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No. 36412-7-III

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

STATE OF WASHINGTON,
Respondent,
v.
MODESTO BRAVO GONZALEZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY
The Honorable Kristin M. Ferrera

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

After a jury trial, Modesto B. Gonzalez was convicted of multiple crimes stemming from four controlled buys and the execution of a search warrant.

Mr. Gonzalez challenges the sufficiency of the evidence for two first degree unlawful possession of a firearm convictions (Counts 5 and 7). The State did not prove the firearms were owned by Mr. Gonzalez, nor was he in actual or constructive possession of them. These convictions should be reversed.

Mr. Gonzalez also challenges the school bus stop enhancements (on Counts 3, 4, and 8) for insufficient evidence. The State did not present evidence the crimes occurred within 1,000 feet of a school bus stop. These enhancements should be reversed.

In addition, defense counsel was ineffective due to the conflict he encountered by making himself a necessary witness, and the conflict adversely affected his representation. Those convictions not reversed for insufficiency should be reversed and remanded for a new trial.

Mr. Gonzalez's right to a unanimous jury verdict for unlawful possession with intent to deliver heroin (Count 8) was violated when there were multiple acts which could have constituted the basis for the

conviction, but the State did not elect which act it was relying on. This count should be reversed and remanded for a new trial.

Also, Mr. Gonzalez's right to a unanimous jury verdict was violated when the trial court failed to instruct the jury as to unanimity because first degree unlawful possession of a firearm (Count 5 and 7), unlawful possession of a controlled substance with intent to deliver heroin (Count 8), and maintaining a drug property (Count 9) are alternative means crimes. These counts should be reversed and remanded for a new trial.

Finally, the trial court erred by imposing interest on legal financial obligations, and this Court should also correct a scrivener's error on the legal financial obligations.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Gonzalez guilty of first degree unlawful possession of a firearm (Counts 5 and 7), where the evidence was insufficient.
2. The trial court erred in finding Mr. Gonzalez guilty of school bus stop enhancements (Counts 3, 4 and 8), where the evidence was insufficient.
3. The defendant's Sixth Amendment right to effective assistance of counsel was violated due to an actual conflict which adversely affected defense counsel's representation.
4. The defendant's constitutional right to a unanimous jury verdict was violated as to Count 8, unlawful possession of a controlled substance with intent to deliver heroin.
5. The defendant's constitutional right to a unanimous jury verdict was violated as to Counts 5 and 7, first degree unlawful possession of a firearm.

6. The defendant's constitutional right to a unanimous jury verdict was violated as to Count 9, maintaining a drug property.
7. The trial court erred by imposing interest on legal financial obligations.
8. The trial court erred by not correcting a scrivener's error.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Gonzalez guilty of first degree unlawful possession of a firearm in Counts 5 and 7, where the evidence was insufficient to convict.

Issue 2: Whether the trial court erred in finding enhancements to counts 3, 4, and 8, where there was insufficient evidence to prove Mr. Gonzalez delivered or intended to deliver controlled substances within 1,000 feet of a school bus stop.

Issue 3: Whether Mr. Gonzalez was denied his Sixth Amendment right to conflict free representation, constituting ineffective assistance of counsel, where defense counsel made himself a witness and thereby created an actual conflict which adversely affected his representation the defendant.

Issue 4: Whether the trial court violated Mr. Gonzalez's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for unlawful possession of a controlled substance with intent to deliver heroin, as charged in count 8.

Issue 5: Whether the trial court violated Mr. Gonzalez's constitutional right to a unanimous jury verdict for counts 5, 7, and 9, because at least one of the alternative means was not supported by the evidence.

Issue 6: Whether the trial court erred by imposing interest on legal financial obligations other than restitution.

Issue 7: Whether the trial court should correct a scrivener's error where the court did not assess a \$200 criminal filing fee yet the judgment and sentence lists the fee.

D. STATEMENT OF THE CASE

On February 21, 2017, the Columbia River Drug Task Force (“Task Force”) set up a controlled buy with a confidential informant (“CI”). (1RP¹ 71-75). The CI was to purchase illegal drugs from Modesto B. Gonzalez. (1RP 73-74). The Task Force gave the CI \$520 of controlled buy funds and transported the CI to an area near Mr. Gonzalez’s home on Crescent Street in Wenatchee. (1RP 74, 223). The Task Force surveilled the CI while he walked to Mr. Gonzalez’s home, and the CI exited not long after with 23 grams of methamphetamine. (1RP 74-75).

The CI and Task Force worked together on three additional occasions to complete controlled buys from Mr. Gonzalez. (1RP 76-82, 111-113). On March 2, 2017, the CI was given \$450 cash to purchase an ounce of methamphetamine from Mr. Gonzalez in his home. (1RP 76-78). On March 9, 2017, and the CI returned from Mr. Gonzalez’s home with \$400 and he purchased approximately 26 grams of methamphetamine. (1RP 78-80). March 15, 2017, was much the same; only this time the CI was given \$240 of controlled buy cash and he returned from Mr. Gonzalez’s home with heroin. (1RP 80-82).

¹ Several volumes were transcribed in this case. “1RP” refers to the volumes transcribed by Barbara J. Scoville, consisting of trial dates 9/11/2018 and 9/12/2018. “2RP” refers to a volume transcribed by Karen E. Komoto, consisting of hearings 7/05/18, 07/11/18, 09/19/18, and 09/24/18.

Two days later on March 17, 2017, the Task Force executed a search warrant on Mr. Gonzalez's home. (1RP 83, 86). During the search, law enforcement found two firearms in the basement of the home, and heroin in a jacket pocket by the front door. (1RP 87-88, 104, 107-109, 142, 146, 233-236). Law enforcement also found \$120 in cash, three cell phones, baggies, and two scales—one which was coated with heroin residue—in Mr. Gonzalez's bedroom. (1RP 118, 164).

The State charged Mr. Gonzalez with nine counts: unlawful delivery of a controlled substance, methamphetamine, with a school bus stop enhancement (Count 1); unlawful delivery of a controlled substance, methamphetamine, with a school bus stop enhancement (Count 2); unlawful delivery of a controlled substance, methamphetamine, with a school bus stop enhancement (Count 3); unlawful delivery of a controlled substance, heroin, with a school bus stop enhancement (Count 4); first degree unlawful possession of a firearm (Count 5); possession of an unlawful firearm (Count 6); first degree unlawful possession of a firearm (Count 7); unlawful possession of a controlled substance with intent to deliver, heroin, with a school bus stop enhancement (Count 8); and maintaining a drug property (Count 9). (CP 226-230).

The case proceeded to a jury trial. (1RP 63-269).

A detective from the Task Force testified at trial. (1RP 63-110). When the search warrant was executed on Mr. Gonzalez's home, the detective

discovered heroin in a jacket pocket, which was hanging on a post by the front door of the residence. (1RP 87-88, 103-104). The detective did not know who owned the jacket. (1RP 103). No one at trial could identify the owner of the jacket. (1RP 63-269). The State did not fingerprint the baggie containing the heroin, which was in the jacket pocket. (1RP 104).

The detective sent the firearms to the lab for fingerprint testing. (1RP 104-105). Mr. Gonzalez's fingerprints were not found on the firearms. (1RP 104-105). Someone else's fingerprints were found on the firearms. (1RP 105). No registration records were found on the firearms and the detective did not know who owned them. (1RP 105).

Multiple people resided in the house where Mr. Gonzalez lived, including his daughter, mother, and a woman who was living in the basement of the home. (1RP 107-108, 263). The CI informed law enforcement the woman living in the basement was living there when the CI conducted the first controlled buy and maybe even during the second controlled buy. (1RP 107-108).

On cross-examination, the detective also testified he was unable to see inside the house during the four controlled buys. (1RP 93). The detective noted there were three bedrooms in the main level of the house. (1RP 94). There was a stairway at the back of the house leading to the basement. (1RP 95).

The detective also acknowledged the CI signed a contract on February 23, 2017, with the Task Force as part of the controlled buy agreement. (1RP 96-97).

In that contract, part of the terms required the CI not to use or sell illegal drugs. (1RP 97). The detective denied knowing whether the CI used drugs while the contract was in effect with the Task Force. (1RP 97). The detective could not recall whether the CI admitted to using drugs during a CI witness interview in November 2017. (1RP 98, 245-246). From the detective's perspective, the CI felt fairly comfortable in Mr. Gonzalez's residence and was familiar with the home. (1RP 101-102).

The detective also testified he was formerly trained in the U.S. Marine Corps as a sniper and was a current sniper with the Washington State Patrol SWAT team. (1RP 241-242). He stated his training for those positions taught him how to visually estimate distance. (1RP 241). The detective claimed the distance between Mr. Gonzalez's home and a school bus stop location was around 300 feet. (1RP 241). However, he admitted he never actually measured the distance between the bus stop to Mr. Gonzalez's home on Crescent Street. (1RP 244).

When the search warrant was executed, a woman named Jennifer Houck was in the residence and in Mr. Gonzalez's bedroom. (1RP 117). Mr. Gonzalez's mother was also in the home. (1RP 107-108, 184, 263).

A sergeant with the Task Force acknowledged he did not know who owned the jacket that contained the heroin. (1RP 143).

The State's forensic scientist tested several exhibits for controlled substances. (1RP 155-167). No possible fingerprints were collected or analyzed. (1RP 165-166).

A former officer with the Wenatchee Police Department testified the basement in Mr. Gonzalez's home is connected to the kitchen, and it is a separate part of the residence. (1RP 177).

The bus router for the Wenatchee School District testified. (1RP 179-182). She stated there was a school bus stop near Mr. Gonzalez's residence on Crescent Street on the dates the controlled buys were completed. (1RP 180-181).

When the search warrant was executed on Mr. Gonzalez's home, an initial sweep of the home by a SWAT deputy revealed no firearms. (1RP 183-185).

The CI testified he participated with the Task Force in four controlled buys at Mr. Gonzalez's home: February 21, March 2, March 9 and March 15, 2017. (1RP 190-196). These buys all occurred in Mr. Gonzalez's bedroom. (1RP 211-214). He also admitted to seeing two firearms in the Mr. Gonzalez's home, but did not state they were Mr. Gonzalez's firearms. (1RP 197-198). The CI merely stated he was with Mr. Gonzalez when he saw them. (1RP 198).

During cross-examination, the CI acknowledged the terms of the contract he signed with the Task Force required he not use buy, use, or sell drugs. (1RP 200). However, he admitted to being under the influence of methamphetamine about every other day in February and March of 2017. (1RP 200, 203). Some

days he used methamphetamine more than once. (1RP 204). He stated he signed the contract around February 21, 2017. (1RP 204). The CI denied using methamphetamine on February 21, 2017, stating he did not think law enforcement would have let him participate in the controlled buy on that date if he had been high. (1RP 206). Next, defense counsel attempted to question the CI about a prior interview conducted by defense counsel, and the following exchange took place:

[DEFENSE COUNSEL]: Do you remember being interviewed by myself last November?

[CI]: Yes.

[DEFENSE COUNSEL]: And do you remember telling me that you used --

[STATE]: I'd object.

[DEFENSE COUNSEL]: -- methamphetamine that day?

...

[STATE]: The reason for the objection is it's improper for counsel to ask a witness, *Didn't you tell me something?* Counsel's actually testifying and making themselves a witness by doing that. If the defendant -- if, in fact, the defendant answers, for instance, *No, I didn't tell you that*, counsel is a witness and must then be called as a witness. It's improper.

He can ask him, *On this day, did you say such and such?* But it's improper for an attorney to ask a witness, *Didn't you tell me something?* whatever it is.

[DEFENSE COUNSEL]: That's --

[STATE]: That's imparting knowledge to the jury by asking the question.

[DEFENSE COUNSEL]: And -- and I completely understand the problem with making myself a witness which is it's a matter on every case, but that's fine. Mr. Hershey was there as to the best of my recollection. I think [the detective] was there. So I can change the question.

THE COURT: Okay.

[STATE]: The State's not objecting if he just says, *On this date, did you say this?* But the same thing, putting himself or me into it.

THE COURT: Right. That is sustained.

...

[DEFENSE COUNSEL]: Okay. Thank you, your Honor.

[DEFENSE COUNSEL]: So, Mr. [CI], do you recall stating on November 28th, 2017, that you were using on February 21st, 2017?

[CI]: No, I don't.

[DEFENSE COUNSEL]: Okay. You don't recall?

[CI]: No, I don't recall.

[DEFENSE COUNSEL]: Okay. So do you recall stating that you had used a few hours earlier but didn't think you were under the influence?

[CI]: No, I do not recall.

(1RP 206-208) (emphasis in original). The CI denied being under the influence of any drugs at the time of the controlled buys. (1RP 216). Defense counsel later proffered: "...we're going to anticipate putting rebuttal testimony on that he did use on one of the days of the buy, and that's why I'm going down this line." (1RP 217). Defense counsel continued to attempt to glean more information about the CI's drug use during controlled buys, but to no avail. (1RP 215-219).

During the search warrant's execution, two firearms were found in the basement under a floorboard to the landing of the basement stairs. (1RP 233-236, 238). One gun was a Mossberg 12 gauge shotgun and the other was a Springfield shotgun 12 gauge. (1RP 234-235). The basement in the home on Crescent Street was an open space, and it included a bed and lots of clutter. (1RP 239). The

firearms were not registered to any owners and were not reported stolen. (1RP 242-244).

Mr. Gonzalez testified. (1RP 256-268). He stated he did not live in the basement of the house on Crescent Street and did not know anything about the firearms in the basement. (1RP 259-260). He noted his mother was the person renting the home on Crescent Street, and he was renting a room from her. (1RP 263-264). He lived there with his mother and daughter. (1RP 263).

No law enforcement officers testified they could observe the activity inside the house during the controlled buys. (1RP 63-269).

During closing argument, the State told the jury they should consider both the heroin found in the jacket pocket and the heroin residue found on one of the scales in Mr. Gonzalez's bedroom as evidence Mr. Gonzalez committed the crime of unlawful possession of a controlled substance with intent to deliver heroin (Count 8). (CP 229; 1RP 320).

The court instructed the jury as follows:

To convict the defendant of the crime of possession with intent to deliver a controlled substance as charged in Count VIII of the Information, each of the following elements of the crime must be proven beyond a reasonable doubt:

1. That on or about the 17th day of March, 2017, the defendant possessed a controlled substance, heroin; and
2. That the defendant possessed the substance with the intent to deliver a controlled substance, heroin; and
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Supp. CP², Instruction No. 17; 1RP 294-295).

The jury was also instructed on the following:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in Count V of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 17th day of March, 2017, the defendant knowingly owned a firearm or knowingly had a firearm in his or her possession or control;
2. That the defendant had previously been convicted of a serious offense; and
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Supp. CP, Instruction No. 25; 1RP 298-299).

The court provided the jury with an almost identical instruction for Count 7, which was also a to-convict instruction for first degree unlawful possession of a firearm. (Supp. CP, Instruction No. 26; 1RP 299-300).

The court instructed the jury on possession:

² A supplemental designation of clerk's papers, for the trial court's instructions to the jury, was filed on May 13, 2019.

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

(Supp. CP, Jury Instruction No. 24; 1RP 298).

Finally, the jury was instructed on maintaining a drug property:

To convict the defendant of the crime of maintaining a drug property, as charged in Count IX of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or between the 21st day of February, 2017 and the 17th day of March, 2017, the defendant did knowingly keep or maintain a dwelling, or other structure or place resorted to by persons using controlled substances;
2. That the drug property was maintained for the purpose of using controlled substances, or was used for keeping or selling controlled substances; and
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Supp. CP, Instruction No. 31; 1RP 302-303).

Special verdict forms were also provided to the jury. (Supp. CP; CP 280, 282, 288). These forms asked the jury whether the school bus route stop enhancement applied to Counts 3, 4 and 8. (Supp. CP, Special Verdict Form

Counts 3, 4, and 8; CP 280, 282, 288). As to Count 3, the special verdict form read:

We, the jury, return a special verdict by answering as follows:

Did the defendant delivery [sic] of a controlled substance—methamphetamine within one thousand feet of a school bus route stop designated by a school district?

(Supp. CP, Special Verdict Form Count 3; CP 280; 1RP 310).

As to Count 4, the special verdict form read:

We, the jury, return a special verdict by answering as follows:

Did the defendant deliver a controlled substance—heroin within one thousand feet of a school bus route stop designated by a school district?

(Supp. CP, Special Verdict Form Count 4; CP 282; 1RP 311).

As to Count 8, the special verdict form read:

We, the jury, return a special verdict by answering as follows:

Did the defendant possess with intent to deliver—heroin within one thousand feet of a school bus route stop designated by a school district?

(Supp. CP, Special Verdict Form Count 8; CP 288; 1RP 313).

The jury found Mr. Gonzalez guilty of the following: unlawful delivery of a controlled substance, methamphetamine, with a school bus stop enhancement (Count 3); unlawful delivery of a controlled substance, heroin, with a school bus stop enhancement (Count 4); first degree unlawful possession of a firearm (Count 5); possession of an unlawful firearm (Count 6); first degree unlawful possession

of a firearm (Count 7); unlawful possession of a controlled substance with intent to deliver, heroin, with a school bus stop enhancement (Count 8); and maintaining a drug property (Count 9). (CP 275-289; 1RP 355-358). After jury polling, it appears the jury was unable to agree on a verdict as to Counts 1 and 2. (1RP 358-430). The jury also found the school bus route stop enhancement applied to Counts 3, 4, and 8. (CP 280, 282, 288; 1RP 358).

The judgment and sentence reflects the court imposed a total of \$1,140.00 in court costs and restitution. (CP 310-311; RP 441, 452). A small notation near the total by the court indicates it found Mr. Gonzalez was indigent. (CP 311; 1RP 452). It does not appear the \$200 criminal filing fee was used in calculation of the total, as one section where the notation of a \$200 fee is crossed out. (CP 310). However, the \$200 is still present on the top of the subsequent page as part of a subsection. (CP 311).

The judgment and sentence requires Mr. Gonzalez pay interest on all legal financial obligations:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

(CP 312).

After sentencing, Mr. Gonzalez expressed concerns to the court about his defense counsel's representation. (2RP 58-59; 1RP 458-459). He explained his attorney did not record an interview conducted with the CI before trial, and at that

interview the CI admitted to being high during one of the controlled buys. (2RP 58-59; 1RP 458). However, because defense counsel did not have a recording or another witness present, there was not a way to impeach the CI during trial. (2RP 58-59; 1RP 458-459). Before trial, defense counsel said the following about the matter: “[T]he confidential informant, when I interviewed him, admitted that he had been using all the way throughout the course of these dealings.” (2RP 18).

Defense counsel also submitted a declaration, stating the same:

2. I had the opportunity to interview the confidential information in this case. . . . During the course of the interview, [the CI] admitted that he was using illegal drugs throughout the course of his work as a confidential informant. [He] specifically admitted to using illegal controlled substances on the first buy from Mr. Gonzalez a few hours earlier in the day.
3. [The CI] additionally admitted that he was using drugs throughout the entire time period that he was working as a confidential informant in this case.

(CP 134).

Defense counsel later added:

I was in the uncomfortable position of being a witness in my own case, and I put a declaration. I don’t think I violated the Rules of Professional Conduct. . . . I just didn’t have an investigator to the interview. I did the interview. And, so, I just wanted to put that on the record, in case that ever is reviewed by the Court of Appeals.

(2RP 34-35).

Mr. Gonzalez timely appealed. (CP 340-341).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Gonzalez guilty of first degree unlawful possession of a firearm in Counts 5 and 7, where the evidence was insufficient to convict.

Mr. Gonzalez was found guilty of first degree unlawful possession of a firearm, Counts 5 and 7, for two shotguns which were found in the basement of the home on Crescent Street where he lived. (CP 283, 285; 1RP 233-236, 356-357). However, the State only proved there were firearms in the basement of a home where multiple adults were living. (1RP 107-108, 263). And, at one point, a woman lived in the basement. (1RP 107-108). Because the State did not prove Mr. Gonzalez owned, possessed, or controlled either firearm, the evidence was insufficient to prove Mr. Gonzalez was guilty of two counts of first degree unlawful possession of a firearm.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citation omitted).

Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citation omitted).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citation omitted). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

Under RCW 9.41.040, a felon may not own, possess, or control a firearm. RCW 9.41.040. Possession can be either actual or constructive, and constructive possession may be shown by proving a defendant had dominion and control over

the firearm. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) (citation omitted). Yet “[m]ere proximity to the firearm is insufficient to show dominion and control.” *Id.* at 899 (citation omitted). “[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” *Id.* at 899 (citation omitted). Courts are hesitant to find vehicle passengers have dominion and control when charged with constructive possession. *Id.* at 900 (citations omitted). However, if a defendant is the owner of a premises or is the driver and/or owner of a vehicle, courts have found sufficient evidence of constructive possession. *Id.* at 899-900 (citations omitted).

“In determining dominion and control, no one factor is dispositive. The totality of the circumstances must be considered.” *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995) (citation omitted). For example, as to dominion and control over a home, there must be more evidence than temporary residence, knowledge of presence of contraband, or personal possessions in residence to prove dominion and control. *Id.* at 501 (citation omitted). “Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession.” *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (dissenting opinion of Justice Stephens, for a majority of the court).

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Gonzalez guilty of first degree unlawful possession of a firearm in counts 5 and 7, the jury had to find he knowingly owned or had in his possession or control a firearm and had previously been convicted of a serious offense. (Supp. CP, Instruction Nos. 25 & 26; 1RP 298-300); *see also* RCW 9.41.040(1)(a)(first degree unlawful possession of a firearm). The jury was also instructed on possession as follows:

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

(Supp. CP, Instruction No. 24; 1RP 298).

There was insufficient evidence presented at trial that Mr. Gonzalez owned the firearms. No witness testified Mr. Gonzalez owned the guns. (1RP 63-269). A few of the State's witnesses admitted they did not know who owned the firearms and no registration search turned up an owner, nor were they reported stolen. (1RP 105, 242-243).

There was also insufficient evidence presented at trial that Mr. Gonzalez possessed or controlled the firearms. Although Mr. Gonzalez lived in the house where the guns were found, there are multiple factors showing he did not actually

or constructively possess them. (Supp. CP, Jury Instruction No. 24; 1RP 298). No witness testified to seeing Mr. Gonzalez handle the guns. (1RP 63-269). And no witness testified Mr. Gonzalez's fingerprints were on the guns. (1RP 63-269). The guns were also found in the basement, not in Mr. Gonzalez's room. (1RP 233-236). Multiple people lived in the home and another person recently occupied the basement. (1RP 107-108).

The testimony at trial revealed two to three adults were living in the house around the time the search warrant was executed: Mr. Gonzalez, his mother, and a woman who lived in the basement for a period of time. (1RP 107-108). Fingerprints—but not Mr. Gonzalez's fingerprints—were found on the guns. (1RP 105). The guns were found in the basement under a floor board, hidden from plain view. (1RP 234-235). The basement was a separate part of the house and was connected to the kitchen. (1RP 177). No evidence was presented that Mr. Gonzalez exercised dominion and control over the guns, or over the premises (the basement) where they were found. (1RP 63-269).

Reviewing the totality of the circumstances, in the light most favorable to the State, the evidence does not show Mr. Gonzalez owned, possessed, or controlled the firearms found in the basement. Because no evidence exists to show Mr. Gonzalez owned or exercised actual or constructive possession of the firearms, he respectfully requests this Court reverse and dismiss Counts 5 and 7 with prejudice.

Issue 2: Whether the trial court erred in finding enhancements to counts 3, 4, and 8, where there was insufficient evidence to prove Mr. Gonzalez delivered or intended to deliver controlled substances within 1,000 feet of a school bus stop.

The jury found Mr. Gonzalez guilty of delivering or intending to deliver controlled substances within 1,000 feet of a school bus route stop on counts 3, 4, and 8. (CP 280, 282, 288). However, the State did not present sufficient evidence that these acts occurred within 1,000 feet of a school bus route stop. The school zone enhancements should be reversed.

RCW 69.50.435(1)(c) provides an enhanced penalty for persons delivering or intending to deliver controlled substances within 1,000 feet of a school bus route stop.

RCW 69.50.435(6)(c) defines "school bus route stop" as "a school bus stop as designated by a school district." The jury was instructed accordingly. (Supp. CP, Instruction No. 37; 1RP 307).

In *State v. Jones*, the court held that because there was no direct measurement of the distance between the location of the alleged crime and the school bus stop, insufficient evidence existed to establish the offenses occurred 1,000 feet from the stop. *State v. Jones*, 140 Wn. App. 431, 437-38, 166 P.3d 782 (2007). The court noted:

There are Global Positioning Systems hard copy maps, digital maps, pedometers, satellite imaging, and numerous other measure devices that can be used to establish distance beyond a reasonable doubt. None of these technologies was used here.

Id. at 437-438. The court reversed the enhancement. *Id.* at 438.

Division III, in *State v. Clayton*, held the terminal point for the school zone enhancement must be the actual site where the offense was committed. *State v. Clayton*, 84 Wn. App. 318, 321-322, 927 P.2d 258 (1996). There, the court found insufficient evidence to uphold the enhancement where the officer measured the distance from the school playground to the defendant's property fence and found it to be 926 feet 10 inches. *Id.* at 321-323. "The record was devoid of any evidence of the measurement to the exact site where the crimes occurred." *Id.* at 322.

Here, the State did not present evidence of a direct measurement from the location where Mr. Gonzalez was accused of delivering or intending to deliver drugs. (1RP 63-269). During trial law enforcement admitted to not measuring the distance. (1RP 244). Instead, the detective testified to his best estimate of the distance between the school bus stop and the residence, estimating the distance to be about 300 feet. (1RP 241). He based the measurement on his training and experience as a military sniper and SWAT member. (1RP 241-242).

Given that the exact measurement is required by statute in RCW 69.50.435(1)(c), and *State v. Clayton*, it is not enough for the State to present testimony of an estimate of that distance. *Clayton*, 84 Wn. App. at 321-323; (1RP 241-242). For there to have been sufficient evidence of the distance, the State

needed an actual measurement. *Clayton*, 84 Wn. App. at 321-322; *Jones*, 140 Wn. App. at 437-438. Many options for meeting this burden were available to the State. *Jones*, 140 Wn. App. at 437-438 (recognizing GPS, maps, satellite imaging, etc., as possible options for units of measurement). Yet the State failed to present sufficient evidence of the distance. *See In re Winship*, 397 U.S. at 364 (1970) (due process requires the State prove beyond a reasonable doubt every element of a charged crime); *Salinas*, 119 Wn.2d at 201 (proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt”).

Viewing the detective’s estimated guess—of the distance between the location of the offenses to the location of the school bus stop—in a light most favorable to the State, no rational trier of fact could have found guilt beyond a reasonable doubt. (1RP 241-242). While the detective may be trained to estimate distances, his estimate is simply not accurate enough to satisfy the standards required by statute and case law. RCW 69.50.435(1)(c); *Clayton*, 84 Wn. App. at 321-322; *Jones*, 140 Wn. App. at 437-438.

No rational trier of fact could have found the detective’s estimated guess of the distance was enough to find guilt beyond a reasonable doubt. The school zone bus route enhancements for counts 3, 4, and 8, should be reversed for insufficient evidence.

Issue 3: Whether Mr. Gonzalez was denied his Sixth Amendment right to conflict free representation, constituting ineffective assistance of counsel, where defense counsel made himself a witness and thereby created an actual conflict which adversely affected his representation the defendant.

Before trial, Mr. Gonzalez's defense counsel interviewed the CI but did not bring an investigator with him nor did he record the interview. (1RP 458-459; 2RP 58-59). The CI revealed to defense counsel during the interview the CI was using drugs during at least one of the controlled buys in this case, contrary to the contract he had with the Task Force. (CP 134; 1RP 206-208, 217, 458; 2RP 18, 34-35, 58-59). However, at trial the CI could not recall or would not admit to having made such a statement. (1RP 215-219). Defense counsel was ineffective for making himself a witness and such an error resulted in an actual conflict at trial for Mr. Gonzalez. Therefore, for those convictions which are not subject to reversal by this Court for insufficient evidence, Mr. Gonzalez's convictions must be reversed and remanded for a new trial.

In general, the Rules of Professional Conduct require a "lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness." RPC 3.7(a). Although some exceptions apply, none of those are applicable to the issue raised in this case. RPC 3.7(a)(1) – (3).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of

counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

“Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.” *Strickland*, 466 U.S. at 688 (citation omitted). The right to effective assistance of counsel “includes the entitlement to representation that is free from conflicts of interest.” *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008) (citations omitted); *see also State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (recognizing effective assistance also includes duty of loyalty) (citing *Strickland v. Washington*, 466 U.S. 668)). However, these basic duties are not an exhaustive list of counsel’s obligations to a client. *Strickland*, 466 U.S. at 688 (citation omitted).

It is the duty of the trial court to investigate potential conflicts between client and attorney if the court knows or reasonably should have known a potential conflict exists. *Regan*, 143 Wn. App. at 425-426. Reversal is required when the attorney or defendant “makes a timely objection because of a claimed conflict and the trial court fails to conduct an adequate inquiry.” *Regan*, 143 Wn. App. at 426 (citations omitted). However, “if the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict of interest that adversely affected the

lawyer's performance." *Id.* (citation omitted). The actual conflict of interest must be more than a "mere theoretical division of loyalties." *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). No prejudice need be shown. *Regan*, 143 Wn. App. at 426 (citations omitted); *see also Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003) (recognizing this standard).

To demonstrate adverse effect a defendant need not show prejudice such that the outcome of the trial would have been different without the conflicted representation. *Regan*, 143 Wn. App. at 428. Rather, the defendant need only show "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Id.* (internal quotations and citations omitted). The conflict of counsel either must cause a "lapse in representation contrary to the defendant's interests" or "have likely affected particular aspects of counsel's advocacy on behalf of the defendant." *Id.* (internal quotations and citations omitted).

In *Regan*, the court held defense counsel's conflict of interest required reversal. *Regan*, 143 Wn. App. at 430. The appellate court stated the trial court's order compelling defense counsel to testify against his client put defense counsel in conflict. *Id.* As a result, the defendant did not need to show any prejudice because actual conflict existed. *Id.* 428-430.

Courts review conflicts of interest de novo. *Regan*, 143 Wn. App. at 428.

Here, defense counsel made himself a witness in violation of the Rules of Professional Conduct. RPC 3.7(a). Though certainly this was not intentional, defense counsel's interview of the CI without an investigator or another defense witness present led defense counsel to discover exculpatory information which he alone could testify to. (CP 134; 1RP 206-208, 217, 458; 2RP 18, 34-35, 58-59). During his interview with the CI, defense counsel learned the CI was high during at least one controlled buy. (CP 134; 1RP 217, 458-459; 2RP 18, 34-35, 58-59). Unfortunately for Mr. Gonzalez and defense counsel, the CI either could not or would not recall that admission while testifying at trial. (1RP 215-219). Because defense counsel could not elicit that information from the CI without testifying at trial himself, he made himself a necessary witness contrary to RPC 3.7(a).

The CI's testimony was the main component of the State's case against Mr. Gonzalez. The CI testified to conducting four controlled buys, wherein he was able to purchase illegal drugs from Mr. Gonzalez. No one observed these controlled buys except for the CI, and no one but the CI testified the drugs came from Mr. Gonzalez. (1RP 63-269). The CI's credibility was central to the State's case against Mr. Gonzalez. (1RP 63-269). Thus, any material which was potentially exculpatory and damaging to the CI's credibility was more than important—it was essential to Mr. Gonzalez's defense. (1RP 329-338).

Defense counsel bravely and fully admitted on the record to the problem. (2RP 34-35). He had become a witness for lack of an investigator. (2RP 34-35).

Actual conflict between the defendant and his attorney existed in this case, and that conflict adversely affected defense counsel's performance. Defense counsel was unable to fully cross-examine the CI regarding his credibility due to the conflict of also being a witness in the case. *Regan*, 143 Wn. App at 428. A plausible defense strategy could not be pursued due to the conflict, causing a lapse in representation contrary to Mr. Gonzalez's interests. *Id.*

The case must be reversed and remanded for a new trial. *Regan*, 143 Wn. App. at 432 (setting forth this remedy). Should this Court find insufficient evidence exists as to some of his convictions, Mr. Gonzalez requests reversal and remand for a new trial on the remainder of his convictions.

Issue 4: Whether the trial court violated Mr. Gonzalez's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for unlawful possession of a controlled substance with intent to deliver heroin, as charged in count 8.³

Mr. Gonzalez was found guilty of unlawfully possessing heroin with intent to deliver in Count 8. (CP 286; 1RP 357). The State chose not to elect which act it was relying upon for conviction of the charge, and the court did not provide a *Petrich* instruction to the jury. (Supp. CP, Instruction No. 17; CP 229; 1RP 320). Therefore, the conviction in Count 8 must be reversed and remanded for a new trial.

³ This argument is made in the alternative to Issue 3.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This issue may be raised for the first time on appeal. *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993).

In order to convict a defendant of a criminal charge, the jury must be unanimous that the criminal act charged has been committed. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); *see also State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified in part by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). In cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572. In such a multiple acts case, the State must either “elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

A trial court’s failure to give a necessary unanimity instruction is constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Therefore, the constitutional harmless error analysis applies. *Id.* In order to find a constitutional error harmless, the appellate court must find the error harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 65. Prejudice is

presumed. *Coleman*, 159 Wn.2d at 512. “The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* (citing *Kitchen*, 110 Wn.2d at 411-12); *see also Camarillo*, 115 Wn.2d at 65.

In *State v. King*, the defendant was found guilty of one count of possession of cocaine. *State v. King*, 75 Wn. App. 899, 901, 878 P.2d 466 (1994). The court noted two possible distinct acts could have formed the basis of the conviction because cocaine was found in two different places. *Id.* at 903–04. No unanimity instruction had been given and the State offered both of the distinct acts to seek a conviction. *Id.* at 903. In reversing and remanding for a new trial, the court determined it could not “say that no rational trier of fact would entertain a reasonable doubt about [the defendant’s] responsibility” for the two different possessions. *Id.* at 904. The evidence was conflicting as to who constructively possessed the first portion of cocaine and whether the second portion of cocaine had been planted by law enforcement. *Id.* at 904.

Here, the trial court should have issued a unanimity instruction for Count 8. (Supp. CP). The State charged in Count 8 that Mr. Gonzalez possessed a controlled substance, heroin, with intent to deliver to another person. (CP 229). But, the State alleged Mr. Gonzalez possessed heroin in two distinct ways: (1) by possessing the heroin in the pocket of the jacket found by the Task Force near the front door of the residence; and (2) by possessing the heroin residue that was on

one of the scales found in Mr. Gonzalez's bedroom. (Supp. CP, Instruction No. 17; 1RP 320). The State did not elect one act upon which to seek a conviction. (1RP 320). The trial court's failure to instruct the jury on unanimity was a constitutional error. (Supp. CP). This error was not harmless. A rational juror could have had reasonable doubt as to Mr. Gonzalez's involvement in the alleged incidents. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12) (setting forth the constitutional harmless error analysis).

First, a rational juror could have had reasonable doubt as to whether Mr. Gonzalez possessed the jacket in the front hallway. (1RP 87-88, 103-104). There was no evidence that Mr. Gonzalez was the owner of the jacket. (1RP 63-269). In fact, a law enforcement officer testified he did not know who owned it. (1RP 103). Thus, there was no evidence presented from which the jury could determine that Mr. Gonzalez possessed or owned the heroin in the pocket of the jacket.

Second, a rational juror could have a reasonable doubt as to whether the owner of the heroin in the pocket intended to deliver it to anyone. "[A]n officer's opinion that a defendant possessed more drugs than normal for personal use is insufficient to establish intent [to deliver]." *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995) (citation omitted), *overruled on other grounds*, *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). No evidence was presented that the heroin in the pocket was being used or planned to be used for distribution to others. (1RP 63-269).

Under the facts presented at trial here, it cannot be said that no rational juror could have a reasonable doubt as to any of the incidents alleged. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12). The trial court erred in its failure to give a unanimity instruction for unlawful possession of a controlled substance (heroin) with intent to deliver, as charged in count 8, and this error was not harmless beyond a reasonable doubt. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12). This court should reverse Mr. Gonzalez’s conviction count 8 and remand for a new trial.

Issue 5: Whether the trial court violated Mr. Gonzalez’s constitutional right to a unanimous jury verdict for counts 5, 7, and 9, because at least one of the alternative means was not supported by the evidence.⁴

“[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *Handyside*, 42 Wn. App. at 415; *Martin*, 69 Wn. App. at 689 (stating that even if instructing the jury on an alternate means that is unsupported by the evidence was “plainly the result of oversight, the giving of this erroneous instruction is not trivial... and may be raised for the first time on appeal.”); *see also* RAP 2.5(a).

⁴ These arguments are made in the alternative to Issues 1 and 3.

“An alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways.” *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017).

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *Ortega-Martinez*, 124 Wn.2d at 707. “But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required.” *Armstrong*, 188 Wn.2d 340; *see also State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017) (stating “[w]hen there is sufficient evidence to support each alternative means, Washington defendants do not enjoy a recognized right to express unanimity.”). “When one element of the crime can be satisfied by alternative means, jury unanimity is satisfied if the jury unanimously agrees the State proved that element beyond a reasonable doubt and the evidence was sufficient for each alternative means of committing that element.” *Id.* at 343; *see also Woodlyn*, 188 Wn.2d at 165 (stating “[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.”).

However, “[i]f there is insufficient evidence to support *any* of the means, a ‘particularized expression’ of juror unanimity is required.” *Woodlyn*, 188 Wn.2d at 165 (citation omitted). “When there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested

its verdict on an invalid ground.” *Armstrong*, 188 Wn2d at 343-344. In this situation, the conviction must be reversed. *Id.*

In *Woodlyn*, our Supreme Court rejected a harmless error approach that “a complete *lack* of evidence for one alternative allows courts to ‘rule out’ the possibility that any member of the jury relied on the factually unsupported means.” *Woodlyn*, 188 Wn.2d at 165-166. Instead, the Court found that “[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative.” *Id.* at 166.

a. Whether the trial court violated Mr. Gonzalez’s constitutional right to a unanimous jury verdict for counts 5, 7, first degree unlawful possession of a firearm, because at least one of the alternative means was not supported by the evidence.

For the charges of first degree unlawful possession of a firearm, counts 5 and 7, the jury was not instructed it had to be unanimous on whether Mr. Gonzalez [1] knowingly owned or [2] knowingly had a firearm in his possession or control. (Supp. CP, Instruction No. 25 & 26; 1RP 298-300). Sufficient evidence does not establish Mr. Gonzalez owned the firearm found in his residence. Therefore, the lack of unanimity instruction on counts 5 and 7 violated his constitutional right to a unanimous jury verdict.

In *State v. Holt*, the court recognized “[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.” *State v. Holt*,

119 Wn. App. 712, 718, 82 P.3d 688 (2004), *overruled on other grounds by State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005).

The issue of whether second degree unlawful possession of a firearm is an alternative means crime was recently addressed by Division III in *State v. Barboza-Cortes*. *State v. Barboza-Cortes*, 5 Wn. App. 2d 86, 91-93, 425 P.3d 856 (2018). Division III disagreed with the appellant’s assertion the charge was an alternative means crime, stating ownership, possession, and control were not alternative means of committing the crime, but rather, were “means within means.” *Id.* The Washington State Supreme Court granted review of this issue in *State v. Cortes*, 192 Wn.2d 1009, 432 P.3d 788 (2019). Oral argument was heard May 9, 2019.⁵ Mr. Gonzalez raises this issue herein to preserve the possible error, should the Supreme Court reverse this Court.

Here, the jury was instructed on the alternative means of committing first degree unlawful possession of a firearm by two means: [1] by owning or [2] possessing and controlling a firearm. (Supp. CP, Instruction Nos. 25 & 26; 1RP 298-300). These two means do not “describe minor nuances inhering in the same act” *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015). The jury was not provided an instruction that it must be unanimous in its verdict as to these two alternative means. (Supp. CP, Instruction Nos. 25 & 26).

⁵https://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2019&file=20190509

Further, there was insufficient evidence to support the alternative means that Mr. Gonzalez owned a firearm, because no evidence was presented at trial that he owned the shotguns found in the residence. (IRP 63-269). Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 188 Wn.2d at 165. Because none was given, Mr. Gonzalez's convictions for first degree unlawful possession of a firearm, counts 5 and 7, must be reversed. *See Armstrong*, 188 Wn.2d at 3434-344. It cannot be assumed that every member of the jury relied solely on the supported alternatives of "possession" and "control." *See Woodlyn*, 188 Wn.2d at 165.

The lack of unanimity instruction deprived Mr. Gonzalez of his constitutional right to a unanimous jury verdict, and therefore, his conviction for first degree unlawful possession of a firearm, counts 5 and 7, should be reversed and remanded for a new trial.

b. Whether the trial court violated Mr. Gonzalez's constitutional right to a unanimous jury verdict for count 9, maintaining a drug property, because at least one of the alternative means was not supported by the evidence.

For the charge of maintaining a drug property, count 9, the jury was not instructed it had to be unanimous on whether Mr. Gonzalez maintained the property for the purpose of [1] using controlled substances or [2] keeping or selling controlled substances. (Supp. CP, Instruction No. 31; IRP 302-303). Sufficient evidence does not establish Mr. Gonzalez maintained the Crescent

Street residence for drug use. Therefore, the lack of unanimity instruction on count 9 violated his constitutional right to a unanimous jury verdict.

Here, the jury was instructed on the alternative means of committing the crime of maintaining a drug property: [1] the property was maintained for the purpose of using controlled substances, or [2] the property was used for keeping or selling controlled substances. (Supp. CP, Instruction. No. 31, 1RP 302-303); RCW 69.50.402(1)(f). These two means do not “describe minor nuances inhering in the same act” *Sandholm*, 184 Wn.2d at 734. The jury was not instructed it must be unanimous in its verdict as to these two alternative means. (Supp. CP, Instruction No. 31; 1RP 302-303).

Further, there was insufficient evidence to support the alternative means that Mr. Gonzalez maintained the property for the purpose of drug use. (1RP 63-269). No one testified to using drugs in the residence, nor was drug paraphernalia found within to indicate drug use in the home. (1RP 63-269). Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 392 P.3d at 1067 (quoting *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). Because none was given, Mr. Gonzalez’s conviction for maintaining a drug property in count 9 must be reversed. *See Armstrong*, 394 P.3d at 379. It cannot be assumed that every member of the jury relied solely on the supported alternatives of “keeping or selling controlled substances.” *See Woodlyn*, 392 P.3d at 1067.

The lack of unanimity instruction deprived Mr. Gonzalez of his constitutional right to a unanimous jury verdict, and therefore, his conviction for maintaining a drug property, count 9, should be reversed and remanded for a new trial.

Issue 6: Whether the trial court erred by imposing interest on legal financial obligations other than restitution.

The provision of the judgment and sentence imposing interest on all legal financial obligations (LFOs) is contrary to recent statutory amendments and must be stricken.

Illegal or erroneous sentences can be challenged the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *see also State v. McCorkle*, 137 Wn.2d 490, 495-496, 973 P.2d 461 (1999).

Mr. Gonzalez's judgment and sentence was entered on October 1, 2018. (CP 305-321; 1RP 432-474).

House Bill 1783, effective June 7, 2018, modified Washington's system of LFOs, addressing "some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Among other changes, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs. *See* Laws of 2018, ch. 269, § 1; *see also*

Ramirez, 191 Wn.2d at 747 (noting this change). Specifically, House Bill 1783 amended RCW 10.82.090 as follows:

Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. *As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.*

RCW 10.82.090(1) (emphasis added); *see also* Laws of 2018, ch. 269, § 1.

Thus, following the changes made by House Bill 1783, the statute now prohibits the accrual of interest on non-restitution LFOs. RCW 10.82.090(1).

The provision in Mr. Gonzalez's judgment and sentence requiring payment of interest, entered after June 7, 2018, violates this provision of amended RCW 10.82.090. (CP 312). Interest cannot accrue on the non-restitution LFOs imposed on Mr. Gonzalez. *See* RCW 10.82.090(1); *see also* Laws of 2018, ch. 269, § 1.

This Court should remand with instructions to modify the judgment and sentence to strike the provision imposing interest on all LFOs.

Issue 7: Whether the trial court should correct a scrivener's error where the court did not assess a \$200 criminal filing fee yet the judgment and sentence lists the fee.

The judgment and sentence reflects the court imposed a total of \$1,140.00 in court costs and restitution. (CP 310-311; RP 441, 452). It does not appear the \$200 criminal filing fee was used in calculation of the total, as one section where the notation of a \$200 fee is crossed out. (CP 310). However, the \$200 is still

present on the top of the subsequent page as part of a subsection. (CP 311). This appears to be a scrivener's error.

Mr. Gonzalez requests this Court remand his judgment and sentence to have the sentencing court clearly strike out the \$200 criminal filing fee.

F. CONCLUSION

Insufficient evidence existed to find Mr. Gonzalez guilty of first degree unlawful possession of a firearm (Counts 5 and 7), and the convictions should be reversed.

Insufficient evidence existed to find school bus stop enhancements applied to Count 3 (unlawful delivery of methamphetamine), Count 4 (unlawful delivery of heroin), and Count 8 (possession with intent to deliver heroin). The enhancements should be reversed.

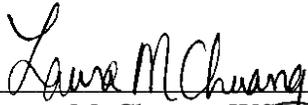
As to any convictions not reversed for insufficient evidence, Mr. Gonzalez requests this Court reverse his remaining convictions due to ineffective assistance of counsel.

In the alternative, Mr. Gonzalez requests his conviction for unlawful possession of a controlled substance with intent to deliver heroin, Counts 5, 7, 8 and 9, be reversed due to violation of his constitutional right to a unanimous jury verdict.

The trial court erred by imposing interest on Mr. Gonzalez's legal financial obligations, and request this Court strike the interest.

Finally, Mr. Gonzalez request this Court require the trial court correct a scrivener's error in the calculation of the legal financial obligations.

Respectfully submitted this 15th day of May, 2019.



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

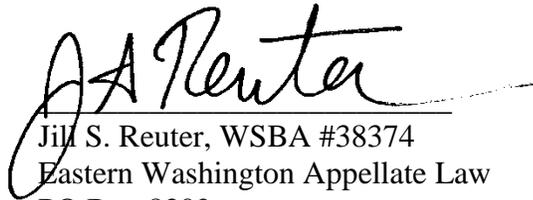
STATE OF WASHINGTON) COA No. 36412-7-III
Plaintiff/Respondent)
vs.) Chelan Co. No. 17-1-00140-7
)
MODESTO BRAVO GONZALEZ,) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 15, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Modesto Bravo Gonzalez, DOC #777618
Airway Heights Corrections Center
PO Box 204
Airway Heights, WA 99001

Having obtained prior permission, I also served a copy on the Respondent at prosecuting.attorney@co.chelan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 15th day of May, 2019.


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