. RP 380. Meyer was at Matz's house on January 8, April 25, June 7 and June 16, 2011. RP 381-84. She could not clearly remember what happened on those dates, but claimed to have seen Matz engage in transactions where money changed hands for pills during the charging period. RP 382, 417, 422-24. Meyer said Matz sold prescription pills, usually to get heroin for himself, and that he might have been selling heroin. RP 382. Meyer also acknowledged that she did not have a good memory, and could not even remember what happened two weeks ago. RP 415-15.

John Nathan Howard had been living in Matz's house for about nine months up to time of the search. RP 445. He was addicted to heroin. RP 447. Matz was trying to help him get off drugs. RP 448. Howard hid his drug use from Matz because his recovery was failing. RP 450. He did not see any drug transactions at Matz's residence. RP 445-46, 448. Howard acknowledged he had taken pills and given them to others. RP 446. He was

in Julie Meyer's motor home getting drugs when the search warrant was executed. RP 448. According to Howard, Julie Meyer had received inheritance money and used it to provide drugs to others: "she was the one with the bag." RP 449-50.

Agent Olson testified that Howard was involved in a controlled buy, which did not take place at Matz's house. RP 307-08. Regan said he conducted controlled buys with Howard, one of which took place at the "Sportsman's Roost" for Dilaudid, and two of which involved buying fake heroin. RP 368-70.

Jeanette Thompson was present when officers searched the house. RP 435. Thompson testified she was at Matz's residence to use drugs for four days leading up to the search. RP 435-36. She obtained her drugs elsewhere. RP 436. According to Thompson, Matz did not know she used drugs at his house but "I'm sure he assumed it." RP 436. She did not use drugs in front of him. RP 437. Thompson's father Lance Torres, Julie Meyer and Joseph Meyers were also using drugs. RP 435, 437-38. Thompson did not see any drug deals in the house. RP 436. She did see methamphetamine use. RP 436-37.

Carrie Leslie came up to see her ex-boyfriend Lance Torres for a couple of days and stayed with him in a camper outside Matz's residence. RP 540-41. They used methamphetamine and heroin. RP 541. Torres

obtained the drugs from Joseph Meyer. RP 541-42, 546. Leslie said she obtained heroin from Matz on June 16 and that she saw Matz give drugs to others at his house during the charging period. RP 542, 547-48. Leslie had a conviction for a burglary involving theft, which she committed shortly before June 16, 2011. RP 542-44.

Matz testified in his own defense. RP 555. He denied selling hydromorphone, contending he needed his prescription pills to manage his pain and would not sell them because he could not afford to buy more. RP 560, 575. He used heroin as a substitute for the hydromorphone when his monthly prescription ran out. RP 560-61.

Matz denied selling heroin, maintaining the heroin found on his person was for personal use. RP 587, 599-601, 603. He busted up and packaged the heroin he bought the night before the search into 1.1 gram packages because his sampling determined that was the amount he needed "to get [him] off." RP 571-72. Matz kept his drugs in his pockets because people in the house were thieves. RP 572-73.

Matz denied selling any drugs to Regan. RP 569-70, 592-93. Matz told the jury that he did not like Regan and that Regan knew it. RP 584. He also denied giving heroin to Carrie Leslie. RP 567. He categorically denied selling drugs to people. RP 575-76.

Matz testified the methamphetamine found in his pocket belonged to Julie Meyer, but knew the substance was there and tried it. RP 575. Matz maintained he did not know cocaine was in his bedroom. RP 588, 601. Other people had used the bedroom. RP 573.

According to Matz, the money list found in his wallet was a list of people who owed him money from loans he gave them. RP 569. He said the old prescription bottles belonging to others were left behind and retained in the event an owner returned to retrieve them. RP 573-74.

Matz had known Julie Meyer for 25 years as a good friend. RP 564. She was a heavy drug user. RP 565. She stayed in her motor home at his residence as of June 16. RP 564. Her son Joseph was there a lot and she had a lot of company, including Jeanette Thompson and her boyfriend Lance Torres. RP 564-65, 567.

Matz described Howard as an addict who had used for many years. RP 565, 596. Matz did not know where Howard "was getting his stuff, but I guess he got started again." RP 597.

Regarding his policy for people coming over to his house, Matz said "Just about everyone's welcome." RP 561. His home was open to people who needed a place to stay because they were drunk, hungry, cold, or needed a bath or a couch to sleep on. RP 562. Most of the people used drugs and all

of them drank. RP 562. Matz denied knowing that Jeanette Thompson and Carrie Leslie came to his house to use drugs. RP 585-86, 597.

The defense theory of the case was that Matz was a drug addict who possessed drugs for personal use, but never delivered drugs or intended to deliver drugs to anyone, nor did he knowingly allow his residence to be used for unlawful drug purposes. RP 141, 145, 670-71, 683-85.

C. ARGUMENT

1. VIOLATION OF MATZ'S RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE CONVICTION UNDER COUNT VI.

A crime under RCW 69.50.401(1) may be committed by four alternative means: (1) manufacture of a controlled substance; (2) delivery of a controlled substance; (3) possess with intent to manufacture a controlled substance; or (4) possess with intent to deliver a controlled substance. The jury was instructed that it could convict Matz under count VI if it found he possessed a controlled substance with the intent to manufacture or deliver it. The evidence was sufficient to convict based on the alternative means of possession with intent to deliver. There was, however, insufficient evidence to support a finding of the alternative means of possession with intent to manufacture.

Due to insufficiency of evidence on an alternative means of committing the offense for count VI, the trial court needed to either

instruct the jury that it must reach unanimous agreement as to the means or issue a special verdict form specifying the means relied upon. Reversal of the conviction under count VI is required because, in the absence of these measures, there was no particularized expression of jury unanimity on each of the alternative means of proving the offense.

a. Conviction Must Be Reversed Where There Is Insufficient Evidence To Support An Alternative Means Of Committing A Crime On Which The Jury Was Instructed.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const., art. 1, § 22. "This right includes the right to an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). More specifically, the right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. Ortega-Martinez, 124 Wn.2d at 707.

"If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Id. at 707–08. But "if the evidence

is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708.

The sufficient evidence test is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

b. Possession With Intent To Manufacture And Possession With Intent to Deliver Are Alternative Means Of Committing The Crime.

Matz was charged under count VI with violating RCW 69.50.401(1), which provides "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." CP 98-99.

Under the "to convict" instruction for count VI, the State was required to prove in relevant part that "on or about the 16th day of June, 2011, the defendant possessed a controlled substance, to wit: Heroin" and "the defendant possessed the substance with the intent to manufacture or deliver a controlled substance, to wit: Heroin[.]" CP 126 (Instruction 22). The "to convict" instruction thus presented the jury with the option of convicting on two alternative means: (1) possession with intent to

manufacture a controlled substance and (2) possession with intent to deliver a controlled substance.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

Legislative intent determines whether a statute sets forth alternative means. Halgren, 156 Wn.2d at 809. There is no bright-line rule. State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). But legislative intent may be determined by considering "(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction." State v. Berlin, 133 Wn.2d 541, 552-53, 947 P.2d 700 (1997) (citing State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)).

Applying those factors to the present case shows possession with intent to manufacture a controlled substance and possession with intent to deliver a controlled substance contains are alternative means of committing a crime under RCW 69.50.401(1). Both exist under the same title ("Food, Drugs, Cosmetics, and Poisons") and the same chapter

("Uniform Controlled Substances Act"). See Berlin, 133 Wn.2d at 553 (title test supported alternative means analysis where second degree intentional murder and felony murder under RCW 9A.32.050(1) existed under the same title of "Murder in the Second Degree").

A readily perceived connection exists where the criminal acts in question accomplish the same result. Arndt, 87 Wn.2d at 380-81. There is a ready connection between possession with intent to manufacture and possession with intent to deliver. Both means accomplish the result of violating the Uniformed Controlled Substances Act through handling a controlled substance in a manner that victimizes the public. See State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) (public was victim in crimes of manufacture and possession with intent to deliver); State v. Bickle, 153 Wn. App. 222, 234, 222 P.3d 113 (2009) (public was victim of crimes of manufacture and possession of controlled substance).

"The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other." Arndt, 87 Wn.2d at 383. Proof of possession with intent to manufacture does not disprove possession with intent to deliver and vice versa.

Prohibited acts inhere in the same transaction when one may simultaneously satisfy the elements of both proposed alternatives. Halgren, 156 Wn.2d at 810. Here, there is no barrier to simultaneously

possessing a controlled substance to manufacture it and possessing a controlled substance to deliver it. The same transaction test is satisfied.

Possession with intent to manufacture and possession with intent to deliver are alternative means because they are "two factual alternatives provided by statute." Id. at 810. This conclusion accords with other cases where courts have found alternative means set forth in a criminal statute.⁵

⁵ See, e.g., State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) ("RCW 9A.46.110(1)(a) provides alternative means of committing the crime of stalking: "intentionally and repeatedly harassing or repeatedly following another person."); State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994) (robbery is an alternative means crime under RCW 9A.56.190: taking property "from the person of another or in his presence."); State v. Holt, 119 Wn. App. 712, 718, 82 P.3d 688 (2004) (under former RCW 9.41.040(1)(b), "[s]econd degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses, or (3) controls a firearm."), overruled on other grounds, State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005); State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008) (crime of interfering with reporting of domestic violence contains three alternative means under RCW 9A.36.150(1)(b): "Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official."), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010); State v. Strohm, 75 Wn. App. 301, 305, 307, 309, 879 P.2d 962 (1994) (offense of leading organized crime under RCW 9A.82.060(1)(a) may be committed by alternative means of "Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity;" trafficking in stolen property under RCW 9A.82.050(2) can be committed by eight alternative means: "A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property[.]").

c. The Conviction Under Count VI Must Be Reversed Because There Is Insufficient Evidence To Support The Alternative Means Of Possession With Intent To Manufacture.

The evidence, looked at in the light most favorable to the State, showed Matz broke down and packaged up heroin into nine 1.1 gram baggies, which were found in his pocket upon arrest. RP 246-48, 475, 527-28, 571-72. He had previously delivered heroin to the confidential informant as part of the controlled buy operation. RP 168-74, 203, 335-36, 354, 356, 367; Ex. 18. A measuring scale, a list of phone numbers, and a list of names with dollar amounts were found in his residence. RP 467-68, 485. This was sufficient evidence to support a finding that Matz possessed heroin with intent to deliver it.

The evidence was also likely sufficient to convict for manufacture because Matz broke down the heroin and packaged it into individual baggies. See RCW 69.50.101(p) ("manufacture" means "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and *includes any packaging or repackaging of the substance* or labeling or relabeling of its container."). But Matz was not charged with committing

the crime in this manner and the jury was not instructed on manufacture as the means. See State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988) (criminal defendant cannot be tried for an uncharged offense).

Rather, Matz was charged with possession with intent to manufacture heroin and the jury was allowed to convict on that means of committing the crime. There was, however, insufficient evidence to support a finding of guilt on the alternative means that Matz possessed heroin with the intent to manufacture it.

Possession with intent to manufacture requires the specific intent to manufacture a controlled substance in the future. In contrast, a manufacturing charge requires no future intent because the crime was committed in the past or present. See State v. McPherson, 111 Wn. App. 747, 758-59, 46 P.3d 284 (2002) (evidence sufficient to convict for manufacture of controlled substance where evidence showed an "already completed manufacture"); Maxfield, 125 Wn.2d at 403 (manufacturing marijuana involved past and present intent to grow, but possession of packaged marijuana involved intent to deliver in future); State v. Burns, 114 Wn.2d 314, 319-20, 788 P.2d 531 (1990) (delivery count required intent to sell in the present, whereas possession with intent to deliver involved intent to sell in the future).

The possession with intent means of committing the crime requires an intent to manufacture a controlled substance in the future. In Matz's case, there is no evidence that anything more needed to be done to finish the manufacturing process for the nine baggies of heroin found in his pocket. The manufacture was already complete. As a result, there is no evidence of intent to manufacture the heroin contained in the baggies in the future.

In addition to the nine 1.1 gram baggies of heroin, the record shows a 4.1 gram chunk of suspected heroin was found on Matz's person. RP 244-46, 472-73. The 4.1 gram chunk was never tested to identify it as heroin. RP 472-73, 527-28. In any event, the prosecutor clearly elected Matz's possession of the nine 1.1 gram baggies of heroin as the basis for conviction under count VI, theorizing the 4 gram chunk was merely for Matz's personal use. RP 661-66. The basis for count VI was Matz's possession of the nine baggies of heroin.

There was no jury unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." Kintz, 169 Wn.2d at 552; see also State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) ("it is prejudicial

error to submit an issue to the jury when there is not substantial evidence concerning it.") (citing Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) ("the giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue")). "If the evidence is insufficient to support any one of the means submitted to the jury, the conviction will be reversed." State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998). The conviction under count VI must be reversed.

d. This Constitutional Error May Be Raised For The First Time On Appeal.

"An appellate court will consider error raised for the first time on appeal when the giving or *failure to give* an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial." State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980). The constitutional right to a jury trial includes the right to a unanimous verdict. Ortega-Martinez, 124 Wn.2d at 707; U.S. Const. Amend. VI; Wash. Const., art. 1, § 22. Defense counsel did not object on unanimity grounds, but the Supreme Court has held instructional errors constituting manifest constitutional error include failing to require a unanimous verdict. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009) (citing State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974)). It is well

established unanimity errors in general verdicts amount to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).

2. INEFFECTIVE ASSISTANCE OF COUNSEL AND EVIDENTIARY ERROR DEPRIVED MATZ OF HIS RIGHT TO A FAIR TRIAL.

Every criminal defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Matz's attorney was ineffective in seeking admission of an affidavit filled out by Deputy Ventura in support of the search warrant. No legitimate tactic justified admission of that affidavit as substantive evidence for the jury to consider and its admission prejudiced the outcome on count III.

Moreover, the court erred in overruling counsel's relevance objection to evidence of a drug overdose that took place at Matz's residence before the charging period. In the alternative, counsel was

ineffective in failing to properly lodge an ER 404(b) objection to the overdose evidence. Counsel was also ineffective in not objecting to evidence of drug dealing before the charging period on grounds of ER 404(b). Reversal on all counts except VIII is required.

a. Counsel Was Ineffective In Requesting Admission Of The Search Warrant Affidavit.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

At trial, the prosecutor had Deputy Venturo identify exhibit 18 as the affidavit for the search warrant and exhibit 19 as the search warrant. RP 180; Ex. 18, 19. The prosecutor offered exhibit 19 into evidence. RP 180. Defense counsel stated, "Defendant would object, Judge, unless No. 18 is admitted. That's the foundation for No. 19 and I think No. 18 should be (inaudible) as well." RP 180-81. The prosecutor said he had no objection, and so both exhibits were admitted into evidence for the jury's consideration. RP 181.

There was no legitimate reason for the affidavit to be admitted. The affidavit contained hearsay that corroborated and bolstered the State's case regarding the three controlled buys. Ex. 18. It set forth Venturo's hearsay statements regarding the controlled buys and surrounding circumstances. Ex. 18. It also contained a summary of Regan's out of court statements made to Venturo regarding the controlled buys. Ex. 18. Matz derived no conceivable tactical advantage from its admission.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. Defense counsel deliberately sought introduction of the affidavit into evidence. But "[n]ot all strategies or tactics on the part of defense counsel are immune from attack." State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). No legitimate tactic justified admission of the affidavit. The legal propriety of the search warrant was not an issue before the jury. Letting the jury consider the "foundation" for the search warrant provided no beneficial strategy to the defense. The affidavit contained the very facts

the State sought to prove at trial and bolstered its theory of the case. Letting the jury consider the foundation for the search warrant via the affidavit only served to reinforce the State's case. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Matz "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

The admission of the affidavit undermines confidence in the delivery of heroin conviction under count III. Venturo testified that Regan, the confidential informant, returned with heroin after the controlled buy on April 25, 2011. RP 168-74, 203. But Regan insisted on the stand that he did not buy any heroin from Matz on that day. RP 336, 367, 369. This contradiction was enough to create a reasonable doubt in the minds of jurors.

In resolving the inconsistency, the affidavit aided the prosecution's case on count III. The affidavit, which never would have been admitted had

defense counsel not sought its admission, set forth Regan's debriefing following the controlled buy on April 25, 2011. Ex. 18; RP 401. The affidavit relates Regan's statements to Deputy Venturo regarding the April 25th buy as follows:

- I met with Detectives to go and buy some dilated [sic] 8's and heroin from Dan Matz
- We drove out to Sage Rd., I walked from there down to Dan Matz
- I showed up, I sat in the kitchen
- I passed him the cash, he gave me 4 dilatuds [sic] and 2.1 grams of heroin for \$350
- Dan was in the room, he's 60, 140 lbs, 5'10"
- Julie Meyers was in the room, she 5', 100 lbs,
- John Howard was in the room, he's 6/4", 210 lbs
- And Andy Pritchard was also in there he's 5'10", blonde hair, 130 lbs
- This is the second time I have bought from Dan

Ex. 18 at 7.

In closing argument, the State used the affidavit to convince the jury to find Matz guilty on the delivery of heroin charge under count III. RP 655-57. With reference to the affidavit, the prosecutor told the jury "This testimony, I submit, here in this document is far more important and is far more credible than what it was that he said on the stand." RP 657. Matz's counsel was reduced to arguing the affidavit should be discounted because Regan did not give his statements under oath. RP 679. Defense counsel's decision to obtain admission of the affidavit was unreasonable and prejudiced Matz. The conviction under count III should be reversed.

b. Counsel Was Ineffective In Failing To Object To Evidence That Matz Sold Drugs Before The Charging Period.

When the prosecutor asked Regan if he had purchased from Matz before speaking with police, defense counsel objected as "outside the scope of this case" and asked that the question be stricken because it was an attempt to elicit misconduct evidence. RP 332. The prosecutor withdrew the question. RP 332.

Shortly thereafter, the prosecutor asked another question designed to elicit the same objectionable evidence: "Why did you believe you could buy those substances from him?" RP 333. Regan answered "Because he always had -- I mean, he had prescription for them. *He's well known for selling them.*" RP 333 (emphasis added). Defense counsel did not object this time.

On redirect, Regan testified he participated in controlled buys with Matz and Julie Meyer because "They -- were killing my friends with meth' in the past --" RP 375-76. No objection was made to this testimony.

A defendant must only be tried for those offenses actually charged. State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). Consistent with this rule, evidence of other crimes, wrongs or acts must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). Acts that are unpopular or disgraceful fall within the scope of ER 404(b). Halstien, 122 Wn.2d at 126. Any doubt about the admissibility of ER 404(b) evidence must be resolved in favor of the defendant. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Defense counsel successfully objected to the prosecutor's question about whether Regan had purchased from Matz before speaking with police. RP 332. But when the prosecutor almost immediately elicited the objectionable answer through a different question, counsel remained silent. RP 333. Counsel was deficient in failing to object to Regan's answer that Matz was well known for selling drugs. RP 333. Counsel was also deficient in not objecting to Regan's later testimony that Matz was "killing my friends with meth' in the past –" RP 375-76. That too was evidence of prior misconduct outside the charging period.

It makes no sense for defense counsel to properly object to prior misconduct evidence but then not object when the same objectionable evidence is elicited through different questions. No coherent tactic, let alone a legitimate one, explains the failure. That Matz was well known for selling drugs prior to the charging period and that he was killing Regan's friends with methamphetamine in the past is classic ER 404(b) evidence that shows a propensity to commit the drugs crimes with which he was charged. As set forth in section C. 2. d., infra, there is a reasonable probability that admission of this evidence affected the outcome.

- c. The Court Wrongly Overruled Counsel's Relevancy Objection To Evidence That A Young Man Overdosed At Matz's Home Or, In The Alternative, Counsel Was Ineffective In Failing To Properly Object To This Evidence.

The following exchange occurred during the prosecutor's cross examination of Matz:

Q: Now you say that you don't really particularly care if people use illegal drugs, right?

A: Not really.

Q: You don't care if they use illegal drugs at your house?

A: Well, I didn't say that.

Q: You don't care if they use illegal drugs at your house, do you?

A; Yes, I do.

Q; Do you care if they overdose at your house?

A; Well, Jesus, I hope so.

Q: Has that ever happened?

A: No.

Q: Nobody's ever overdosed at your house?

A: I think -- I think one kid might have been overdosed when he came to my house, and -- but I -- we didn't realize it. He didn't say nothing. He came in and ate, and we talked for a little while, and he wanted to lay down. He laid down on the couch and -- didn't get up for 21 hours. And -- his brother had come and gone, and -- and, you know --.

Q; When did this happen?

A: Oh, -- Oh, man. Two -- three years ago.

Q: How old was this guy?

Mr. Clay: Judge, I'm going to object. This is way prior to any pertinent -- pending charges here.

The Court: Overruled. Go ahead.

Q: How old was this guy?

A: Early twenties.

Q; Is it common for people in their early twenties to come to your house and use drugs?

A: No.

Q: It's uncommon? Doesn't happen that often?

A: People don't come to my house to use drugs. People who use drugs come to my house.

RP 584-85.

The prosecutor returned to the issue later during cross examination, asking Matz for the name of "that kid who overdosed at your house?" RP 606. Matz said the kid, identified as Scott Weber, did not overdose at his house. RP 606. On redirect, Matz denied having anything to do with the overdose. RP 608-09. On re-cross, the prosecutor asked Matz if he remembered Deputy Venturo and another officer responding when Weber overdosed at Matz's house. RP 614. Matz maintained no officer responded. RP 614.

In rebuttal, the prosecutor called Venturo, who testified police went to Matz's house in 2009 in response to Weber's suspected overdose. RP 616. Upon arrival, Venturo saw Weber on his back, having spasms and mucus coming out of his mouth. RP 616. According to Venturo, the only two people present were Matz and the Weber boy. RP 616.

Outside the presence of the jury, the judge later made a record of his ruling on evidence regarding the Weber overdose:

And then, -- the second area, here, has to do with the two or three years ago the OD. And there the court did allow the inquiry by the state about that. And essentially this goes to the line of inquiry about the people that frequenting Mr. Matz's home, and the possible drug use, and any involvement he might have had in that, and knowledge of it. And so I thought it was highly relevant. It is before the time period that's charged in count 10, but on the other hand I think it's highly relevant, and given the nature of this trial and the evidence that's before this jury about ongoing activity at the residence, then I don't see it as unduly prejudicial, but relevant to the state's case. So that would be my explanation on that ruling.

RP 619-20.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Counsel objected on grounds of relevance. RP 585 ("This is way prior to any pertinent -- pending charges here."); see State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (if the ground for objection is apparent from the context, the objection is sufficient to preserve the issue). The court abused

its discretion in failing to adhere to the requirements of the evidentiary rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Defense counsel objection on grounds of relevance should have been sustained.

"Relevant evidence" means evidence having 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. Irrelevant evidence is inadmissible. ER 402.

The court believed evidence of a prior overdose was relevant to count X, which involved whether Matz knowingly made his house, room, space or enclosure available for the purpose of manufacturing, delivering, selling, storing or giving away drugs under RCW 69.53.010(1). RP 619-20. But knowingly allowing another to *use* drugs at a residence is not a crime under RCW 69.53.010(1). The overdose, which took place before the charging period, did not establish Matz supplied the drug to the young man at his house. The evidence therefore did not make it more probable that Matz knowingly made his residence available for the purpose of providing drugs during the charging period. The evidence was of no consequence to count X.

Even if the evidence was relevant, defense counsel was ineffective in failing to properly object to the overdose evidence on grounds of ER

404(b). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." Kyllo, 166 Wn.2d at 862. The failure to preserve error for review can constitute ineffective assistance of counsel justifies examination of substantive issue on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Evidence that Matz allowed a young man to use drugs and overdose in his house is evidence of prior misconduct. At the very least, a juror would view Matz's involvement in providing a haven for the man to put his life in danger as disgraceful. Halstien, 122 Wn.2d at 126.

Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury, or an undue tendency to suggest a decision on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence that a young man overdosed on drugs in Matz's home fits squarely into this category. The subtext underlying that evidence is that Matz was recklessly allowed a young person to put his life in danger. The evidence is inflammatory and unnecessarily risked arousing an instinct in

the jury to punish Matz for contributing to the poisoning of youth in the community.

The court believed the evidence was not unduly prejudicial. RP 619-20. The court did not explain why its probative value outweighed its prejudicial effect, nor was it asked to because counsel failed to object on grounds of ER 404(b). "A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). But the trial court did not begin with this presumption due to defense counsel's failure to lodge an ER 404(b) objection.

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of other bad acts "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336. In light of these concerns, the

drug overdose evidence was inadmissible under ER 404(b) and counsel unreasonably failed to object on that ground.

d. The Errors Prejudiced The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). In the context of ineffective assistance, prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Thomas, 109 Wn.2d at 226.

There is a reasonable probability that juror consideration of the ER 404(b) evidence influenced deliberation on whether the State proved Matz's guilt beyond a reasonable doubt. This evidence showed Matz was the type of person who would commit the acts for which he was charged, the very inference ER 404(b) is designed to prohibit. In the absence of a limiting instruction, the jury was allowed to consider both the overdose evidence and evidence that Matz had sold drugs before the charging period for a propensity purpose. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) ("absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others.").

The jury's consideration of the evidence cannot be considered trivial because such evidence stripped the presumption of innocence from Matz. Bowen, 48 Wn. App. at 195. And it likely elicited an emotional rather than rational response from jurors as they deliberated on Matz's fate. Cronin, 142 Wn.2d at 584.

The evidence was not so overwhelming that admission of the prior misconduct evidence was harmless. The defense theory on counts I through V was that Regan falsely testified about buying drugs from Matz. RP 672-80, 683. Regan's credibility was subject to doubt. He had motive to lie based on his previous altercation with Matz during which he was humiliated and Matz's lack of sympathy after he overdosed. RP 331, 375-76, 378, 568-69, 583. He also had motive to lie as a confidential informant to get out from under the drug charges hanging over his own head. RP 291-92, 333, 363-65.

The pre-buy searches of Regan's person were not comprehensive, especially by Regan's own account, allowing for the possibility that Regan was setting up Matz by concealing drugs on his person and then passing them off as ones Matz sold him. RP 196-97, 333-34, 355. Furthermore, Regan testified he bought 8 mg Dilaudid from Matz on January 8, but Matz had a prescription for 4 mg Dilaudid, not 8 mg. RP 207-08, 335-36, 367. This is further basis to doubt Regan's credibility.

Julie Meyer and Carrie Leslie — the only other witnesses to testify that Matz dealt drugs — had their own credibility problems. RP 382, 417, 422-24, 542, 547-48. Leslie had been convicted for a crime of dishonesty. RP 542-44, 682; see State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980) (evidence of prior convictions under ER 609 enlightens the jury with respect to a witness's credibility). Meyer, who had been charged with delivery of a controlled substance, testified against Matz to obtain a reduced drug charge as part of a plea agreement. RP 387-88, 414, 422-23; Ex. 193. The available inference is that Meyer wanted to ingratiate herself to the prosecutor and protect her plea agreement by testifying in a manner that produced a result desired by the prosecutor. RP 683.

Moreover, Meyer delivered drugs herself and was present on each of the dates Regan came to the house, allowing for the inference that Meyer, not Matz, was really responsible for the drugs Regan said he obtained. RP 191, 316, 381-84, 449-50. In fact, she had participated in a controlled buy with Regan on January 10. RP 191.

Howard, who lived in Matz's house, also dealt drugs, as shown by Regan's testimony that he had bought drugs from Howard before as part of his cooperation agreement. RP 307-08, 368-70. Howard was also present during the three controlled buys at Matz's house. RP 334, 369-70, 336-37, 356, 370-71. Regan had ready access to other drug sources.

The defense theory on count VI was that Matz possessed the heroin found on his person for personal use, and therefore should not be found guilty of possession with intent to deliver. RP 681. Evidence that Matz was a drug addict who used drugs to self-medicate supported this theory. RP 558-61, 587, 599-601, 603. A rational juror could have gone either way on this count.

Morphine and cocaine (counts VII and IX) were found in Matz's bedroom, but others had access to that area of the house. RP 464, 476, 573. There was therefore an evidentiary basis for a rational trier of fact to conclude the State failed to prove Matz possessed these drugs beyond a reasonable doubt. The jury could infer they belonged to someone else.

The unlawful use of a building charge (count X) was also subject to doubt. Evidence showed people used drugs on Matz's property, but the question of whether Matz knowingly made his house, room, space or enclosure available for the purpose of to manufacturing, delivering, selling, storing or giving away drugs was questionable. Again, Regan, Meyer and Leslie claimed Matz dealt drugs but their credibility was open to attack. Matz denied giving drugs to anyone. RP 560, 567, 569-70, 575-76, 587, 592-93, 599-601, 603. Evidence showed Julie Meyer and Howard dealt or gave away drugs, but it was unclear whether those events occurred on

Matz's property or whether Matz knew those things were happening on his property. RP 307-08, 370, 436, 446, 448-50.

There is a reasonable probability, sufficient to undermine confidence in the outcome, that the prior misconduct evidence to which counsel did not properly object influenced the jury's verdicts. Faced with competing versions of the facts and competing inferences to be drawn from the evidence, the improperly admitted misconduct evidence may have skewed a juror's decision-making process towards a finding of guilt.

After all, a juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). The admission of the ER 404(b) evidence allowed the jury to follow its natural inclination and infer Matz acted in conformity with his character and therefore likely committed the criminal acts charged by the State.

Aside from ineffective assistance, the trial court's error in overruling the relevance objection to the overdose evidence affected the outcome for the reasons advanced above. The overdose evidence was not only irrelevant but inflammatory because it presented Matz as a long-time

menace to the community who enabled youth to endanger their lives through drugs. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). As set forth above, the evidence the error was not harmless because the evidence allowed for different facts and inferences to be drawn in Matz's favor. The overdose evidence invited the jury to draw those facts and inferences in favor of the State.

The defense conceded guilt on the methamphetamine possession charge (count VIII). RP 670. The errors were harmless in relation to that count. Reversal is required on the remaining counts.

e. Cumulative Error Denied Matz A Fair Trial.

Every criminal defendant has the constitutional right to a fair trial. U.S. Const. amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22; State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that an accumulation of errors affected the verdict. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). The cumulative effect of two or more instances of ineffective

assistance may therefore warrant a new trial when each instance, examined alone, would not. Malone v. Walls, 538 F.3d 744, 762 (7th Cir. 2008); Blackburn v. Foltz, 828 F.2d 1177, 1186 (6th Cir. 1987).

The following accumulation of errors deprived Matz of a fair trial: (1) improper admission of the drug overdose evidence on relevancy grounds or, in the alternative, defense counsel was ineffective in failing to object to this evidence on ER 404(b) grounds; (2) ineffective assistance of counsel in failing to object to evidence of Matz's prior drug sales that took place before the charging period; and (3) ineffective assistance in seeking admission of the search warrant affidavit. Reversal on all counts except VIII is appropriate.

3. CLERICAL ERRORS IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

The record of the sentencing hearing unequivocally shows the court intended to impose 100 months confinement on counts III through VI, but the judgment and sentence lists 120 months confinement for those counts. The judgment and sentence must be corrected to reflect the court's actual intention. In addition, the judgment and sentence incorrectly lists count II as a Class B felony when, in fact, it is a Class C felony. That clerical error should be corrected as well.

a. The Judgment And Sentence Does Not Reflect The Court's Intent To Impose 100 Months Confinement For Counts III Through VI.

At the sentencing hearing, the court stated, "So, the state is recommending the 120 months. The court's sentence will be 100 months in prison." RP 715. A short time later, the prosecutor asked "So, your Honor, is it your ruling that -- or is it -- your sentence on each of those matters subject to the 120-month maximum that the sentence is 100 months?" RP 717. The court responded "100 months on everything that has that available. And then those that are the lesser would be whatever the maximum is for those, but run concurrently with the 100 months." RP 717-18.

Counts I, III, IV, V and VI carry a maximum sentence of 120 months. CP 160-61. The written judgment and sentence, in breaking down the term of imposed confinement for each count, lists 100 months for count I but 120 months for counts III, IV, V and VI. CP 162. The judgment and sentence specifies "Actual number of months of total confinement ordered is: 100 months. All counts shall be served concurrently[.]" CP 162.

The judgment and sentence contains clerical errors. The court unequivocally intended to impose 100 months confinement counts III

through VI. RP 715, 717-18. The judgment and sentence, in listing 120 months confinement for those counts, does not reflect the court's intent.

Clerical errors are mistakes in a document that do not reflect the trial court's actual intention. State v. Hendrickson, 165 Wn.2d 474, 478-79, 198 P.3d 1029 (2009). "In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, *as expressed in the record at trial.*" Hendrickson, 165 Wn.2d at 479 (quoting Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479.

The judgment and sentence here does not reflect the court's intention, expressed at the sentencing hearing, that the punishment for counts III, IV, V and VI is 100 months confinement, not 120 months confinement. The error is clerical and subject to nunc pro tunc correction. Id. at 478-79.

A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Consistent with this mandate, "[s]entences in

criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). The sentence here fails this test. As written, the judgment and sentence exposes Matz to the risk that the Department of Corrections will subject Matz to 120 months confinement.

A nunc pro tunc order "records judicial acts done at a former time which were not then carried into the record." Hendrickson, 165 Wn.2d at 478 (quoting State v. Petrich, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980)). Such an order allows a court to date a record reflecting its action back to the time the action in fact occurred. Hendrickson, 165 Wn.2d at 478. This Court should remand to allow the trial court to correct the judgment and sentence to unambiguously reflect the court's intent to impose 100 months confinement for counts III through VI.

b. The Judgment And Sentence Inaccurately Classifies Count II As A Class B Felony.

The judgment and sentence contains another clerical error. The judgment and sentence classifies count II, the offense of delivery of a controlled substance (clonazepam), as a class B felony. CP 158. The Uniform Controlled Substance Act classifies that offense as a class C felony. RCW 69.50.210(b)(10) (clonazepam listed as Schedule IV controlled

substance); RCW 69.50.401(2)(d) ("A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW[.]").

Clerical errors such as the one at issue here may be corrected at any time. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P .3d 353 (2005) (citing CrR 7.8(a)). The remedy is to remand to the trial court for correction of the scrivener's error in the judgment and sentence. Mayer, 128 Wn. App. at 701. The judgment and sentence should be corrected to reflect count II 's status as a class C felony.

D. CONCLUSION

Matz requests that this Court reverse conviction on counts I, II, III, IV, V, VI, VII, IX and X. The clerical errors in the judgment and sentence related to confinement time and felony classification should be corrected.

DATED this 9th day of July, 2012

Respectfully Submitted,

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State v. Daniel Matz

No. 30645-3-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 9th day of July, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 9th day of July, 2012.

X 