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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 34063-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

THEODORE R. RHONE,

Appellant.

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

The Honoraballle Linda Lee, Judge

OPENING BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

1305 N.E. 45th Street, # 205
Seattle, WA 98105
(206) 547-1742

PM 5/11/06

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Rhone's CrR 3.6 motion to suppress the physical evidence against him.

2. The following findings of fact in support of the trial court's CrR 3.6 ruling are not supported by substantial evidence in the record:

> 2) . . . . Deputy Shaffer had investigated fast-food restaurants robberies in Lakewood in which employees at drive through windows were held up at gunpoint. Based on his experience investigating narcotics trafficking, Deputy Shaffer was also aware that drug-related transactions and/or collection of drug-related debts often involved the use of firearms.
>
> 5) . . . . the defendant reached back into the rear interior of the vehicle. Deputy Shaffer feared the defendant was reaching for a gun . . . .
>
> 8) As Deputy Shaffer approached the vehicle to determine if there was a gun in the vehicle that could pose a threat to law enforcement officers, Phyllis Burg stated that there was a gun in the car. Deputy Shaffer then entered the vehicle.
>
> 9) While surveying the vehicle for a gun, Deputy Shaffer observed a white plastic bag on the floorboard behind the driver's seat. . . . Under the driver's seat, Deputy Shaffer located a white plastic tube containing two pieces of suspected crack cocaine. Under the back passenger seat, Deputy Shaffer located a purple crown royal [sic] bag that contained five bundles of suspected crack cocaine . . . .
>
> 11) After speaking to Isaac Miller and Bambi Meyer, Deputy Miller immediately relayed by phone and/or radio the information he learned to Deputy Shaffer. Deputy

Shaffer then placed all three occupants from the suspect vehicle under formal arrest.

3. Mr. Rhone assigns error to the following conclusions of law in support of the trial court's CrR 3.6 ruling:

> 2) Deputy Shaffer's contact with the vehicle and subsequent detention of the defendant was a lawful investigatory stop and detention.
>
> 3) Deputy Shaffer possessed a reasonable concern for his safety and a reasonable suspicion that the defendant was dangerous and may gain access to a weapon in the vehicle based on the prior report of the passenger possessing a gun, the defendant's furtive movements in reaching back into the vehicle, Phyllis Burg's belligerent and uncooperative behavior, and Phyllis Burg's confirmation that the occupants had just been at the Jack-in-the-Box restaurant.
>
> 4) Deputy Shaffer's search of the vehicle was lawful and based on his reasonable safety concern and suspicion that the defendant was dangerous and might gain access to a weapon in the vehicle.
>
> 5) Deputy Shaffer was not attempting to accelerate the discovery of evidence when he searched the passenger compartment of the vehicle.
>
> 7) After receiving the information from Deputy Miller, Deputy Shaffer had probable cause to arrest the defendant for robbery. Assuming Deputy Shaffer had not searched the vehicle based on his safety concerns, he would have used proper and predictable procedures to arrest the defendant for robbery and search the vehicle incident to arrest.
>
> 8) Had Deputy Shaffer arrested the defendant for robbery and searched the suspect vehicle incident to

arrest, all the evidence from the vehicle would have been inevitably discovered.

9) The defendant's motion to suppress evidence is denied.

10) All evidence seized by Deputy Shaffer from within the suspect vehicle is admissible at trial.

CP 121-125.

4. The trial court erred in granting the prosecution's motion to exclude Mr. Rhone's expert witness at the CrR 3.6 hearing.

5. The trial court erred in refusing to require the prosecutor to give a race-neutral reason for excusing the one African-American remaining on the jury panel after the only other African-American had been excused for cause.

6. There was insufficient evidence to support Mr. Rhone's conviction for possession of a controlled substance with intent to deliver.

7. The trial court erred in allowing the state to present expert testimony that was not helpful to the jury and invaded the province of the jury.

8. The court should have polled the jury to determine if they heard a statement the complaining witness made as he left the stand.

9. The prosecutor's misconduct in closing argument denied Mr. Rhone a fair trial.

10. Cumulative error denied Mr. Rhone a fair trial.

11. The trial court erred in finding Mr. Rhone's prior Oregon convictions to be comparable to most serious offenses in Washington.

12. The trial court erred in using an Oregon conviction which was not shown to have been found by a unanimous jury verdict.

13. The trial court erred in imposing sentences of life without the possibility of parole under the Persistent Offender Accountability Act (POAA).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Must an appellate court hold that findings of facts in support of the denial of a CrR 3.6 motion cannot be upheld where the findings have no support in the record and are substantially misleading?

2. Is a search of a car for officers safety impermissible, following an investigatory stop, where the occupants have been removed from the car, searched, handcuffed and secured in patrol cars and thus the car is beyond the immediate reach of the occupants and they cannot reasonably have access to the car?

3. Even assuming, without agreeing, that a search may be initially proper as a search for officers safety, is a continued search for evidence improper after the weapon sought in a protective search is found?

4. Is a search incident to arrest which precedes an actual lawful arrest not subject to the inevitable discovery doctrine under State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2001)?

5. Does the trial court err in refusing to suppress evidence based on findings which are not supported by the record and improper application of officer safety and inevitable discovery doctrines?

6. Did the trial court err and violate Mr. Rhone's state and federal constitutional rights to compulsory process by refusing to allow him to present relevant expert testimony on subjects testified to by the state's police officer witnesses?

7. Did the trial court err and violate Mr. Rhone's state and federal constitutional rights to equal protection in refusing to require the prosecutor to provide a race-neutral reason for excusing the only African-American remaining in the jury pool after the other African-American was excused for cause?

8. Was there insufficient evidence to support Mr. Rhone's conviction for possession of a controlled substance with intent to deliver where the drugs were found in a car belonging to someone else and driven by yet another person and there was no evidence that he was aware of the drugs or had any connection to them?

9. Did the trial court err in imposing judgment and sentence for possession of a controlled substance with intent to deliver and violate Mr. Rhone's state and federal constitutional right to due process where there was insufficient evidence to prove the elements of the crime beyond a reasonable doubt?

10. Did the trial court err in allowing the state to present expert testimony about street level drug deals, when the expert could not say that the case involved a street level drug transation, and where the facts were inconsistent with common street-level transactions such that the testimony was not helpful to the jury and denied Mr. Rhone his state and federal constitutional rights to a jury verdict based on evidence presented at trial?

11. Where the defendant and others heard the comment of the complaining witness as he left the stand, did the trial court err in relying on her belief that the jurors could not have heard rather than inquiring of the jurors themselves?

12. Did the prosecutor's misconduct in arguing facts not in evidence and facts which, if true, would have meant that the state's witnesses testified falsely deny Mr. Rhone a fair trial?

13. Did cumulative error deny Mr. Rhone a fair trial?

14. Did the trial court err in imposing a sentence of life without parole under the POAA where the statute is unconstutional under Blakely v. Wahington, where Mr. Rhone's Oregon conviction is not a valid conviction under the laws of Washington in that he was not guaranteed a unanimous verdict by a jury of twelve, and where his Oregon robbery conviction is not comparable to a strike offense in Washington?

C. STATEMENT OF THE CASE

1. Procedural history

On June 2, 2003, the Pierce County Prosecutor's Office charged Theodore Rhone, along with Cortez Brown and Phyllis Burg, with unlawful possession of a controlled substance with intent to deliver.[1] CP 1-2. The Information alleged that Mr. Rhone or an accomplice was armed with a firearm at the time of the crime. CP 1-2. On June 17, 2003, the prosecutor filed a persistent offender notice informing Mr. Rhone that if he were convicted as charged he would be sentenced to life without the possibility of parole. CP 3.

---

[1] The state dismissed the charges against Ms. Burg even though the car in which the drugs and gun were found belonged to her, her boyfriend Cortez Brown was driving the car and Mr. Rhone was a passenger-guest in the car. RP 542. Mr. Brown entered a plea of guilty to unlawful possession of a controlled substance. RP 665. Both testified at trial against Mr. Rhone.

On March 10, 2004, the state filed an amended information charging Mr. Rhone with additional counts of first degree robbery while armed with a firearm (Count II), unlawful possession of a firearm (Count III), and bail jumping (Count IV). CP 4-6. On April 25, 2005, a second amended information was filed amending the language charging him with being armed with a firearm during the commission of the robbery. CP 60-62.

A jury found Mr. Rhone guilty as charged after trial before the Honorable Linda Lee, and found that he was armed with a firearm while unlawfully possessing a controlled substance and during the commission of a robbery. CP 106-109, 112-113.

On November 18, 2005, Judge Lee sentenced Mr Rhone to a term of life without the possibility of parole for Counts I and II and standard range sentences for Counts III and IV. CP 156-171. Mr. Rhone subsequently filed a timely notice of appeal. CP 172-173.

2. The CrR 3.6 hearing

(i) Testimony

Lakewood police officer Darin Miller and Pierce County deputy David Shaffer were the state's two witnesses at the CrR 3.6 hearing.

Officer Miller, who worked for the Pierce County Sheriff's Department at the time of the incident, testified that at approximately 5:30

p.m. on May 30, 2003, he received a call from the police dispatcher to investigate a report of a person with a weapon at the Jack-in-the-Box located at 8800 South Tacoma Way. RP 98-99, 106. The call was a suspicious person call. RP 106.

Officer Miller was diverted by a report over the radio that a car matching the description of the car from the Jack-in-the-Box, a Camaro, had been stopped slightly over a mile away at 10700 South Tacoma Way. RP 99. On arrival at 10700 South Tacoma Way, Officer Miller, along with a number of other officers who responded to the scene, provided cover as the occupants were removed from the Camaro. RP 100, 110, 161, 179.

Once the occupants were safely out of the Camaro, searched, handcuffed and secured in the back seats of patrol cars, Miller went to the Jack-in-the-Box and took verbal and written statements from two employees, Bambi Meyer and Isaac Miller. RP 102-103, 110-111. Ms. Meyer reported that a Camaro had come through the drive-through two times, thirty to forty minutes apart; the second time she saw that the front seat passenger had a gun in his lap. RP 137-138. Isaac Miller said the first time the car drove through he gave the people in the car money and the second time when they said he owed more money, he took all the money he had in his pocket and threw it into the car. RP 139-140.

Officer Miller testified that he spoke with Deputy Shaffer by phone before leaving the Jack-in-the-Box, although he did not recall whether Deputy Shaffer contacted him or he contacted Shaffer. RP 103, 127-129. Miller did recall that the Camaro was being searched before he left the scene to go to the Jack-in-the-Box. RP 141.

The computer-generated police "CAD" report indicated that the dispatch call went out at 5:23 p.m., that Mr. Rhone was arrested at 5:27 p.m. and that Officer Miller arrived at the scene at 5:46 p.m. RP 117-119.

Deputy Shaffer testified that he was very familar with Lakewood and had recognized the Camaro from the dispatcher's description. RP 154. Shaffer drove to the apartment complex where he had seen the car and it was there. RP 155-156. When Shaffer saw someone exiting the car, he turned and pulled in behind it, drew his weapon and activated his car's overhead lights. RP 156-157. Shaffer demanded that Mr. Rhone, who was stepping out of the passenger door of the Camaro, get out of the car with his hands up. RP 159. According to Shaffer, Mr. Rhone "slowly and deliberately reached back down into the car" and bent down into the car. RP 159. On further shouted command, Mr. Rhone showed his hands and left the car. RP 160-161. Although Shaffer testified that he believed that Mr. Rhone threw a gun into the car, he was very clear on cross

examination that he did not see anything in Mr. Rhone's hands, did not see his hands at all, and did not see any movements indicating Mr. Rhone was throwing anything. RP 165, 204. Shaffer also agreed that the Camaro was a two-door car and that it was necessary to push a lever by the passenger's seat to let someone exit the backseat of the car. RP 203.

Shaffer testified that Mr. Rhone was thoroughly searched, handcuffed and detained in a patrol car, and that the other two occupants, Cortez Brown and Phyllis Burg, were also searched, handcuffed and placed in patrol cars before the Camaro was searched. RP 161-162, 165, 208, 223. He agreed that none of the suspects could get out of the patrol cars "other than kicking out a window or something," and that they had been safely removed from the Camaro at the time of the search. RP 223.

Shaffer's rationale for searching the car was his belief that there was a gun in it. RP 165-167. Shaffer did not stop the search, however, when the gun was located on the floor in a bag behind the driver's seat; he continued to search until he found a plastic tube with suspected cocaine in it up under the driver's seat and a Crown Royal bag with suspected cocaine in it under the back seat. RP 166, 212-213, 212, 243.

Although Shaffer's report indicated that all of the suspects were searched "incident to arrest" and the car was searched "incident to arrest,"

Shaffer insisted at the CrR 3.6 hearing that the report was mistaken and that he did not have probable cause to search or arrest until after talking with Officer Miller and learning of what the witnesses at the Jack-in-the-Box had to say.[2] RP 167-168, 178, 209-212, 223, 248.

In describing his knowledge of the Lakewood area, Shaffer described Lakewood as an area with a lot of violence, drug and gang-related crimes and prostitution. RP 152. He indicated that it was common for the crimes to involve firearms. RP 152. Shaffer agreed with the prosecutor that there were a number of "shop and rob" crimes at fast food restaurants. RP 153. Shaffer, however, never testified about "collection of drug-related debts often involv[ing] the use of firearms." CP 121-125. He testified generally that fast food restaurants were targets of robberies; he did not testify that such robberies involved "employees at drive through windows [being] held up at gunpoint." RP 153; CP 121-125.

(ii) Exclusion of defense witness

The trial court excluded the testimony of defense expert Bob Crow who had twenty years of experience in police investigation and was retired

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[2] The state questioned both Officer Miller and Deputy Shaffer to try to establish that the CAD system dictated how information was put into reports and how the CAD program might result in an erroneous time of arrest. RP 137-138, 143-144, 175-177. The defense examined about information that was not included in the CAD report. RP 201.

from the Pierce County Sheriff's Office. RP 272-277, 280-282. Mr. Crow would have testified about the CAD report, police procedures and his interview with Officer Miller. RP 272. Mr. Crow had also reviewed hundreds of Deputy Shaffer's reports and could testify that there were no mistakes in them, as Shaffer claimed at trial. RP 382.

(iii) Court's oral CrR 3.6 ruling

Initially, the trial court found that Deputy Shaffer's report was more accurate than his testimony, that all of the searches were incident to arrest, and that Shaffer had probable cause to arrest for criminal activity. RP 402. At the insistent urging of the prosecutor to find that the evidence would have inevitably been discovered, the trial court revised the CrR 3.6 ruling that the arrest was lawful. RP 404-405, 411. The court ruled, however, that the police did not act unreasonably to accelerate discovery of evidence and that the evidence would have been inevitably discovered in spite of the absence of probable cause to arrest. RP 412.

(iv) Written CrR 3.6 findings

The court's written findings and conclusions conclude that Deputy Shaffer's search of the car was lawful based on safety concerns and that the evidence in the car would have been inevitably discovered. CP 121-125.

3. Excusing the African-American juror

Mr. Rhone objected that he was denied a jury of his peers when the prosecutor used a peremptory challenge to remove the only African-American on the jury. RP 438-439.

The court considered the challenge to be a Batson challenge. RP 451. The court noted that there were only two African-American jurors in the entire venire; one was excused for cause with the agreement of the defense and the prosecutor exercised a peremptory challenge to excuse the other. RP 452-453. The court ruled that excusing one African-American juror was insufficient to establish a prima facie case of discrimination and denied the challenge without asking the prosecutor to articulate a race-neutral reason for excusing the juror. RP 452.

4. Trial testimony

At trial, the complaining witness Isaac Miller testified that Mr. Rhone, who he knew as "T" or "Big T," had been friends with Miller's downstairs neighbors and he and Mr. Rhone had both been to barbecues at the neighbors. RP 480-482. Isaac Miller knew Cortez Brown as "Bear" and Ms. Burg as "Peaches." RP 482. He testified that they were all friends. RP 482.

At approximately 5:30 p.m. on May 30, 2003, Miller was assisting Bambi Meyer at the drive through window at Jack-in-the-Box. RP 482-483. The red Camaro came through twice. RP 483. There were three people in the car and they asked for money. RP 484. According to Miller, he owed Mr. Rhone money, but Brown had come by earlier in the day and asked for it. RP 485. Miller had given Brown $20. RP 485.

When the Camaro came through the first time, Brown was driving and Mr. Rhone was the passenger. RP 486. Miller told them that Brown had already collected the money. RP 486. According to Miller, a gun was sitting in Mr. Rhone's lap. RP 486. Miller testified further that he took all of the money in his pocket and threw it into the car. RP 488.

Miller testified that prior to the incident, he had had a "decent relationship" with Mr. Rhone. RP 491. He explained that he was poor and borrowed money from Mr. Rhone and that he had borrowed money once before and had paid Mr. Rhone back. RP 493-494. According to Miller, the Camaro drove through the window twice without ever leaving Jack-in-the-Box. RP 498.

Bambi Meyers testified that the Camaro drove through two times, about a half hour apart. RP 589-589. The passenger and driver exchanged words with Isaac Miller. RP 591. She looked down and noticed that the

passenger had a gun in his lap; she reported this to the manager who called 911. RP 591. The passenger did not point the gun at them, nor did he have his finger on the trigger. RP 596. Ms. Meyers identified Mr. Rhone in court as the *driver* of the Camaro. RP 592.

Phyllis Burg testified that she and Brown, who was her boyfriend and who lived with her, gave Mr. Rhone a ride to the Jack-in-the-Box on May 30, 3003, in her Chevy Camaro. RP 549-552, 562. Burg said she was in the front seat on the way, but that at the Jack-in-the-Box Mr. Rhone got into the front seat.[3] RP 554. According to Burg, after Mr. Rhone told the person at the window that he wanted his $40, she saw money coming through the window. RP 556. She did not see Mr. Rhone making gestures and did not see a gun at that time.[4] RP 557, 571-572.

Burg testified that she had loaned Issac Miller money because he had no food in his house and he always paid her back. RP 567. She denied, however, ever having been to a barbecue with him. RP 567-568.

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[3] Given Mr. Rhone's size, 272 pounds at the time of his arrest, it is very unlikely that Mr. Rhone could have fit comfortably in the back seat of the two-door Camaro or that he would have switched from the back to the front at the Jack-in-the-Box, RP 36.

[4] It is not clear how Ms. Burg was aware there was a gun in the back seat of her car unless it was her gun or Mr. Brown's since she did not see it at the Jack-in-the-Box and it was found behind the driver's seat wrapped in a towel and bag when the police found it. RP 166.

Cortez Brown testified that Mr. Rhone was an acquaintance, but denied ever calling him "T" or "Big T." RP 649, 673. Brown could not recall where people sat when they went to the Jack-in-the-Box or what happened there. RP 660-662. He agreed that he pled guilty, without admitting guilt, to unlawful possession of a controlled substance. RP 665. He was impeached with his prior alleged statements to Deputy Shaffer. RP 673-675. He denied knowing Isaac Miller or collecting money from him on behalf of Mr. Rhone. RP 677.

Deputy Shaffer described how he recognized the Camaro from the dispatch broadcast, how he encountered the car and arrested the occupants. RP 600, 604-625. Shaffer described finding the gun wrapped in a towel in a white bag, finding narcotics under the driver's seat and more suspected cocaine in a Crown Royal bag. The Crown Royal bag had a sandwich-sized bag inside with five smaller baggies in it and a handwritten note saying "40's," and $30. RP 623-627.

According to Shaffer, Mr. Rhone said that he held a gun in his lap, but denied pointing it at anyone. RP 696.

Shaffer confirmed that the Camaro belonged to Ms. Burg and that he had never seen Mr. Rhone in the car before May 30, 2003. RP 698. Shaffer confirmed that neither the weapon nor the packaging had been

tested for fingerprints. RP 703-707. The handwriting on the note "40's" was not compared to any other handwriting. RP 705.

Experts from the Washington State Patrol Crime Law confirmed that the revolver was operable and that the suspected drugs tested positive for cocaine. RP 805, 810-814, 819, 824, 826-827.

Officer Darin Miller described his actions in backing up Deputy Shaffer and in interviewing Bambi Meyers and Isaac Miller. RP 718-721.

Over defense objection, the state was permitted to present the testimony of Detective Oliver Hickman as an expert on street level narcotics distribution. RP 833-835.

Hickman described dealers pulling into parking lots where they were met by runners who acted as go-betweens with customers. RP 842-843. Hickman testified that ordinarily crack cocaine is sold, without packaging, in $20 rocks or two rocks for $40. RP 845-847, 849. Hickman testified that dealing drugs could be dangerous and sellers might arm theselves or take other measures to protect themselves. RP 843-844. Hickman admitted that the notation "40's" meant nothing to him, but he was led to believe that the baggies were packaged for sale for $40. RP 852. He testified that, in his opinion, the way the drugs were packaged looked like someone had

weighed and packaged them and this was not typical of drug users, but typical of drug dealers. RP 855.

On cross-examination, Hickman admitted that a user generally goes through one to two grams a day and would use the amount in the plastic tube found under the driver's seat in less than one hour. RP 856. Hickman further admitted that he would expect to see elements not present in this case such as cell phones, pagers, crib notes, or scales if the drugs were possessed with intent to deliver. RP 862. Finally, Hickman admitted that he did not know if the charged drugs were part of a street level operation or not. RP 869.

Lori Kooman, deputy prosecuting attorney, testified that Mr. Rhone had been charged with a Class B felony, that he was obligated to appear in court and that a bench warrant issued after he failed to appear at the appointed time. RP 730, 733, 735-739.

4. Closing argument

During closing argument the following exchange took place:

> The State would submit that Mr. Rhone is in the business of dealing drugs. Everyone dances around this -- All the witnesses -- And again, they're not all perfect, ladies and gentlemen. But they all dance around this money, what was it owed for, and so forth. Ladies and gentlemen, the State would submit, when you take all the charges and put them together -- because, frankly, they're kind of unusual charges to see together -- But when you put them together, what

makes sense. Mr. Miller, besides being just naive, gets into the wrong type of activity with Mr. Rhone. Mr. Miller is engaging in probably some illegal conduct on his own, on his own accord, dealing with dope.

MR. MOSELY [defense counsel]: Your Honor, I would object that those are facts that are not in evidence.

MR. OISHI [prosecutor]: Reasonable inference therefrom, Your Honor.

THE COURT: I'm going to allow him to continue.

RP 989.

5. Sentencing

At sentencing, Mr. Rhone argued that his two Oregon convictions were not comparable to most serious offenses in Washington and there was no evidence that Mr. Rhone was found guilty of the robbery by a unanimous jury. RP 1049-1056. The court found that the crimes were comparable and imposed sentences of life without the possibility of parole on Counts I and II and standard range sentences on the remaining counts. RP 1065-1067, 1076, 1079.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. RHONE'S CrR 3.6 MOTION TO DISMISS.

The trial court erred in denying Mr. Rhone's CrR 3.6 motion to suppress. First, the court's findings and conclusions are not supported by

substantial evidence and, taken as a whole, are misleading because of material omissions to them. Second, Deputy Shaffer was not authorized to search the car for safety concerns after all of its occupants had been removed, searched, handcuffed and secured in patrol cars. Even, however, if safety concerns did justify searching the car to secure the gun, those concerns did not authorize the continued search for evidence that followed after the gun was discovered. Finally, under the authority of State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2001), the doctrine of inevitable discovery does not apply here where the police conduct a search incident to arrest prior to a lawful arrest.

a. Inaccurate and misleading findings

Many of the court's written findings are not supported by substantial evidence, and they are as a whole substantially misleading because of the facts that they omit. The findings do not reflect the facts established at the evidentiary hearing.

Finding of fact number 2 includes a finding that Deputy Shaffer was aware of robberies of fast food restaurants in Lakewood where employees were held up at gunpoint at drive through windows and that collection of drug-related debts often involved firearms. CP 122. There is simply no evidentiary support of any kind for either finding. These findings are

included to suggest that Deputy Shaffer had probable cause to arrest at the time of the stop of the Camaro. Shaffer, however, expressly testified that he did not have probable cause at that time, and the court found that the stop was an investigatory stop, not an arrest. RP 178; CP 124.

The statement in finding of fact number 5 that Mr. Rhone reached back into the *rear interior* of the car is not supported by the record. Deputy Shaffer testified that he could not see Mr. Rhone's hands and could not tell what Mr. Rhone was doing other than reaching into the car. RP 159, 165, 204.

Finding number 8 is misleading because it implies that as Deputy Shaffer was approaching the Camaro, Ms. Burg told him that there was a gun in the car and he entered for that reason. CP 123. In fact, it was undisputed that Ms. Burg, Mr. Rhone and Mr. Brown had been detained, searched, handcuffed and secured in the back seats of patrol cars and could not get to the car at the time Deputy Shaffer decided to search the car. RP 161-162, 165, 208, 223. Mr. Rhone, Burg and Brown had been secured in patrol cars even prior to Officer Miller leaving the scene to go to the Jack-in-the-Box to speak with Isaac Miller and Bambi Meyers and Miller saw Shaffer searching the car before he left. RP 102-103.

Finding number 9 is misleading insofar as it implies that Deputy Shaffer observed the plastic bag in the car before physically entering it and that he found the drugs while searching for the gun. CP 123. Deputy Shaffer was very clear and unambiguous in his testimony at the CrR 3.6 hearing; he entered the car and searched until he found the gun and then *continued* searching until he found the drugs. RP 166, 212-213.

Finding number 11 is misleading in that it implies that Officer Miller immediately called Deputy Shaffer after speaking with Isaac Miller and Bambi Meyers. CP 123. Office Miller could not recall even if he contacted Shaffer, or Shaffer contacted him, or at what point the contact occurred during his investigation at the Jack-in-the-Box. RP 126-127, 129.

As a whole, the findings omit the clear testimony of Deputy Shaffer that he did not believe that he had probable cause to arrest at the time Mr. Rhone was detained, searched, handcuffed and secured in a patrol car; that he and the others were secured in the patrol car at the time Shaffer initiated the search of the car; that Mr. Rhone had no access to the Camaro and that Shaffer continued searching even after finding the weapon.

An appellate court reviews findings of fact to which error has been assigned to determine whether the findings are supported by substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1998);

State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence is sufficient evidence to convince a fair-minded and rational person that a finding is true. State v. Hill, 123 Wn.2d at 644.

Here, the challenged findings are not supported by any evidence in the record and, in some instances, the evidence presented by the state at the hearing contradicts the findings. As set out above in detail, Deputy Shaffer was clear in his testimony that he detained, handcuffed and secured Mr. Rhone, Mr. Brown and Ms. Burg in a patrol car before he had probable cause to arrest them; that he searched the car after they were secured in the patrol car and no longer a threat to obtain a weapon; and that he continued his search of the car after locating the weapon. Further, Deputy Shaffer never testified about people using the drive through window to commit robberies of fast food restaurants and never testified that people collecting drug debts used firearms. In fact, there was no testimony at trial that anyone involved was collecting or owed a drug debt. Under these circumstances the findings are not supported by substantial evidence and do not correctly convey the facts established at the CrR 3.6 hearing.

b. The improper car search

Given that Mr. Rhone was safely secured away from the Camaro at the time, the search of the car for a weapon was beyond the scope of

an investigatory search, which the court found the stop was. Moreover, Deputy Shaffer conducted a search of the Camaro that was indistinguishable from a search incident to arrest. He conducted a search that far exceeded a search for weapons and was not preceded by a lawful arrest.

In State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002), the Supreme Court set out the applicable law with respect to investigatory searches of cars for weapons. First, the Glossbrener court noted that in State v. Kennedy, 107 Wn.2d 1, 3, 726 P.2d 445 (1986), in holding that "an officer [may] make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon within the suspect's or passenger's area of control," the court carefully distinguished the scope of a search based on officer safety and a search incident to arrest as authorized in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). Glossbrener, 146 Wn.2d at 678. Because of the difference between a protective search and a search incident to arrest, the court in Kennedy had limited the search for officer safey to "the investigatee's immediate control." Kennedy at 12; Glossbrener, at 678.

The Glossbrener court further noted that in State v. Larson, 88 Wn. App. 849, 949 P.2d 1212 (1997), the court properly held that a search for officer safety could include a search of the passenger compartment even

though the suspect was outside the car. Glossbrener, at 678-679. This was because the suspect in Larson would have had to return to the car to obtain the car registration. Glossbrener, at 679. The court concluded that while under appropriate circumstances, such as when the suspect would have to return to the car before the encounter had concluded, the passenger compartment could be searched when the driver and passengers were no longer in the car, "a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns." Glossbrener at 679. "In the context of a protective search of a car based on officer safety concerns . . .a "'Terry stop and frisk may extend into the car if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.'" Glossbrener, at 680 (quoting State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993), and State v. McIntosh, 42 Wn. App. 573, 578-579, 712 P.2d 319 (1986)).

Here, it is clear that any weapon in the car was beyond the immediate area of Mr. Rhone's control or the control of any of the occupants of the car and there was no reasonable likelihood that anyone could gain access to a weapon. Everyone had been searched, handcuffed and secured in a police vehicle some distance away from the car. There

were a number of deputies on the scene to guard them. There was no realistic possibility that Mr. Rhone, Mr. Brown or Ms. Burg would be able to get to the car or a weapon inside it. Under the entire circumstances of the stop, the search was not necessary for officer safety.

Most importantly, however, even if the search had been justified for officer safety, the search went well beyond that purpose. Deputy Shaffer simply did not stop the search once the weapon had been located and secured. He continued searching for evidence. This was impermissible as a search based on safety concerns. During a protective search for weapons, a police officer may not intentionally search and uncover items that he knows are not weapons. State v. Fowler, 76 Wn. App. 168, 883 P.2d 338 (1994) (a protective frisk must be limited to its purpose). The purpose of the search is not to discover evidence, but to allow the officer to pursue his investigation without fear. Adams v. Willaims, 407 U.S. 143, 145-146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). "To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches." State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1972).

The search of the car was not justified for officer safety; but even if it were, it went beyond the scope of such a protective search. All of

the evidence seized from the car should be suppressed, and certainly the plastic tube found under the driver's seat and the Crown Royal bag found under the back seat.

c. The inapplicability of inevitable discovery doctrine

Inevitable discovery does not apply to make admissible evidence seized during a search incident to arrest where the search came before a lawful arrest. State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2001). The court in O'Neill expressly held:

> The inevitable discovery rule cannot be applied because it would undermine the holding that a lawful custodial arrest must be effected before a valid search incident to arrest can occur. If we apply the inevitable discovery rule, there is no incentive for the state to comply with article 1, section 7's requirement that the arrest precede the search.

O'Neill, 148 Wn.2d at 592. If the inevitable discovery rule cannot save a search incident to arrest where the officer had probable cause, but searched prior to affecting a lawful arrest, then in cannot save a search incident to arrest based only on grounds for a Terry stop. See also, State v. Radka, 120 Wn. App. 43, 83 P.3d 1038 (2004) (search incident to arrest not lawful where the officer intended to release the driver with a citation).

O'Neill is controlling and precludes application of the inevitable discovery rule in this case.

Moreover, under the analysis of this Court in State v. Reyes, 98 Wn. App. 923, 932-933, 993 P.2d 921 (2000), the test for inevitable discovery cannot be met because the police action in searching the car for contraband prior to arrest was not reasonable and accelerated the discovery of evidence. In Reyes, the court specifically held that the search of the defendant's pocket for drugs after a Terry stop was not reasonable and was intended to accelerate the discovery of drugs. Reyes, at 932. Inevitable discovery may save a search only where "(1) The police did not act unreasonably or to accelerate the discovery of the evidence in question; (2) proper and predictable investigatory procedures would have been utilized; and (3) those procedures would have inevitably resulted in the discovery of the evidence in question." State v. Richman, 85 Wn. App. 586, 577, 933 P.2d 1088 (1997); Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). Under Reyes, the facts of this case would not satisfy the first criterion.

Inevitable discovery cannot save the unlawful search here because O'Neill holds that if this were the case there would be no way to require that a valid arrest precede a search incident to arrest. Further, the state cannot meet the test for inevitable discovery because Deputy Shaffer did not act reasonably in exceeding the scope of an investigatory stop.

d. Suppression of evidence

The evidence seized from the Camaro should be suppressed as fruits of the illegal search. Evidence obtained through exploitation of an illegal search must be suppressed. Wong Sun v. U.S., 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Evidence obtained as a result of an unconstitutional investigatory seizure must also be suppressed. State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994). "Where the original detention is illegal, the government cannot claim any advantage which it gained on the subject of the pursuit by doing the illegal act." State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980), citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 2d 319, 40 S. Ct. 182, 24 A.L.R. 1426 (1920). "[V]iolation of a constitutional immunity automatically implies exclusion of the evidence seized." State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990).

The exclusionary rule, in Washington, predates and is even broader than the federal exclusionary rule. State v. Bonds, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982). Evidence should be excluded to obtain three objectives: "first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity

of the judiciary by refusing to consider evidence which has been obtained through illegal means." State v. Bonds, 98 Wn.2d at 12. Under the Washington exclusionary rule as well as under the Fourth Amendment, the evidence seized in this case must be suppressed.

2. THE TRIAL COURT ERRED IN EXCLUDING MR. RHONE'S EXPERT WITNESS FROM TESTIFYING AT THE CrR 3.6 HEARING.

One of the primary questions for the court to decide at the CrR 3.6 hearing was whether Mr. Rhone had been arrested at the time of the search of the car as Deputy Shaffer's report indicated. Further, the time sequences set out in the CAD report, information about when Officer Miller was at the scene, information about the decision not to conduct an identification show up and inferences from information not in the CAD report were relevant to the suppression motion; the state's witnesses testified on these issues. RP 116-118, 126, 146, 175, 178-179, 192, 199-200, 215, 248-250.

Mr. Rhone had a state and federal constitutional right to present evidence on these points as well. He had a right to call investigator Bob Crow as an expert on police practices and someone who had reviewed hundreds of reports written by Deputy Shaffer, and to present hearsay evidence that Officer Miller said at an interview that Shaffer was "tearing

the car apart" while Miller was still at the scene. RP 141, 271-282. Such hearsay is admissible as substantive evidence at a preliminary hearing under ER 104 and ER 1101, and Mr. Rhone had a right to present it. United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

The court's denial of the right to present material and relevant evidence contesting the state's evidence denied Mr. Rhone his fundamental right to appear and defend at trial, as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution. See State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996) ("Washington defines the right to present witnesses as a right to present material and relevant testimony").

Exclusion of relevant evidence offered by the accused to controvert the state's evidence is a denial of a fundamental element of due process of law.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies . . . This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); see United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974).

State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The evidence was relevant to the CrR 3.6 ruling on the admissibility of the evidence seized during the search of the Camaro. It would have helped clarify the CAD report: the way reports are generated by the Pierce County Sheriff's office; the difficulty of inadvertently making a mistake about the time of arrest or the computer program causing such a mistake; Deputy Shaffer's usual practice of accurately recording relevant information and the fact that Shaffer was actively searching the car for contraband as well as the weapon before Miller even left to contact the witnesses at the Jack-in-the-Box. Denial of the right to present this evidence was a violation of Mr. Rhone's state and federal constitutional rights and represents an additional grounds for reversing the trial court's CrR 3.6 ruling.

3. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE PROSECUTOR TO GIVE A RACE-NEUTRAL REASON FOR EXCUSING THE ONE AFRICAN-AMERICAN REMAINING ON THE PANEL.

In this case, the trial court erred in failing to require the state to provide a race-neutral reason for excluding the remaining African-American juror in the jury panel. Given that Mr. Rhone is African-American, that there were only two African-Americans on the entire jury panel, that one of the two African-Americans was excused for cause, the state's use of a peremptory challenge to excuse the only remaining African-American gave rise to an inference of discrimination. Given the inference of

discrimination, the trial court erred in not requiring the prosecutor to give a race-neutral reason for excusing the juror. Because of that error, Mr. Rhone's convictions should be reversed.

Each party at trial, as a general rule, has the right to exercise peremptory challenges against potential jurors without giving a reason. RCW 4.44.140; CrR 6.4(e)(1). But under the equal protection clauses of the federal and state constitutions, a peremptory challenge "may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, supra. "Race-based peremptory challenges violate both a defendant's equal protection right not to have members of his or her own race excluded from the jury on account of race and the equal protection rights of the excluded jurors who are denied a significant opportunity to participate in civic life." State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996).

The discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th cir. 1996).

The Supreme Court, in Batson, articulated a three-step inquiry for determining whether a peremptory challenge was a product of racial

discrimination. The first step requires the defense to make a prima facie showing that the state exercised its challenges on the basis of race. Hernandez v. New York, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); Rhodes, 82 Wn. App. at 196. Once a prima facie showing is made, the burden shifts to the state to articulate a race-neutral explanation for its challenges. Hernandez, 500 U.S. at 358-359. If the state is able to articulate a race-neutral justification, step three requires the trial court to determine whether the state's explanation is a pretext. Hernandez, at 359.

The defendant's initial burden of establishing a prima facie case of discrimination is two-pronged: (1) he must "first show that the peremptory challenge was exercised against a member of a constitutionally cognizable group," and (2) he must "show that the . . . peremptory challenge" and "other relevant circumstances raise an inference of discrimination." State v. Wright, 78 Wn. App. 93, 99, 896 P.2d 713 (1995) (quoting State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994)).

Here, it was undisputed that the juror was African-American. Because the juror was the only remaining African-American juror and Mr. Rhone is African-American, the inference arises that the juror was excused to prevent Mr. Rhone from having a member of his race on the juror. The

court should have asked the prosecutor to provide a race-neutral reason for excusing the jury. Since the court did not, Mr. Rhone's right to equal protection was violated and his convictions should be reversed.

4. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. RHONE'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

The trial court erred in entering a judgment and sentence for possessing a controlled substance with intent to deliver, as charged in Count I of the information. CP 156-171. The *only* evidence of possession was that Mr. Rhone had been a passenger in a car owned by someone else and driven by someone else. The drugs were not found on his person and were not found near him. No one testified that Mr. Rhone had any relationship to these drugs; none of the packaging for the drugs was tested for fingerprints; the handwriting on the note with the drugs was not analyzed. RP 705. The fact that Mr. Rhone was a passenger in someone else's car where the police found concealed drugs is insufficient to establish that he either actually or constructively possessed drugs.

As the jury was instructed, to find Mr. Rhone guilty of possession with intent to deliver, they had to find that he possessed a controlled substance. CP 82. The jury was further instructed:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

CP 78.

Due process, under the state and federal constitution, requires that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Phyllis Burg testified that the car was hers and that she was not aware of there being narcotics in the car. RP 552, 562-563. She testified that she never loaned the car to Mr. Rhone, that she did not know to whom

the narcotics belonged and that she had never seen the Crown Royal bag.[5] RP 573. Cortez Brown denied memory of the incident or any involvement with drugs, but was impeached with his apparent statement to the police that he "told Mr. Rhone to put a Crown Royal bag under the back seat." RP 667, 674. Not only was this testimony not admitted as substantive evidence, it established that the drugs were Mr. Brown's. It did not establish that Mr. Rhone was aware of what was in the Crown Royal bag or that he constructively possessed it.

Mr. Rhone was not in actual possession of the drugs found in the car. To establish constructive possession, the state had to prove beyond a reasonable doubt that he had dominion and control over either the drugs or the premises where the drugs were found. State v. Spruell, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). A car is "premises" for purposes of establishing constructive possession. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

Mere proximity to the drugs is insufficient to establish dominion and control. Spruell, 57 Wn. App. at 388-389; State v. Amezola, 49 Wn. App. 78, 86, 741 P.2d 1024 (1987). In Spruell, the court held that there

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[5] Ms. Burg, who is Caucasian, was in constructive possession of the drugs given her dominion and control over them in her car. Yet the charges were dropped against her and the two black men alone faced charges.

was insufficient evidence of constructive possession where the defendant was in close proximity to the controlled substance, but there was no evidence of dominion and control over the premises. In State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983), the court held that knowledge of the presence of the drugs and proximity to them, together, did not establish dominion and control or constructive possession. Similarly in State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), the Washington Supreme Court held that even temporary possession of the drugs was insufficient to establish constructive possession where the defendant was a guest on the houseboat where the drugs were found. In State v. Roth, 131 Wn. App. 556, 128 P.3d 114 (2006), the court held that being in a room with a refrigerator full of beer in another person's house alone would not support a finding of constructive possession.

In State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987), the court held that the fact that the defendant was a passenger in a stolen vehicle was insufficient to establish dominion and control over drugs found in it.

Most recently in State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004), the court held that the defendant's presence as a passenger in a car where drugs were found and his fingerprint on a jar which was found in

a meth lab were insufficient evidence to convict of possession of ephedrine with intent to deliver.

Under all of this authority, there was insufficient evidence to convict Mr. Rhone of possession of a controlled substance with intent to deliver. It was undisputed that Mr. Rhone was a temporary passenger in a car owned by someone else and that he never had exercised dominion and control over it. His mere presence in a car where the drugs were found could not establish dominion and control over them. There was no evidence that he knew about the drugs or ever touched or possessed them. Even if there had been such evidence, it would not be sufficient to establish constructive possession. Mr. Rhone's conviction for possession of a controlled substance with intent to deliver should be reversed and dismissed for insufficiency of evidence.

5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY WHICH INVADED THE PROVINCE OF THE JURY AND WAS NOT HELFUL TO THE JURY.

The court erred in allowing the state to call Detective Oliver Hickman to testify as an expert on street-level narcotics transactions. His testimony was not helpful to the jury and invaded the province of the jury. This denied Mr. Rhone his state and federal constitutional right to have a jury determination of the facts based on evidence presented at trial.

Even though there was no evidence of a delivery of any kind at trial and even though Mr. Rhone was not accused of delivering a controlled substance, Detective Hickman testified about street-level drug deals involving runners and sellers who drove into parking lots and used runners to act as go-betweens with buyers. RP 833-835, 843-847. Most importantly, Hickman candidly admitted that he did not know if the charged drugs were even part of a street-level operation. RP 869.

Hickman testified that crack cocaine sold at the street level is usually not packaged and the note with the word "40's" on it found near the drugs in this case meant nothing to him. RP 645-847, 852. He nevertheless offered his opinion that the drugs were packaged in a manner typical of drug sellers rather than drug dealers. RP 855.

This was not expert testimony aimed at explaining something to the jurors that was beyond their common understanding; it was merely a police detective giving his opinion that the drugs were possessed with intent to deliver. Detective Hickman's testimony did not meet the requirements of ER 702, that it would "assist the trier of fact to understand the evidence or to determine a fact at issue." State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984) (to be admissible under ER 702, the expert testimony must be helpful to the trier of fact).

The testimony by Hickman was essentially the kind of profile testimony that is inadmissible except in limited circumstances, such as in rebuttal after the defense has opened the door to the testimony. See, e.g. United States v. Lim, 984 F.3d 331, 335 (9th Cir. 1993). Since there was not even any evidence that Mr. Rhone or anyone else involved in the case fit the profile, the effect of Hickman's testimony was to tell the jurors that he was a very experienced narcotics officer and that he believed that the drugs were possessed with intent to deliver. This invaded the province of the jury, was not helpful to the jurors and should require reversal of Mr. Rhone's convictions.

6. THE COURT SHOULD HAVE POLLED THE JURY TO DETERMINE IF THEY HEARD THE STATEMENT BY ISAAC MILLER AFTER HE LEFT THE WITNESS STAND.

Isaac Miller had moved to Oregon by the time of trial and was apparently unhappy about having to return to Washington to testify. He was unhappy because he had to wait several days to testified and even more unhappy when he learned at the end of his testimony as a state's witness that he might have to remain to testify for the defense. RP 519-528. As a result, Miller stormed away from the witness stand and said as he walked away, "I could make it real easy on everybody and just say I didn't recognize the gun." RP 528-529. Defense counsel noted that Mr. Rhone

heard this and asked that the jury be polled to determine whether they had heard it as well. The court erred in denying the request based on the fact that the court believed the jurors were mostly at the door when the comment was made, and that the court did not hear the statement. RP 530.

By refusing to determine whether any of the jurors had heard Miller's outburst, the court denied Mr. Rhone his right to an impartial jury.

The Sixth Amendment and Const. art. 1, § 22 guarantee to criminal defendants the right to a trial by a fair and impartial jury. Unauthorized contact between jurors and third parties may compromise this right to an impartial jury trial and is presumptively prejudicial. Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 2d 654, 74 S. Ct. 450 (1954); Mattox v. United States, 146 U.S. 140, 150, 36 L. Ed. 2d 917, 13 S. Ct. 50 (1892) ("[p]rivate communications, between jurors and third persons . . . invalidate the verdict unless their harmlessness is made to appear"); State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986).

Once the improper contact has been established, the contact gives rise to a presumption of prejudice which the state bears the burden of disproving beyond a reasonable doubt. Murphy, 44 Wn. App. at 296 (citing Remmer v. United States, supra, and State v. Rose, 43 Wn.2d 553,

557, 262 P.2d 194 (1953)). The presumption is overcome only where the trial court determines the contact was harmless beyond a reasonable doubt. Murphy, at 296; State v. Brenner, 53 Wn. App. 367, 372, 786 P.2d 509 (1989); State v. Saraceno, 23 Wn. App. 473, 596 P.2d 297 (1979).

In this case, Miller's unsworn statement would constitute improper contact if heard by the jurors. Given that such contact is presumptively prejudicial, the trial court erred in not determining whether the jurors heard it. The risk of prejudice to Mr. Rhone was substantial and it would have been easy to do what the constitution requires, find out if the jurors heard the statement. The failure to do so should require reversal of Mr. Rhone's convictions.

7. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT DENIED MR. RHONE A FAIR TRIAL.

The prosecutor committed misconduct in closing argument by arguing to the jury that the incident arose because Isaac Miller owed money for drugs and that Mr. Rhone and Mr. Brown were collecting drug money. RP 989. Defense counsel properly objected that this argument was not supported by facts in evidence, but the trial court overruled the objection by letting the prosecutor continue without sustaining the objection. This was error. Not only was there no evidence to support this argument, the prosecutor never tried to elicit evidence to support the argument during

trial. The prosecutor, in fact, elicited testimony from state's witnesses that contradicted this theory. Ms. Burg and Isaac Miller testified, on direct examination, that Miller borrowed money because he was poor and had no food in his house, from both Burg and Mr. Rhone. RP 493-494, 567.

Thus, the state either elicited testimony it believed to be false, without even attempting to correct the false impression, or the prosecutor was arguing based on facts not in the record. In either instance the prosecutor was committing misconduct.

Under Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 31 L. Ed. 2d 1217 (1959), and Giglio v. United States, 405 U.S.150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), a prosecutor commits misconduct by allowing false testimony to be presented to the jury and by allowing false testimony to remain uncorrected. "The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269. See also, Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

A conviction based on false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1976); Mooney v. Holohan, 294 U.S.103,

55 S. Ct. 340, 79 L. Ed. 2d 791 (1935). Misleading as well as false testimony violates due process. Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957).

If the prosecutor believed that Isaac Miller and Ms. Burg were committing perjury when they testified about the purposes of loans to Miller, the prosecutor had the obligation not to present that testimony. See e.g., United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) (failure to correct testimony that witness was not a member of a religious sect); United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) (argument that the witness did not tstify because he invoked his privilege against self-incrimination when the witness had been granted immunity); DeMarco v. United States, 928 F.2d 1074 (11th Cir. 1991)(failure to correct testimony that witness could be charged with perjury from a former trial); Brown v. Waintwright, 785 F.2d 1457 (11th Cir. 1986)(failure to correct testimony that witness had not received immunity).

The jury almost certainly would have had a different view of Isaac Miller's credibility if he had been forced to admit that he testified untruthfully and if he had been exposed by the state as a person who bought or sold illegal drugs. As it was, he portrayed himself as a poor, but hard-working person.

The jury might well have had a different view of the case if it was aware of the fact that Isaac Miller had a strong motive to testify favorably for the state, given the prosecutor's apparent belief about his possible involvement in criminal activity. Such evidence would be admissible to establish his motive and bias in testifying. In Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), for example, the trial court excluded evidence that a key witness was on juvenile probation at the time he testified. The United States Supreme Court reversed, holding that the trial court violated the defendant's Sixth Amendment right to confrontation and cross-examination to establish the witness's bias.

It was misconduct for the prosecutor to bypass impeachment and cross-examination, to present false and misleading evidence and then essentially ask the jurors to accept a different set of facts in closing argument. If the prosecutor believed the witnesses were untruthful, he should not have elicited the false testimony and left it uncorrected. If the prosecutor did not believe the testimony was false, he certainly committed misconduct in presenting the jury with argument unsupported by the record.

It is improper for a prosecutor to argue facts not in evidence. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). "A prosecutor has no right to call to the attention of the jury matters or considerations

which the jurors have no right to consider." Belgarde, 110 Wn.2d at 508 (citing State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

Here, the prosecutor committed misconduct which went to the heart of the case by allowing witnesses who claimed to have firsthand knowledge of the incident give false testimony and then arguing inconsistently and without a factual basis. Given that the false testimony likely had an effect on the jury and that the jurors were misled, Mr. Rhone's convictions should be reversed based on the prosecutor's misconduct.

8. CUMULATIVE ERROR DENIED MR. RHONE A FAIR TRIAL.

It is well settled that the combined effects of error may require a new trial, even where those errors individually might not. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993) (recognizing that cumulative error can deny a defendant due process even where the individual errors were harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

In this case, the trial errors, both individually and cumulatively, denied Mr. Rhone a fair trial. The failure to suppress alone should require

reversal because the drugs and the gun found in the car should have been suppressed. Without the drugs the case for possession with intent to deliver could not have gone forward. Without the gun, the robbery and unlawful possession charges would have been undermined. Moreover, just having the evidence of drugs in the car presented at trial was overwhelmingly prejudicial, particularly in light of the prosecutor's misconduct in closing argument and the improper expert testimony implying that Mr. Rhone was a street-level drug dealer. All of Mr. Rhone's convictions should be reversed with instructions to suppress the evidence seized from the car. Mr. Rhone's conviction for possession with intent to deliver should be vacated as insufficiently supported by evidence.

9. THE TRIAL COURT ERRED IN IMPOSING SENTENCES OF LIFE WITHOUT THE POSSIBLITY OF PAROLE UNDER THE POAA.

The trial court erred in imposing sentences of life without the possibility of parole for Counts I and II under the POAA, for three reasons. First, Mr. Rhone's sentence of life without the possibility of parole is unconstitutional under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Second, the court erred in counting Mr. Rhone's Oregon robbery conviction because Oregon juries do not have to

be unanimous to convict. Third, Mr. Rhone's Oregon robbery conviction was not shown to be comparable to a Washington strike offense

a. The POAA is unconstitutional

Mr. Rhone asserts that his sentence of life without the possibility of parole is unconsti-tutional under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and asks that this Court reconsider its decision in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied.

In Blakely, the United States Supreme Court held that any fact, other than a prior conviction, which must be established before a sentence greater than the sentence authorized by the jury verdict can be imposed must be proven to a jury by proof beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536-2537. In Blakely, the court further held that the applicable sentence authorized by jury verdict is the top of the standard range. Blakely, 124 S. Ct. at 2537-2538.

The Supreme Court, in Blakely, and in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), did not limit its holdings to specific types of statutes; Blakely and Apprendi apply to any situation in which the jury verdict authorizes one sentence and the trial court imposes a longer sentence based on additional findings, not

submitted to a jury. The legal principle underlying both decisions, and the decision in Ring v. Arizona, 536 U.S. 317, 609, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (2004) (aggravating factors in capital cases function as elements of the greater crime), is that it violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury. Essentially, the Supreme Court has held unconstitutional statutes, whether enhancements statutes, exceptional sentences statutes, or death penalty statutes, in which judicial fact finding is more critical to the sentence imposed than the charged crime. In those cases the defendant is denied his right to a jury trial.

In Ring, the Supreme Court, in fact, expressly rejected the argument that form can prevail over matter. The Court held that "the dispositive question . . . 'is not one of form, but of effect.' If the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439-2440.

The inquiry is: (1) What sentence does the jury verdict alone authorize? (2) Is the sentence imposed by the trial court longer than the sentence the jury verdict alone authorizes? (3) Does the statute authorizing the longer sentence require any fact-finding beyond the mere fact of a prior

conviction? (4) Does the statute permit the facts to support the longer sentence be established by proof less than beyond a reasonable doubt? (5) Does the statute permit the facts to be decided by a judge rather than a jury? If the answer to all of these questions is yes, the statute in unconstitutional under Blakely; it violates the defendant's rights under the Sixth Amendment.

Here, clearly the jury's verdict alone did not authorize sentences greater than the top of the standard range. Life without the possibility of parole is longer than the top of the standard ranges for Mr. Rhone's convictions. The statute requires fact finding beyond the mere fact of a prior conviction. Under POAA, before a sentence of life without parole can be imposed, the trial court has to find that the defendant has prior convictions which qualify as strike offenses. Specifically, the trial court has to find that (a) on two separate occasions, (b) the defendant has been convicted of felonies that meet the definition of most serious offenses, (c) the defendant's prior conviction counts as offender score, and (d) at least one conviction for a most serious offense occured before any of the other most serious offenses was committed. RCW 9.94A.030(32)(a)(ii). The statute does not require that the facts be found beyond a reasonable doubt or by a jury. Therefore the POAA violates the Sixth Amendment.

Blakely applies to Mr. Rhone's sentence of life without the possibility of parole and, since the further fact finding was not submitted to the jury, Blakely requires reversal of Mr. Rhone's sentence.

Additionally, Mr. Rhone believes that the United States Supreme Court will hold, at its next opportunity, that even the fact of prior convictions must be submitted to a jury and proven by proof beyond a reasonable doubt. He wishes to preserve this issue by raising it on appeal and by asking this Court to hold that, in order to impose a sentence of life without parole under the POAA, prior convictions must be proven beyond a reasonable doubt to a jury.

b. No proof of a unanimous verdict

The Washington constitution requires a unanimous twelve-person verdict in a criminal case. Article 1, § 21 provides that this right "shall remain inviolate." Oregon's constitution, on the other hand, permits criminal convictions where only ten of twelve jurors agree that the defendant is guilty. Under the Washington constitution, therefore, Mr. Rhone's Oregon conviction for robbery, which went to trial, is invalid.

This court, in State v. Gimarelli, 105 Wn. App. 370, 377-379, 20 P.3d 430 (2001), review denied, 144 Wn.2d 1014 (2001), held that under the Full Faith and Credit Clause of the federal constitution the Oregon

conviction was valid, absent proof that the Oregon court lacked jurisdiction or the conviction was constitutionally invalid. Gimarelli, 105 Wn. App. at 377-378. This Court should reconsider its decision in Gimarelli.

First, Gimarelli was decided before the decision in Blakely. Blakely has changed the legal analysis. As set out above, Blakely essentially makes any fact-finding required to impose any sentence above the top of the standard range functionally equivalent to an element of the crime: that fact must be proven beyond a reasonable doubt to a jury in order to impose the sentence of life without parole.

Under Apprendi and Blakely, the reason why the prior convictions do not have to be proven to a jury beyond a reasonable doubt is that the defendant had an opportunity to have his guilt proven to a jury beyond a reasonable doubt prior to imposititon of the prior conviction. State v. Hughes, 154 Wn.2d 118, 135, 110 P.3d 192 (2005) (citing Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), which held that "facts of prior convictions were distinguishable from other factors increasing a sentence, which would have to be found by a jury, because a 'prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees'").

Once it is clear that proof of facts used to go beyond the top of the standard range is akin to an element and that prior convictions are excluded only because of the assumption that those prior convictions were established through constitutionally adequate procedure, it becomes equally clear that absent proof that Mr. Rhone was afforded his state constitutional right to a unanimous verdict by a jury of twelve his sentence in Washington under the POAA is unconstitutional.

The decision in Gimarelli, holding that the issue is dictated by the Full Faith and Credit Clause in incorrect. The issue is not one of enforcing the Oregon judgment in Washington; the issue is whether the Oregon judgment qualifies as a strike offense under the POAA for purposes of imposing a sentence under Washington law. This distinction is critical because the POAA itself contemplates the possibility that a foreign conviction for a crime with a similar name, such as "robbery" or "assault," might not qualify as a strike offense in Washington. RCW 9.94A.505, .555, .570; State v. Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). This does not mean that the Washington court is failing to give Full Faith and Credit to that foreign conviction, only that it does not constitute a strike offense under Washington law.

The inquiry under the POAA is two-fold: (1) can a felony conviction produced by a non-unanimous verdict "under the laws of this state" be considered a most serious offense, and, if it can (2) does it meet the comparability and washout provisions of RCW 9.94A.525. See RCW 9.94A.030(32)(a)(ii). Since the right to a jury trial in art. 1, § 21 is the right preserved at the time of statehood and more extensive than the right to a jury trial protected by the federal constitution, "under the laws of this state" a non-unanimous jury verdict by a jury of twelve is impermissible. Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (art. 1, §21 more protective than federal constitutional right to a jury verdict); State v. Herzog, 48 Wn. App. 831, 834, 740 P.2d 380 (1987) (German conviction obtained with two-person jury is constitutionally infirm).

Because of this, an Oregon conviction which was obtained without the requirement of a unanimous verdict cannot be a most serious offense under the POAA regardless of whether it otherwise compares to a most serious offense under RCW 9.94A.525.

Even before Blakely, the Washington Supreme Court in State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998), stopped short of holding that a judgment rendered by a less than unanimous verdict from a jury of less than twelve could be considered a strike offense. In Morley, the court

held that a judgment from a military court could be used as a strike offense where one defendant had voluntarily waived a jury trial and where another defendant had entered a plea. The importance to the Court of the fact that neither defendant had actually been convicted by a jury shows concern for using a conviction which would not be constitutionally valid in Washington as a basis for imposing a sentence of life without the possibility of parole in Washington.

The trial court erred in using Mr. Rhone's robbery conviction from Oregon as a strike offense and his sentence of life without parole should therefore be reversed and vacated.

c. noncomparability

Mr. Rhone's Oregon robbery conviction is not comparable to a Washington strike offense. This is because, in Oregon, a person does not have to be in the presence of the person from whom he is taking property. RCW 9A.56.190 provides:

> A person commits robbery when he unlawfully takes personal property *from the person of another or in his presence* against his will by the threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. . . .

(emphasis added). Exhibit 9.

In contrast, ORS § 164.395 provides:

> (1) A person commits the crime of robbery in the third degree if in the course of commtting or attempting to commit theft the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking the property or to retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another peson to deliver the property or to engage in other conduct which might aid in the commission of the theft.

Robbery in the third degree become a first degree robbery if the defendnat is armed with a deadly weapon. ORS § 164.415. Exhibit 8.

Thus, as defense counsel argued at sentencing:

> The Oregon statute does not have any requirement of presence . . . . you could do it by telephone. You could do it by raido There are a number of ways to do it. You could do it by having somebody else who you are threatencing and then you could telephone and then commmit the theft that way. That is a defeinition difference in the two statutes, the Oregon one being broader.

RP 1054.

Under Lavery, this facts that the Oregon and Washington statutes do not have the same elements and that the Oregon statute is broader is fatal to finding the statutes comparable: "Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable." Lavery, 154 Wn.2d at 258. In reaching this conclusion, the Lavery court

considered the case of State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), which considered the issue of whether a Texas statute which criminalized contact with children under 17 to a Washington statute which required the child to be under 12. The court noted that "even if the child in the Texas case had claimed to be 11, Ortega would ahve had no incentive to challenge and prove that the child was actually 12 at the time of contact." Lavery at 257.

Here, the information charging Mr. Rhone with robbery in Oregon alleged that he (1) "did unlawfully and knowingly threaten the immediate use of physical force upon Sharlett J. Jones," (2) "was armed with a deadly weapon," (3) "while in the course of committing theft of property [clothing and wrist watch]" and (4) acted "with the intent of preventing resistance to the said defendant's taking and retention immediately after the taking of said property," Exhibit 1. Nothing in this recitation established that Mr. Rhone was taking the property from her person or in her presence. Mr. Rhone could have been threatening Ms. Jones to give him information about the location of the clothing and wrist watch he intended to take; or, as trial counsel suggested, made his threats over the telephone.

The Oregon robbery convcition should not have been considered to be a strike offense in Washington and the trial court erred in imposing a sentence of life without parole under the POAA.

E. CONCLUSION

Mr. Rhone respectfully submits that his convictions should be reversed and his conviction for possession of a controlled substance with intent to deliver vacated for insufficiency of the evidence. On remand the court should be instructed to suppress the evidence seized during a search of the Camaro. In any event, Mr. Rhone's sentence under the POAA should be vacated because the state failed to establish that he had two prior strike offenses.

DATED this 11th day of May, 2006.

Respectfully submitted,

Rita J. Griffith

RITA J. GRIFFITH
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 11th day of May, 2006, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Theodore Rhone
708234
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Rita J. Griffith 5/11/06
Rita J. Griffith DATE at Seattle, WA

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