Cause No. 12-1-00114-4

90629-7

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Respondent,

v.

William Showers,
Appellant.

PETITION FOR REVIEW

William B. Showers
(Print Your Name)
Petitioner, *Pro se.*
DOC# 942484, Unit C-211-L
Monroe Correctional Complex
(Street Address) 16700 177TH AVE S.E
P.O. Box 777
Monroe, WA 98272

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Respondant,

v.

William B. Showers,
Appellant.

NO. 90629-7

COA No. 43996-4-II

PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Mr. William B. Showers asks this Court to accept review of the decision designated in Part II of this motion.

II. DECISION

Mr. William B. Showers asks this Court to accept review of the following decision or parts of the decision filed on June 24, 2014. The decision (Did what): AFFirmed on all charges and Grounds. see copy of the decision

A copy of the decision is attached as Attachment _____.

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A. Standard of Review

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V. Mr. Showers did not validly waive his state constitutional right to trial by Jury

A. Standard of Review

B. Wash. Const. art I §21 and §22 provide greater protection of the right to a jury trial than does the Sixth Amendment.

C. Under the state constitution, waiver of the right to a jury trial requires a higher showing than that required for waiver under the Sixth Amendment.

TABLE OF AUTHORITIES

FEDERAL CASES

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State v. Enlow, 143 Wn. App. 463, 178 P.3d 366 (2008).
State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).
State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007).
State v. Homan, 172 Wn. App. 488, 290 P.3d 1041 (2012).
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United States v. Taylor, 11 F. 470 (C.C. Kan. 1882)

ASSIGNMENT OF ERROR

1. The evidence was insufficient to prove that Mr. Showers unlawfully possessed either charged controlled substance (heroin and methamphetamine).

2. The prosecution failed to prove that Mr. Showers constructively possessed the contents of the backpacks found in the bed of a red Dodge pickup truck parked in the neighborhood near where he was arrested.

3. The convictions were based in part on evidence illegally obtained in violation of Mr. Showers's right to be free from unreasonable searches and seizures under the Fourth Amendment and his right to privacy under Wash. Const. art. 1, §7

4. The police unlawfully searched backpacks found in the bed of a pickup truck which they belive Mr. Showers had been driving before his arrest in a coffee shop nearby.

5. The backpack search was not justified as a search incident to arrest.

6. The backpack search was not justified by Mr. Showers's community custody status.

7.) Mr. Showers's conviction was based in part on improper opinion testimony, in violation of his right to an independent jury determination of the facts.

8.) The trial court erred by admitting improper opinions of Mr. showers's guilt.

9.) Mr. showers was denied his six and Fourteenth Amendment right to have effective assistance of counsel.

10.) Defense counsel was ineffective for failing to seek suppression of items obtained through an illegal search.

11.) Defense counsel was ineffective for failing to object to improper opinion testimony of Mr. showers's guilt.

12.) The convictions were entered in violation of the state constitutional requirement that facts in a felony trial be determined by a jury

13.) The trial court erred by accepting Mr. Showers's jury waiver without an affirmative showing that he understood all of his rights under Wash. Const. art. 1, §21 and §22.

14.) The trial court erred in entering Finding of Fact No. 1.

15.) The trial court erred in entering Finding of Fact No. 5.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1.) The prosecution was required to prove that Mr. Showers possessed items found in a backpack in the bed of a pickup truck. At trial, the state failed to establish dominion and control over the backpack or its contents. Was the evidence insufficient for conviction?

2.) Evidence seized without a warrant is inadmissible at trial, unless the prosecution establishes an exception to the warrant requirement. In this case, police arrested Mr. Showers in a coffee shop, and then searched a pickup truck on the belief that he'd been driving it prior to his arrest. Did the trial court error by admitting illegally seized evidence in Vidation of Mr. Showers's rights under the Fourth Amendment and Wash. Const. art. 1, §7?

3.) A warrantless probation search is permitted based on reasonable suspicion that the probationer has violated a condition of sentence, but only if there is probable cause to associate the probationer with the area to be searched. Here, the police searched backpacks discovered in the bed of a truck which they belived Mr. Showers had been driving, without and evidence that the backpacks belonged to him. Did the search violate Mr. Showers's rights under the Fourth Amendment and Wash. Const. art. 1, §7?

4.) A "nearly explicit" opinion on an accused person's guilt

Violates the person's constitutional right to an independent determination of the facts by the fact-finder. In this case witnesses were permitted to testify that Mr. Showers drove recklessly. Did the opinion testimony violate Mr. Showers's right to an independent determination of the facts, in violation of the Fourteenth Amendment's due process clause?

5.) The sixth and Fourteenth Amendment guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to seek suppression of illegally seized evidence, and failed to object to improper opinion testimony. Was MR. Showers denied his sixth and Fourteenth Amendment right to the effective assistance of counsel?

6.) An accused person's State constitutional right to a jury trial is broader and more highly valued than the corresponding federal right. Here, the record does not affirmatively demonstrate that MR. Showers understood his right to help select the jury, his right to have the jury instructed on the presumption of innocence and the burden of proof, and his right to a unanimous verdict on each charge and aggravating factor. In the absence of such an affirmative showing, was Mr. Showers's waiver of his right to a jury trial inadequate under Wash. const. art 1, §21 and §22?

16.) The trial court erred in entering Finding of Fact No. 6.

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18.) The trial court erred in entering Finding of Fact No. 9.

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31.) The trial court erred in adopting conclusion of Law No. 5.

32.) The trial court erred in adopting conclusion of Law No. 6.

IV. STATEMENT OF THE CASE

William Showers was arrested at a coffee shop called "One Moore Cup" Mr. Showers had an arrest warrant, and the police believed he'd been the driver of a red Dodge pickup truck that was found in the middle of the street nearby. RP 23, 85. RP 8-9, 21.

City of Raymond Reserve Police officer Eric Fuller had earlier seen the pickup, noticed that it didn't have a front license plate and that the windshield was cracked. When officer Fuller RP 7, 8, 27-28
tried to stop the pickup, the driver ran a stop sign and pulled up onto a curb. A blonde woman got out of the truck, with a baseball cap pulled down over her brows, and walked away quickly. The truck pulled away fast, RP 8-9
and officer Fuller turned on his lights and gave chase. The truck continued speeding, fishtailing RP 9-10
at times. The truck stoped, facing the opposite RP 11-12
direction of traffic, then again pulled away fast. RP 13

Fuller could not tell who was driving or how many people were in the truck. RP 13, 30

STATEMENT OF THE CASE

Pacific County Sheriff's Deputy Jon Ashley arrived and motioned for the truck to pull over. The truck didn't stop, but made turns and ran another stop sign. A juvenile was picking up garbage in the alleyway and was pulled out of the way by his father as the truck sped through. The father said that he saw the driver. Both officers lost sight of the truck at this point, they later found it stoped in the middle of a street, unoccupied. RP 31 After Mr. Showers was arrested at the coffee shop nearby, Community corrections officer Linda Tolliver came and searched the truck and the truck's bed, NO items related to Mr. showers were found inside the truck's cab, The truck's bed contained at least three backpacks and a duffle bag. One of the backpack's contained heroin, also found in the truck's bed were scales, bolt cutters, needles, small plastic bags, a pipe Methampetamine, and keys for vehicles. RP 66, 69-72, 86, 88.

RP 14. RP 14-16. RP 44 RP 20, RP 64-66, 81 RP 25. RP 25, 73. RP 29, 70-71, 90, 11

The keys to the truck were found inside the cab of the truck. The state charged Mr. showers with possession of heroin with Intent to deliver, possession of Methamphetamine, and Attempting a pursuing Police vehicle. To each count, the prosecutor added the allegations that the standard range would be clearly too lenient, and that Mr. showers's high offender score would result in some offenses going unpunished. CP 2-4.

CP 1-4.

In addition, the state averred that the eluding charge endangered one or more persons. At trial, the man who saw the driver in the alleyway was asked if the driver was in the courtroom, He responded that he did not see him there.

RP (8/4/12) 44 CP 3

STATEMENT of the CASE

OFF-duty officer Heath Laymon testified that he saw the red truck that day and that Mr Showers was the driver. However, he did not know if the driver had facial hair, what he may have been wearing, and whether he was bald. RP (9/4/12) 50-5 A fireman saw the truck drive off-road through a park. He claimed that the person driving "looked very much like the man sitting right there [Mr Showers]," and that "it could be the person sitting over there". He did not remember if the driver wore a hat, what the driver was wearing, whether or not he wore glasses. RP (9/4/12) 56. RP (9/4/12) 32-34 RP (9/4/12) 38.

During trial, the prosecutor asked Fuller about the driving that he observed:

Q. Is that a safe maneuver?

A. No.

Q. Okay. Would you characterize that kind of driving as reckless?

A. Recklessly, absolutely.

Q. Thank you. RP (9/4/12) 12.

Defense counsel did not object to this testimony. RP (9/4/12) 12.

Fuller was also asked to opine about a safe speed for the alley (20 mpH) and whether or not the boy in the alley was in danger. RP (9/4/12) 18.

OVER defense objection, the officer answered that the juvenile was in fact in danger, and he also stated that the truck was traveling at 35-40 mpH throug the alley, when a safe speed would have been 10-15 mph. RP (9/4/12) 18-19. RP (9/4/12) 20.

The prosecutor asked off-duty officer Laymon the following:

STATEMENT OF THE CASE

Q: [A]s a trained law enforcement officer, did it appear to you that that was being driven in a reckless manner?

A: Oh, absolutely. RP (9/4/12) 52-53.

Deputy Ashley was asked if the driving he saw was "reckless"; He responded "Absolutely." RP (9/4/12) 80.

Deputy Ashley described the amount of heroin found as quite large, and the state asked him why a person would buy such a large amount, over defense objection, he stated that a person has this amount to break it into smaller amounts and sell it. RP (9/4/12) 92, 98. RP (9/4/12) 98.

Judge Sullivan found Mr. showers guilty as charged, also found that Mr. showers had endangered another during his attempt to elude, and that his multiple current offenses and high offender score would result in some current offenses going unpunished. He specifically relied on the officers opinions regarding the speed of the truck and the amount of the heroin for his guilty findings. Finding of Fact 6, CP 6. CP 10. CP 10.

Mr Showers timely Appealed CP 26-27

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because: The state failed to prove that Mr. showers possessed Either controlled substance. Evidence is insufficient for conviction if no rational fact-finder could find the elements proven beyond a reasonable doubt, even when viewing the evidence in the light most favorable to the state. State v. chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013). When a case is tried to the bench, a reviewing court must determine if the evidence supports the courts finding of facts[3], if the findings support the conclusions of law, and if the conclusions of law support the judgement[4] State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Dominion and controll over the vehicle is insufficient to prove dominion and controll over all the items found in the trunk of a car or the bed of a truck. To prove constructive possession, the state must show dominion and controll over an object and "the

No. 20, CP 84

conclusions of law 485, CP 9.

ability to reduce (it) to actual possession" Chouinard, 169 Wn. App. at 899. Dominion and controll are assessed under the totality of the circumstances. Enlow, 143 Wn. App. at 468-69. Mere proximity of contraband is insufficient to prove constructive possession. Chouinard, 169 Wn. App. at 899.

By itself, dominion and controll over a vehicle is insufficient to prove dominion and controll over items inside the vehicle. State V. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). IN shumaker the defendents conviction was overturned because the trial court erroneously instructed Juror's that dominion and controll over premises - in that case, a car - proved constructive possession of drugs found therein. The court held that dominion and controll over the vehicle alone was insufficient to prove dominion and controll over the drugs.

Similarly, evidence is insufficient to establish constructive possession when the accused had been a passenger in a truck containing contraband. State V. Cote, 123 Wn. App. 546, 550, 936 P.3d 410 (2004). This was so in cote even though the defendant's fingerprints were on a container holding the contraband.[5]

The court of appeals errored in desiding MR showers was in actual possession of the drugs OR that MR showers had dominion and controll over items in the bed of the truck, because the court of appeals WASHINGton App. has already decided these same issues state V. Chouinard and State V. Enlow, 143 Wn. App. at 468-69. Chouinard, 169 Wn. App. at 899. State V. Shumaker,

Finding of fact 20, CP 8.

142 Wn. App. 330, 334, 174 P. 3d 1214 (2007). State v. Cote, 123 Wn. App. 546, 550, 936 P. 3d 410 (2004). and in the court of Appeals Division II not aplying these same cases to Mr Showers, Mr Showers should be granted review of the higher courts to decide these issues.

The court of appeals Division II errored in deciding that the search of the backpack found in the bed of the truck Mr Showers was driving was a legal search. A warrantless search is impermissible unless authorized by one of the carefully-drawn exceptions to the warrant requirement. Warrantless searches are per se unreasonable under the Washington state constitution. Wash. const. art. 1§7; State v. Snapp, 174 Wn. 2d 177, 187-88, 275 P. 3d 289 (2012). The exceptions to the warrant requirement are "carefully drawn" and the state bears the burden of establishing facts that support any purported exception. Snapp, 174 Wn. 2d at 188. In Mr Showers case he did not own the truck and when the officers found the vehicle no one was in side or around the truck, and officer fuller wait for back-up then searched the vehicle for weapons and Removed the Key's from the truck and then went looking for the driver. Finding of fact 14-16, CP 7-8

Mr Showers was ARrested in a coffee shop Blocks away, now with Mr Showers in cuff and his Right read to him, he was placed in back of a police car, there could be NO threat to officer safty or Finding of fac 15, CP 7-8 RP 65.

a threat to evidence being destroyed and Mr Showers was not within proximity to the vehicle, so the search cannot be justified as a search incident to Mr Showers arrest. State V. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). An unconstitutional search can be a manifest error affecting a constitutional right raised for the frist time on appeal. State V. Swetz, 160 wn. App. 122, 128-29, 247 P.3d 802 (2011); RAP 2.5 (a)(3). The privacy protection under the State constitution are qualitatively different from those under the Fourth Amendment. Snapp, 174 Wn.2d at 187. ART. 1§7 recognizes a privacy interest in vehicles and their contents. Id Additionally, a "container" such as a purse, suitcase, or backpacks may not be searched without a warrant. State V. Rison, 116 Wn. App. 955, 959-60, 69 P.3d 362 (2003). The search of the Backpacks cannot be Justified as a search incident to arrest. The was no risk to officer safty or no risk to conseal or destory evidence snapp, 174 Wn.2d at 189. The scope of the search is limited to the area within the arrestee's reach at the time of the search. Arizona V. Grant, 556 U.S. 332, 343, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). When community corrections Linda Tolliver was called to search the truck she stated she was called to search the Vehicle to see if there was any thing that belonged or related to Mr Showers. R.C.W 9.94A.631. Prior to the search, officers must have probable cause to belive that premises to be searched

Finding of Fact 16, CP 8.

Finding of fact 14, CP 7.

are actually connected to the supervisee. State V. Winterstein, 167 Wn. 2d 620, 630, 220 P. 3d 1226 (2009). The probable cause standard is necessary to protect the privacy interests of third parties and to protect citizens from "rash and unreasonable interferences with privacy and from unfounded charges of crime" Winterstein. 167 Wn. 2d at 629. D o C officer Tolliver was asked to search a vehicle to see if there was any thing in the vehicle that related to MR. Showers, that does not show that officer Tolliver had probable cause to belive Mr Showers owned this Vehicle, D.o.c officer Linda Tolliver could have ran the plates of the Vehicle in question for proof of owner ship. The court of appeals errored in upholding Mr Showers conviction and the higher courts should grant review to Mr showers do to State V. Snapp, State V. Swetz, State V. Valdez, State V. Winterstein and Arizona V. Gant, All being over looked by the court of Appeals Division II and Not Aplyed properly to Mr showers case.

The court of appeals errored upholding Mr. Showers conviction when he was Denied his Right to A fair trial by the Admission of improper testimony.

Constitutional issues are reviewed de novo. McDev. H V. Harborview Medical Center, NO. 85367-3, - Wn. 2d -, 291 P. 3d 876, 878 (Dec. 27, 2012). The admission of improper testimony can be raised for the frist time on review

as a manifest error affecting a constitutional Right State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009) RAP 2.5(a)(3).

The trial court erred in permitting witness to provide improper opinions of Mr. Showers Guilt.

Testimony providing an improper opinion of guilt violates the right to a fair trial. U.S. Const. amends. VI, XIV; "see also Wash. const. art. 1, §3." State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91 (2007); aff'd on other grounds, 165 Wn.2d 870, 205 P.3d 916 (2009).

An opinion is improper and inadmissible if it is an explicit or "nearly explicit" opinion on the accused person's guilt. State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); see Also State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) ("[T]his court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials.

Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.") Whether other testimony constitutes an improper opinion of guilt depends on the circumstances of the case and turns on a 5-part inquiry. State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). The reviewing court should consider: (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." Hudson, 150 Wn. App. at 653.

Whether the accused drove in a reckless manner is

an element of attempting to elude a pursuing police vehicle. RCW 46.61.024(1). The court permitted explicit opinion testimony on this issue.

Here, in response to direct questions from the state, each of the three law enforcement witness testified that Mr. Showers drove recklessly. RP 12 (officer Fuller); RP 52-53 (officer LAyman); RP 80 (Deputy AShley). Additionally, officer Fuller and Travis Wheeler each testified that a safe speed to drive down the Alley would have been 10-15 mph. RP 20, 43. over defense objection, officer Fuller also testified that a person in the alley was indangered by Mr. showers's driving. RP 18. Under the factors outlined in Hudson, this testimony infringed Mr. Showers right to do process. Hudson, 150 Wn.App. at 653. Looking frist to the type of witness, each law inforcement witness was permitted to testify that Mr. Showers had been driving recklessly. Id. Turning next to the nature of the testimony, each officer used the words of the statute, responding to questions framed in terms of the reckless element of the offense. Id. Reguarding the nature of the charges, conviction required proof that Mr. showers drove in a reckless manner.

The next factor for analysis is the nature of the defense: Mr. Showers' general denial put each element at issue. Examining finally the other evidence before the trier of fact, almost every witness to the incident provided an improper opinion of guilt. Hudson, 150 Wn. App. 653

Furthermore, the court relied explicitly on Deputy Ashley's opinion that Mr. Showers had driven recklessly in its finding of facts to that effect. Finding of Fact 6, CP 6. The court also specifically found that a safe speed to drive down the alley would have been 15mph. Finding of fact 10, CP 10. The only evidence regarding a safe speed to drive down the alley came in the form of impermissible opinions from Travis Wheeler and officer Fuller. RP 20, 43.

The trial court erred by admitting and relying upon impermissible opinion testimony as to MR. Showers' guilt of attempting to elude a pursuing police vehicle. Sutherby, 138 Wn. App. at 617. The admission of this improper testimony constitutes manifest error affecting a constitutional right because it had practical and identifiable consequences as can be seen by the courts explicit reliance on the testimony in its finding of fact. Johnson, 152 Wn. App. at 934. ACCordingly, Mr. Showers' conviction on count three must be reversed, and the charge remanded for a new trial. Id.

Finding of fa 6, CP 6.

The court of Appeals DIV. II erred in upholding Mr. Showers conviction and not remanding for a new trial do to the Ineffective assistance of Counsel. Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the frist time on appeal. State v. Kyllo, 166 Wn. 2d 856, 862, 215 P. 3d 177 (2009). Reversal is required if counsel's deficient performance

prejudices the defendant. Id. (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mr. Showers trial counsel provided ineffective assistance by failing to seek suppression of drugs and paraphernalia, and by failing to object to improper opinion testimony. Counsel's performance is deficient if, based on consideration of all reasonableness and cannot be justified as a tactical decision. U.S. Const. Amends. VI, XIV, Ky110, 146 Wn.2d at 862 " See also Wash const. art. 1§22." The accused is prejudiced by the deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. Id. Failure to object to OR seek suppression of inadmissible evidence constitutes deficient performance when there is no valid tactical reason for the failure. State v. Hendrickson, 138 Wn.App. 827, 833, 158 P.3d 1257 (2007); State v. Meckelson, 133 Wn. App. 431, 436, 135 P. 3d 91 (2006)."

Mr. Showers' trial counsel did not seek suppression of evidence illegally seized. AS outlined above, officers lacked a warrant or other lawful authority for the search of the backpacks found in the truck bed.

Because of this, defense counsel's performance was deficient. Meckelson, 133 Wn. App. at 436.

Furthermore, the error was prejudicial. Suppression would have required dismissal of the drug charges. Trial counsel argued extensively in closing that there was insufficient

evidence linking Mr. Showers to the items seized, but failed to raise the same argument in a motion to suppress. RP (09/04/2012) 125-29, 131. Accordingly, Mr. Showers was prejudiced by counsel's failure to make that dispositive motion. Id. Similarly, on all but one occasion, trial counsel failed to object to repeated instances of inadmissible opinion testimony on Mr. Showers' guilt on the eluding charge. RP 18 (objection); RP 12, 20, 43, 52-53, 80 (no objection). There can be no tactical reason for failing to object to these impermissible opinions. Defense counsel recognized as much in making his single objection, but failed to protect MR. Showers from the remainder of the prejudicial testimony. The error was prejudicial, as can be seen from the court's findings (which specifically relied upon Deputy Ashley's improper opinion). Finding of Fact 6, CP 6.

Mr. Showers' trial counsel provided ineffective assistance. He should have moved to suppress the drug evidence, and he should have objected to impermissible opinion testimony on multiple occasions. Mr. Showers' convictions should be reversed. Kyllo, 166 Wn. 2d at 871. Mr. Showers's conviction should be remanneded for a new trial in light of the ineffective assistance of counsel DAVid Hatch provided. Kyllo, 166 Wn. 2d at 871.

The court of appeals erred in upholding MR. Showers convictions when he did not validly or knowingly waive his state constitutional Right to a trial by Juey.

constitutional issues are reviewed de novo: McDevitt, 291 P.3d at 878. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); State v. Smith, No. 29832-9-III, 298 P.3d 785, 789 (Apr. 19, 2013)(Smith I); see also State v. Williams, 23 Wn. App. 694, 695, 598 P.2d 731 (1979).

Wash. Const. art. I §21 and §22 provide greater protection of the right to a jury trial than does the Sixth Amendment.

As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal Right.[12] City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

The showing required to waive a constitutional right varies depending on the nature of the right. See e.g. State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002) (outlining the showing required to waive the right to self-representation); State v. Robinson, 172 Wn.2d 783, 263 P.3d 1223 (2011) (outlining the showing required for waiver of rights pursuant to a guilty plea). Gunwall analysis establishes that waiver of the state constitutional right to a jury trial requires a higher showing than waiver under the Sixth Amendment.

Analysis of a constitutional provision begins and ends with the text. State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). This includes an examination of the words themselves, their grammatical relationship with one another, and there context. Gallwey, 146 Wn.2d at 459-460. The constitution

must be construed as the framers understood it in 1889. State v. Norman, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

Art. I §21 preserves the right to jury trials "inviolate." This term "connotes deserving of the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

Art. I §22 provides strong protection to the jury system. The specific mention of juries in the context of "criminal Prosecutions," and the mandatory language employed by the provision ("shall have the right... to have a speedy public trial by an impartial jury") demand that the jury tradition be afforded the highest respect.

Significant differences in the texts of paralle provisions of the federal and state constitutions.

The second Gunwall factor requires analysis of the differences between the texts of paralle provisions of the federal and state constitutions. Wash. Const. art. I §21 has no federal counterpart. The Washington Supreme Court in Mace found this significant, and held that under the Washington constitution "no offense can be deemed so petty as to warrent denying a jury trial if it constitutes a crime." Mace, 98 Wn.2d at 99-100. This is in contrast to the more limited protections available under the federal constitution. Id.

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution.

State constitutional and common law history demonstrate that the drafters of the Washington constitution intended to prohibit

Waiver requires more than simple assent.

Under the third Gunwall factor, this court must look to state constitutional and common law history. Art. 1, §21, Washington "preserves the right as it existed at common law in the territory at the time of its adoption." Mace, 98 Wn. 2d at 96. see also State v. Schaaf, 109 Wn. 2d 1, 743 P. 2d 240 (1987) State v. Smith, 150 Wn. 2d 135, 151, 75 P. 3d 934 (2003) (Smith II). State v. Martin, 171 Wn. 2d 521, 531, 252 P. 3d 872 (2011). In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the state territories, that the right to a jury trial in felony cases could not be waived. see e.g., State v. Lockwood, 43 Wis. 403, 405 (1877) ("The right to a jury trial can not be waived") State v. Larrigan, 66 Iowa 426 (1885); Cordway v. State, 25 Tex. Ct. App. 405, 417 (1888) (A defendant "may waive any right except that of trial by jury in a felony case"); United States v. TAYLOR, 11 F. 470, 471 (C.C. Kan. 1882) ("This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous"); United States v. Smith, 17 F. 510, 512 (C.C. Mass 1883) (Smith III) ("The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...")

This tradition was rooted in the common law:

There can be no question that, at common law, the only

recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. t.t. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327... The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court. A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform there functions in such cases, and if he attempts to do so, his act must be reguarded as nugatory.

Harris v. People, 128 Ill. 585, 590-591 (Ill. 1889), overruled in part by People ex rel. Swanson v. Fisher, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in "the soundest conception of public policy." State v. Carman, 63 Iowa 130, 131 (1884). According to the Iowa Supreme court: Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and

placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

Carman, 63 Iowa at 131.

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing "[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases." Laws of Washington territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.[13,14] The framers would have been aware of both the prevailing view (described above) and the territorial legislature's experiment.

The state constitutional and common law history show that the framers did not intend for the right to a jury trial to be waivable. It necessarily follows that, if the statute permitting waiver is constitutional, it must at least require a higher showing than required under the much less stringent Sixth Amendment. Gunwall factor three favors the interpretation of art. 1, § 21 urged by Mr. Showers.

4.) Pre-existing state law does not suggest that waiver of the state constitutional right to a jury trial may be made absent a thorough understanding of the right.

The fourth Gunwall factor "directs examination of

preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" Grant County Fire Prot. Dist. NO. 5 v. City of Moses Lake, 150 Wn. 2d 791, 809, 83 P. 3d 419 (2004) (quoting Gunwall, 106 Wn. 2d at 62).

RCW 10.01.060 permits waiver of the right to a jury except in capital cases "with the assent of the court." That provision does not describe, however, what showing is required in order for the court to assent to the waiver. RCW 10.01.060. Likewise, CrR 6.1 permits a case to be without a jury but does not describe the showing necessary to find a valid waiver of the right to a jury.

Pre-existing state law is thus inconclusive. Non-constitutional authority does not weigh in favor of or against the position urged by Mr. Showers.

5.) Differences in structure between the federal and state constitutions.

The fifth Gunwall factor "will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the state's power." State v. Young, 123 Wn. 2d 173, 180, 867 P. 2d 593 (1994). As in all contexts, this factor favors independent application of the state constitution. Id.

6.) Matters of particular state interest or local concern.

The sixth Gunwall factor deals with whether the issue is a matter of particular state interest or local concern. The

ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. See Smith II, 150 Wn.2d at 152. Gunwall factor number six thus also points to an independent application of the state constitutional provision in this case.

7.) Conclusion: Gunwall analysis establishes that waiver of the right to a jury trial under the state constitution requires a higher showing than that under the federal constitution.

Five of the six Gunwall factors establish that a waiver of the state constitutional right to a jury trial requires a thorough understanding of the right. Factor four (preexisting state law that is not of constitutional dimension) does not contradict this conclusion.

The waiver of the right to a jury trial in this case violates Wash. const. art. 1, § 21 and § 22. Accordingly, Mr. Showers' conviction must be reversed and the case remanded to the trial court for a jury trial.

D. Mr. Showers' waiver of his state constitutional right to trial by jury was not knowing, intelligent, and voluntary because the record does not prove that he thoroughly understood the right and the practical and legal consequences of its waiver.

The state constitutional right to a jury trial is "jealously guarded by the courts." Auburn Mechanical, Inc. v. Lydig Const.,

Inc., 89 Wn. App. 893, 897, 951 P. 2d 311 (1998). Any purported waiver of the right to a jury trial should be "narrowly construed in favor of preserving the right." Wilson v. Horsley, 137 Wn. 2d 500, 509, 974 P. 2d 316 (1999).

The burden of proving waiver of a constitutional right rests with the state. State v. Chetty, 167 Wn. App. 432, 439, 272 P. 3d 918 (2012). Absent an adequate record to the contrary, "every reasonable presumption" should be indulged against waiver of a constitutional right. State v. Stone, 165 Wn. App. 796, 815, 268 P. 3d 226 (2012); see also Johnson v. Zerbst, 304 U. S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ("Waiver of a constitutional right must clearly consist of an intentional relinquishment or abandonment of a known right or privilege.").

An accused person's waiver of a constitutional right is not knowing and voluntary if she or he lacks a thorough understanding of the right. State v. Hos, 154 Wn. App. 238, 250, 225 P. 3d 389 (2010). In other contexts, courts have required an affirmative showing that the accused person was informed of the details of the right and all practical and legal consequences of the waiver. See e.g. Robinson, 172 Wn. 2d 783 (regarding waiver of rights pursuant to a guilty plea); Faretta v. California, 422 U. S. 806, 95 S. Ct. 2525, 45 L. Ed. 562 (1975) (regarding waiver of the right to counsel); Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (regarding waiver of the right to counsel and the privilege against self-incrimination). In Faretta, for example, the court held that valid waiver of the right to counsel required a showing on the record that the accused was made aware of the dangers and disadvantages of waiver and that "he

knows what he is doing and his choice is made with eyes open." 422 U.S. at 835. The right to a jury trial includes, inter alia, the right to participate in jury selection, the right to have the jury instructed on the presumption of innocence and the state's burden of proof, and the right to a unanimous verdict on each charge and aggravating factor. State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011); State v. Bennett, 161 Wn.2d at 307; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); In re Beito, 167 Wn.2d 497, 491, 220 P.3d 489 (2009).

The record does not show that Mr. Showers was advised of each of these things. Instead, he was told only that he was giving up the right to "have 12 people sit over there to [his] left and decide whether to acquit [him] or whether to find [him] guilty." RP 2-3. His written waiver stated only that he was waiving the right to an impartial jury from the county where the offense was alleged to have been committed. Jury Trial Waiver Form, Supp CP. Although Mr. Showers discussed his rights with counsel, no details of that discussion were provided RP 1-3. On this record, it is impossible to conclude that Mr. Showers had a full understanding of the rights he was waiving.

Nor does the record establish that he made his choice "with eyes open." Faretta, 422 U.S. at 835. Mr. Showers' waiver of his state constitutional right to trial by jury was not knowing, intelligent, and voluntary. His conviction must be reversed. Wash. const. art 1, §21 and §22.

E.) Pierce and Benitez were wrongly decided and should be reconsidered.

Without engaging in Gunwall analysis, the court of Appeals has upheld jury waivers even absent proof of a thorough understanding

of the state constitutional right. State v. Benitez, NO. 42420-7-II, 2013 WL 2606251, -P.3d- (June 11, 2013); State v. Pierce, 134 Wn. App. 763, 142 P.3d 610 (2006). Both decisions rest on prior cases that did not specifically address waiver of the state constitutional right. Benitez, 2013 WL 2606251, -P.3d- (citing State v. Brand, 55 Wn. App. 780, 780 P.2d 894 (1989) and State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994)); Pierce, 134 Wn. App. at 613-14 (citing Brand and Stegall).[15]

Without citation to authority, both Benitez and Pierce hold that Gunwall anaylsis is irrelevant to waiver of state constitutional rights. Benitez, 2013 WL 2606251, -P.3d- ("Gunwall determines the scope, not the waiver, of a constitutional right"); Pierce, 134 Wn. App. at 614 ("Gunwall addresses the extent of a right and not how the right in question may be waived"). But the requisites for waiver of a state constitutional right vary depending on the nature of that right. see e.g. Vermillion, 112 Wn. App. 844; Robinson, 172 Wn.2d 783. The nature of the right itself determines what is required for waiver, and the nature of the right is entirely dependent on Gunwall. Thus, validity of any waiver of a state constitutional right cannot be determined absent Gunwall anaylsis.

Benitez and Pierce were wrongly decided, and should be reconsidered.

The record does not show a valid waiver of Mr. Showers's state constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial.

CONCLUSION

Mr. Showers' convictions must be reversed. The eluding charge must be remanded for a new trial because the conviction was based in part on improper opinion evidence, to which counsel unreasonably failed to object.

The drug charges must be dismissed because the evidence was insufficient for conviction. Furthermore, the evidence introduced at trial was illegally seized following a warrantless search, and defense counsel unreasonably failed to seek a suppression of that evidence.

If the drug charges are not dismissed, Mr. Showers is entitled to a new trial on all charges, because the record does not establish that his jury waiver was knowing, intelligent, and voluntary.

VI. CONCLUSION

Based on the foregoing facts and arguments, this Court should accept review.

Dated this 22 day of AUGUST, 2012.

william B. Showers

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM B. SHOWERS, Appellant.	No. 43996-4-II UNPUBLISHED OPINION

HUNT, J. — William B. Showers appeals his bench trial conviction for possession with intent to deliver heroin, possession of methamphetamine, and attempting to elude. He argues that (1) insufficient evidence supports his possession convictions; (2) the warrantless search of the backpacks found in his truck bed violated his rights under the Fourth Amendment[1] and article 1, section 7[2]; (3) admission of improper opinion testimony denied him his right to a fair trial; (4) defense counsel's failure to seek suppression of evidence and to object to improper opinion testimony constituted ineffective assistance; and (5) he (Showers) did not validly waive his state constitutional right to trial by jury. We affirm.

FACTS

I. CRIMES

On July 6, 2012, City of Raymond Police Officer Eric Fuller observed a pickup truck traveling with a defective windshield and without a front license plate; William B. Showers was

[1] U.S. CONST. amend. IV.

[2] WASH. CONST. art. I, § 7.

later identified as the driver. Fuller observed Showers exit the highway and turn into the town of Raymond. Following Showers, Fuller observed him drive through a stop sign before pulling up to a curb, where a female exited from the passenger side, put on a backpack and a baseball cap, and walked away at a fast pace, pulling the baseball cap down over her face. Showers quickly drove away from the curb.

Fuller followed and activated his emergency lights to stop Showers. But Showers accelerated to approximately 50 MPH in a 25 MPH zone, turned onto Highway 101 at a speed that caused the pickup to sway, and spun the pickup in a complete 360-degree turn in the middle of Highway 101 before coming to a stop, facing the opposite direction of traffic. Pacific County Sheriff's Deputy Jonathon Ashley observed the pickup's spinout and had to brake and to pull over to the highway shoulder to avoid hitting the pickup. As Fuller pulled up to the stopped pickup, Showers revved the pickup's engine and sped off past Fuller into the oncoming lane of traffic, heading back towards Raymond. Fuller followed Showers; Ashley joined the pursuit.

Off-duty City of Cosmopolis Police Deputy Chief Heath Laymen observed Showers and the officers enter and exit Highway 101. Sitting in his open Jeep outside a Raymond printing shop near the Highway 101 merge lane, Laymen observed Showers drive past the printing shop at an estimated 60 MPH in a 25 MPH zone and travel into oncoming traffic, causing at least one vehicle to brake to avoid a head-on collision with Showers. Laymen observed Fuller's fully marked police car attempting to stop the pickup with its activated sirens and lights; Laymen later identified the pickup's driver as Showers.

Showers sped through Raymond at an estimated 50-60 MPH in a 25 MPH zone, driving through at least two stop signs. Standing in a park next to the fire station, City of Raymond Fire

Department paramedic William Didion heard tires screeching, saw Showers drive through the park directly towards him, and ran out of Showers' path to avoid being struck.

Fuller followed Showers traveling down an alley at more than 20 MPH over the alleyway's safe speed limit toward a child sweeping rocks and garbage in front of an auto parts store. The child's father heard tires squeal, ran out into the alley to find Showers' pickup a foot away from his child, and immediately pulled his child out of Showers' path.

Fuller continued to follow Showers out of the alley onto Alder Street and proceeded to the intersection of Second and Blake Streets, hoping to intercept Showers but could not locate him. Fuller stopped at the intersection of Second and Alder Streets, looked to the left, and observed the pickup abandoned in the middle of the street, with the driver's door open. Officers approached the pickup to ensure it was unoccupied, took the keys from the ignition so it could not be driven, and then began searching for Showers. Citizens in the area pointed and directed the officers to a local establishment, where a sweaty, out-of-breath, shirtless Showers was hiding in the restroom. The officers took Showers into custody.

Showers' Community Corrections Officer (CCO), Linda Tolliver, was called to the scene, where she observed Showers in the back of a police vehicle and his pickup truck with its doors open. In her capacity as Showers' CCO, Tolliver searched the pickup, located several backpacks in the bed of the truck, and, with Fuller's assistance, searched the backpacks[3]; inside

[3] *See* RCW 9.94A.631(1): "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property."

the backpacks they found heroin, two scales, several small plastic baggies, methamphetamine, a pipe and hypodermic needles.

II. PROCEDURE

The State charged Showers with possession of heroin with intent to deliver, possession of methamphetamine, and attempting to elude a pursuing police vehicle. Showers waived his right to a jury trial and elected a bench trial. At a pretrial hearing, the trial court reviewed the written waiver that Showers had signed in consultation with his counsel, engaged in a colloquy with Showers about this waiver, and ruled that Showers understood his right to a jury trial and that his waiver of his right to a jury trial was knowing, intelligent, and voluntary.

At trial, three law enforcement officers testified that Showers had driven in a "reckless" manner as previously described. The trial court found Showers guilty of possession of heroin with intent to deliver, possession of methamphetamine, and attempting to elude a pursuing police vehicle. Showers appeals.

ANALYSIS

I. JURY TRIAL WAIVER

Showers contends that he did not validly waive his right to a jury trial. This argument fails.

Washington law requires that a defendant personally express a waiver of his or her jury trial right in order for the waiver to be valid. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). But Washington law does not require the trial court to conduct an extensive on-the-record colloquy with the defendant before determining whether the defendant validly waived his jury trial right. *Pierce*, 134 Wn. App. at 771. "As a result, the right to a jury trial is easier to

waive than other constitutional rights." *State v. Benitez*, 175 Wn. App. 116, 129, 302 P.3d 877 (2013).

We review de novo the validity of a jury trial waiver. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). A defendant's waiver of his or her jury trial right must be made knowingly, intelligently, voluntarily, and without improper influences. *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). A written jury trial waiver "is strong evidence that the defendant validly waived the jury trial right." *Pierce*, 134 Wn. App. at 771. "An attorney's representation that the defendant's waiver is knowing, intelligent, and voluntary is also relevant" to a determination of whether the defendant's jury trial waiver was valid. *Benitez*, 175 Wn. App. at 128 (citing *Pierce*, 134 Wn. App. at 771). Additionally, we consider whether the trial court informed the defendant of his or her jury trial right. *Pierce*, 134 Wn. App. at 771.

Showers argues that under article I, sections 21 and 22 of the Washington Constitution, "a valid waiver of the state constitutional right to a jury trial requires a thorough understanding of the right." Br. of Appellant at 32. He argues that because the record does not prove that he thoroughly understood the right and the practical and legal consequences of his waiver, his waiver was not knowing, intelligent, and voluntary. Showers also asks us to overrule our recently affirmed jury trial waiver opinions in *Benitez* and *Pierce*, both upholding jury trial waivers in similar circumstances.

Showers argues that the six *Gunwall*[4] factors establish that waiver of a jury trial under the state constitution requires a higher showing than waiver under the federal constitution. Showers recognizes that we recently rejected this same argument in *Pierce* and *Benitez*, but he argues

[4] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

these cases were wrongly decided and should be overturned. We rejected this argument in *Pierce* and *Benitez* because, in those cases, the defendants' reliance on *Gunwall* was misplaced. And we decline to revisit or to overrule those cases here.

Showers presented the trial court with a written waiver of his jury trial right. The trial court conducted a colloquy with him[5], ensuring that (1) he understood his right to a jury trial, (2) he had discussed the matter with his attorney so he understood what he was waiving, and (3) his request was voluntary. These procedures show that Showers personally expressed his desire to waive his jury trial right and that his waiver was knowing, intelligent, and voluntary. The record supports the trial court's ruling that Showers validly waived his right to a jury trial.

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[5] The trial court questioned Showers to be sure he was knowingly, voluntarily, and intelligently waiving his right to a trial by jury:

> THE COURT: . . . Mr. Showers, I know Mr. Hatch reviewed this with you but I'm asking you at this time, the Waiver of Jury Trial means that you're giving up your constitutional right to have 12 people sit over there to your left and decide whether to acquit you or whether to find you guilty of the crime that the State has charged. You're giving up that right and if I find that you're doing this knowingly, intelligently, and voluntarily and I certify this, then in very plain, simple vernacular, you're stuck with me or whichever judge hears that case. It's a one-way street. I know you know this. I'm just making sure that is what your understanding is at this present time.
> [SHOWERS]: Yes, sir.
> THE COURT: Very well. And are you in agreement with the Waiver of Jury Trial?
> [SHOWERS]: I am.
> THE COURT: Did you sign it only after you reviewed it with your attorney so you were certain you knew what you were signing?
> [SHOWERS]: Yes, sir.
> THE COURT: Very well. Thank you. Did you sign of your own free will?
> [SHOWERS]: I did.
> THE COURT: Any threats or coercion?
> [SHOWERS]: No.
> THE COURT: Very well.

Verbatim Report of Proceedings (VRP) (Aug. 31, 2012) at 3-4.

II. WARRANTLESS SEARCH

For the first time on appeal, Showers challenges the warrantless search of the backpacks under both the Fourth Amendment[6] and article 1, section 7,[7] arguing that the officers unlawfully searched his vehicle without a search warrant. At trial, however, Showers neither filed a motion to suppress nor challenged the lawfulness of the vehicle search and the seizure of evidence from the vehicle. Because Showers failed to raise these arguments below, there was no suppression hearing and no record developed on which we can review these first time challenges.

A party must raise an issue at trial to preserve it for appeal, unless the party can show the presence of a "'manifest error affecting a constitutional right'" under RAP 2.5(a)(3). *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Issue preservation rules "encourage 'the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

Courts employs a two-pronged analysis to determine whether a non-preserved error is a "manifest error affecting a constitutional right" under RAP 2.5(a). *See State v. Grimes*, 165 Wn. App. 172, 179-80, 267 P.3d 454 (2011). First, the court must determine whether an alleged error

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[6] The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. amend IV.

[7] Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Article I, section 7 requires "no less" than the Fourth Amendment. *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite "'authority of law.'" *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010) (quoting WASH. CONST. art. I, § 7).

is truly constitutional; second, the court must determine whether the alleged error is "manifest." *Grimes*, 165 Wn. App. at 180. Showers' challenge to the legality of the search and seizure of the drug evidence from his pickup is constitutional in nature. Thus, we turn to the manifest error prong of the test.

A constitutional error is "manifest" if it caused actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To demonstrate actual prejudice, the appellant must plausibly show that the asserted error had practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99. Because Showers fails to show such consequences, he fails to show that alleged constitutional error is manifest. *O'Hara*, 167 Wn.2d at 99; *McFarland*, 127 Wn.2d at 333. Holding that Showers cannot argue for the first time on appeal that the search and seizure of evidence were illegal, we do not further address this issue.[8] RAP 2.5(a).

III. SUFFICIENT EVIDENCE

Showers contends that sufficient evidence does not support his convictions for drug possession because (1) the State failed to demonstrate that he had dominion and control over the drugs; and (2) the trial court's findings of fact were insufficient to support the legal conclusion that he had possessed the drugs. We disagree.

A. Standard of Review

Evidence is sufficient to support a conviction if, "after viewing the evidence and all reasonable inferences from it in the light most favorable to the State, a rational trier of fact could

[8] Were we to address this claim, Showers' argument would fail because the search was pre-authorized as a condition of Showers' community custody and did not require a search warrant.