

NO. 47593-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JESUS SOLIS-VAZQUEZ,

Appellant.

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

The Honorable Michael H. Evans, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper admission of a law enforcement officer's opinion as to appellant's guilt and veracity violated his right to a jury trial and requires reversal.

2. There was insufficient evidence to support the firearm enhancements.

Issues pertaining to assignments of error

1. Appellant was charged with possession of methamphetamine with intent to deliver after methamphetamine was discovered in a car in which he was a passenger. Over defense objection a law enforcement officer testified that he believed everyone in the car knew about the drugs. Where appellant testified that he did not know about the drugs and was only in the car because he needed a ride, did the officer's opinion as to appellant's credibility or guilt violate his right to a jury trial?

2. The jury returned special verdicts finding that appellant or an accomplice was armed with firearms during commission of the drug offense. Where the jury did not unanimously agree that appellant was in possession of a firearm and there was no evidence that he and the other occupants of the car where the firearms were found were accomplices, must the firearm enhancements based on the special verdicts be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On December 17, 2014, the Cowlitz County Prosecuting Attorney charged appellant Jesus Solis-Vazquez with possession with intent to deliver methamphetamine, unlawful possession of a firearm in the first degree, possession of a stolen firearm, two counts of third degree assault, disarming a law enforcement officer, and first degree criminal impersonation. The information alleged that Solis or an accomplice was armed with four firearms during the commission of the drug offense. CP 1-4; RCW 69.50.401(1); RCW 69.50.401(2)(b); RCW 9A.01.010; RCW 9A.01.025; RCW 9A.01.033(3); RCW 9A.01.310(1); RCW 9A.01.140(1); RCW 9A.01.031(1)(g); RCW 9A.01.023(1); RCW 9A.01.040(1)(a). The State filed an amended information, dropping the possession of a stolen firearm charge. CP 6-9.

The case proceeded to jury trial before The Honorable Michael Evans. The court dismissed the charge of disarming a law enforcement officer for lack of evidence, and the jury hung on the unlawful possession of a firearm charge. CP 125, 137; RP 474. The jury returned guilty verdicts on the remaining charges and affirmative findings on the firearm allegations. CP 97-105. The court denied Solis's post-trial motion for arrest of judgment, although it dismissed two of the firearm enhancements.

CP 106-10, 121; RP 664. The court imposed standard range sentences with two firearm enhancements, and Solis filed this timely appeal. CP 125, 133.

2. Substantive Facts

On the evening of December 12, 2014, law enforcement officers were working DUI emphasis patrols in Cowlitz County. RP 71, 127, 324. Deputy Brady Spaulding noticed a vehicle with a headlight out, and he pulled it over. When the car stopped, Spaulding saw the driver and front seat passenger switch seats. RP 151, 324-25. Spaulding found that concerning, and he radioed for other units to assist. RP 72, 327. When Spaulding approached the car, Evan Hadlock, who had been driving, was in the passenger seat, and Vanessa Slape was in the driver's seat. RP 325. Spaulding asked them for identification. RP 327.

Jesus Solis-Vazquez was sitting in the back seat behind the driver. Spaulding noticed that Solis was not wearing seatbelt, so he asked for Solis's identification too. RP 328. Solis gave Spaulding a Mexican passport in the name of Genaro Padraza-Martinez, which he used for work. RP 328-29, 501. The man sitting in the back passenger-side seat was not identified, but Solis referred to him as Delo. RP 496.

Spaulding ran the identifications and learned that Hadlock had a suspended license, and he returned to the car to arrest Hadlock. RP 151,

330. When Spaulding opened the passenger door, he saw a short barrel pistol grip shotgun on the floorboard between the door and the passenger seat. RP 114, 152, 331. Hadlock reached for the gun, and Spaulding stomped on his hand to prevent him from grabbing it. RP 115, 332. The other officers drew their weapons, and one of them removed the shotgun. RP 152-53, 332.

Slape was ordered to keep her hands up and come out of car, but she did not comply. RP 119. She kept moving her hands and leaning forward, and it looked like she was reaching under the seat. RP 120, 200-01. Slape said she did not want to get out of the car because she had her cat with her, but she eventually did as commanded, and she was taken into custody. RP 120-22.

In the meantime, Solis and Delo were ordered to keep their hands up as they waited in the back seat. RP 115, 156. When Officer Jeffrey Gann arrived, he covered Solis, with his weapon drawn, from about five feet away. RP 73-74, 99. Solis had his hands up, but he brought them down toward his lap. Gann ordered him to keep his hands up, but he brought them down at least two more times. RP 75. Unlike Slape, Solis did not appear to be leaning forward or moving his shoulders and could have just been resting his hands on his legs or on the car seat in front of him. RP 102, 134, 196-97, 228, 521.



As an officer removed Delo from the passenger side, Solis jumped from the driver's side of the car and started running. RP 76, 161. Spaulding tried to stop Solis, and they struggled before Solis broke free and continued running. RP 77, 335. Gann and Spaulding chased after Solis, and other officers joined in. During Solis's struggles with the officers he swung his arms, striking Gann with a closed fist. RP 78-78. He also kicked Gann and stepped on Gann's hand, before Gann punched him twice in the face. RP 81-83. Solis did not obey commands to get to the ground, and the officers' attempts to incapacitate him with a Taser were unsuccessful. RP 78-80, 83, 335-36. Finally, an officer struck Solis repeatedly with a baton, and he was brought to the ground. The officer applied a vascular neck restraint, and when Solis started to lose consciousness he was placed in handcuffs. RP 85-87, 167-68.

Delo also broke free and ran, but he was not captured. RP 124-25, 218. An officer who searched the area where Delo was last seen found two plastic bags, each containing 25.4 grams of methamphetamine. RP 224, 236, 261.

On a video recorded from Spaulding's patrol car, Hadlock was heard telling police to leave his girlfriend alone because she didn't do anything, and the shotgun was his. RP 375. During the chase, Hadlock and Slake discussed needing to get their stories straight. RP 445-46.

Once Solis was taken into custody, he was placed in Gann's patrol car. RP 94. Gann searched Solis incident to arrest and found \$1933 in cash. RP 95. Solis had no weapons or other contraband in his possession. RP 107. After he was advised of his rights, Solis told Gann that he had fought because he did nothing wrong and did not want to go to jail. RP 96. Gann asked Solis about the guns in the car, and Solis said he did not know about them. RP 96. Solis complained about chest pain, and Gann took him to the hospital. After he was checked out and cleared, Solis apologized to Gann. RP 96-97. Gann took Solis to jail, where he was booked under the name Genaro Padraza-Martinez. RP 189. His true identity was discovered a few days later. RP 321.

Slape consented to a search of the car. Spaulding recovered a Kel-Tec semiautomatic pistol under the front passenger seat, several rounds of .38 special ammunition from the back seat, a Springfield XD pistol and ammunition in a case behind the front passenger seat, and a Ruger LCR .38 caliber revolver in a paper bag on the floor in the back passenger-side area. RP 172-74, 342-46. Spaulding also found two ball-shaped plastic bags containing methamphetamine under the driver's seat, weighing a total of 61.4 grams. RP 265, 347-48. When he located the drugs, Spaulding stopped the search and obtained a warrant. RP 348. A later

search turned up two baggies with crystal residue in the dashboard ashtray. RP 363.

At trial the State presented testimony from Timothy Watson, a Longview Police Officer who used to serve on the drug task force. RP 276. Watson testified that local dealers purchase methamphetamine in one-ounce packages, which they then break down and sell to users in 1/8 ounce or 1/16 ounce quantities. RP 288. An ounce would sell for between \$600 and \$1000. RP 289. In Watson's opinion, it is unlikely that a bag containing an ounce of methamphetamine would be for personal use. RP 292. Watson testified that drug transactions commonly occur in vehicles, and it can be common for guns to be involved in drug transactions. RP 297, 300.

Solis testified that he lives in Oregon, but he was in Cowlitz County that day visiting a friend. RP 492-93. Solis did not own a car, and he needed to get a ride home, so he contacted Delo, with whom he had become friends on Facebook. RP 493-94. Delo agreed to give him a ride, and they met at a restaurant. Delo was riding in the back seat of a car, and a man and woman Solis had never met before were in the front. RP 495-97. Solis sat in the back seat behind the driver, and Delo sat next to him. RP 498. Before taking Solis where he needed to go, they stopped at a house. Solis followed Delo inside and waited for about 15 minutes while

Delo was in the bathroom with some other people. RP 498-99. Solis did not see any guns or drugs while he was there. RP 499. Shortly after they left the house, the car was stopped by police. Solis was not aware of any guns or drugs in the car either. RP 500.

Solis testified that when he was asked for identification, he gave police the Mexican passport, even though he knew it was not a real passport. RP 500-01. Solis testified that he used the name Genaro Padraza-Martinez for work, and he presented his most recent paystub as evidence. RP 502. After he gave police the passport, Solis became afraid they would find out it was a fake name, and he thought he would get in trouble. He was also very scared when the officers drew their weapons after finding the shotgun. RP 502-03. Solis testified that he did not know the shotgun or any other gun was in the car, and he had never been in the car before that day because he did not know Hadlock or Slape. RP 503. He denied moving around in the car or discarding or hiding anything after police drew their weapons. RP 503-04.

Because he was scared and believed he would be arrested for using a false passport, Solis ran when he saw an opportunity. RP 506. He acknowledged that as he was trying to escape he moved around frantically and it was possible he struck one of the officers. RP 507-08.

Solis testified that the money Spaulding found in his wallet was his savings from working construction, not from selling drugs. RP 509-10. He was not working with anyone in the car to deliver drugs. He was just in the car for a ride. RP 515.

C. ARGUMENT

1. IMPROPER ADMISSION OF DEPUTY SPAULDING'S OPINION AS TO SOLIS'S GUILT AND CREDIBILITY VIOLATED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

On redirect, Deputy Spaulding testified that all three people who had been taken into custody were charged with possession of methamphetamine. RP 456. The prosecutor asked Spaulding if he believed they were accomplices, and Spaulding answered that he did. RP 457. Defense counsel objected that the question called for a legal conclusion and moved to strike Spaulding's answer. The court sustained the objection, telling the prosecutor to rephrase. RP 457. The prosecutor then asked, "What did you believe about the three people in the car?" Defense counsel again objected as to foundation and that the question called for a narrative, but the court overruled. RP 457. Spaulding testified that he believed they had knowledge of the drugs in the car. RP 457-58.

It is well established that a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v.

Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Further, “[g]enerally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Improper opinion testimony violates the defendant's constitutional right to a jury trial, because the questions of guilt and veracity are reserved solely for the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

Whether testimony constitutes improper opinion as to the defendant's guilt depends on the circumstances of the case. In making this determination, the court considers such factors as (1) the type of witness, (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.

Montgomery, 163 Wn.2d at 591; State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009).

In Johnson, this Court reversed the defendant's conviction because the jury was allowed to consider impermissible and highly prejudicial opinion testimony. Johnson, 152 Wn. App. at 926. There, the defendant was charged with second degree child molestation. State's witnesses were permitted to testify about a confrontation between the victim and the defendant's wife, during which the wife said she believed the victim's allegations. Johnson, 152 Wn. App. at 932-33. On appeal Johnson argued that testimony about the confrontation amounted to improper opinion testimony as to his guilt. This Court agreed. Although the State argued that the testimony was admitted only to help the jury assess the wife's credibility, this Court noted that the testimony in actuality demonstrated only what the wife believed about the allegations in the case. The wife's opinion was not only collateral, but it "served no purpose except to prejudice the jury." Id. at 934. Admission of the improper opinion evidence denied Johnson his constitutional right to a fair trial. Id.

In this case, as in Johnson, improper opinion evidence denied Solis a fair trial. Deputy Spaulding's testimony that he believed everyone in the car had knowledge of the drugs informed the jury that he had concluded Solis and the others were accomplices in an intended drug transaction and

that Solis was lying when he denied knowing about the drugs. Spaulding's belief was not relevant to any issue and could only serve to prejudice the jury. When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. Id. "Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing Dolan, 118 Wn. App. at 329).

The court sustained defense counsel's objection when the prosecutor asked if Spaulding believed the people in the car were accomplices. The prosecutor's rephrasing of the question, asking what Spaulding believed about the people in the car, sought the same improper opinion. Defense counsel's objection as to foundation put the court on notice that the question was not seeking admissible testimony based on personal knowledge but rather inadmissible opinion. Even if this objection was insufficient to alert the court to the nature of the impropriety, however, Spaulding's explicit or nearly explicit opinion on Solis's guilt and credibility constitutes a manifest constitutional error, which this Court may review on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a). Admission of improper opinion evidence violates the



constitutional right to a jury trial and requires reversal unless the error was harmless beyond a reasonable doubt. Dolan, 118 Wn. App. at 330 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Demery, 144 Wn.2d at 759; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

The danger that Spaulding's opinion improperly influenced the jury is very real. Of the four people in the car that night, Solis is the only one who testified. He told the jury he knew nothing about the drugs or guns in the car, he did not know Hadlock or Slape, he was not working with Delo, and he was in the car only because he needed a ride. The jury had no other direct evidence as to what any of the others knew or intended. Although the State argued that all four people in the car were working together to deliver methamphetamine, that argument rested on speculation as to several factors, including what each of them knew, when and where the drugs were obtained, and where they were heading when the car was pulled over. The State's attempt to influence the jury with the deputy's opinion that they all knew about the drugs likely carried a lot of weight with the jury on this crucial determination. See Demery, 144 Wn.2d at 765 (testimony from law enforcement officer carries "special aura of reliability"). The State cannot prove that the improper admission

of Spaulding's opinion as to Solis's guilt and veracity was harmless beyond a reasonable doubt, and his conviction for possession with intent to deliver must be reversed.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENTS.

Solis was charged with unlawful possession of a firearm, as well as four allegations that he or an accomplice was armed with a firearm during the course of possessing methamphetamine with intent to deliver. CP 6-9. The jury did not unanimously agree that Solis knowingly had a firearm in his possession or under his control, and the court declared a mistrial as to the unlawful possession of a firearm charge. RP 640. In answering the special verdicts, however, the jury found that Solis or an accomplice was armed with each of the four firearms during the commission of the drug offense. CP 102-05. Because the jury did not agree that Solis was armed, these verdicts indicate that the jury considered Solis and the others in the car accomplices.

Following the verdicts, the defense moved for arrest of judgment on the firearm enhancements. CP 106-07. Defense counsel argued that there were no facts to establish any relationship between the occupants of the car and the drug transaction. The evidence established only that there were four people in the car where the methamphetamine was found, and

mere presence is insufficient to establish accomplice liability. Counsel argued that since the jury did not find Solis in possession of a firearm, and the evidence did not establish that the occupants of the car were accomplices, the firearm enhancements should be vacated. RP 651-53; CP 108-10.

The court found that although the evidence showed Hadlock and Slape knew about the guns in the car, the evidence was insufficient to show that they were accomplices to the drug transaction. RP 661-63. It vacated the firearm enhancements for the guns found in the front seat. RP 664. It ruled however, that the amount of cash in Solis's possession, the total amount of methamphetamine recovered, the ammunition on the back seat, the fact that the occupants of the car reached down even when the police drew their guns, and the fact that both Solis and Delo ran were sufficient to support the firearm enhancements for the guns in the back of the car. RP 662-63.

The State has the burden of proving every element of an offense beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). When reviewing sufficiency issues, the appellate court views the evidence in the light most favorable to the State to determine whether any rational jury

could have found the essential elements of the crime beyond a reasonable doubt. State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009).

For the purposes of the firearm allegations in this case, the State had to prove that Solis or an accomplice was armed with a firearm at the time of the commission of the crime. RCW 9.94A.533(3); CP 95. A person is an accomplice in a crime if, with knowledge that it will promote or facilitate the crime, he solicits, commands, or encourages another person to commit the crime, or he aids or agrees to aid another person in committing the crime. RCW 9A.08.020(3). To hold someone liable as an accomplice, the State is required to prove that person actually knew he was promoting or facilitating the crime. A theory of constructive knowledge is not sufficient. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). A person's mere presence at the scene of a crime is also insufficient to establish accomplice liability. Asaeli, 150 Wn. App. at 569-70. The State must prove the person was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, demonstrating a community of unlawful purpose. State v. Truong, 168 Wn. App. 529, 540, 277 P.3d 74, review denied, 175 Wn.2d 1020 (2012).

There was no evidence demonstrating a community of unlawful purpose in this case. Although there was evidence from which the jury

could find both Solis and Delo possessed methamphetamine, there was no evidence that they were working together to deliver it or even that they knew the other was in possession. None of the occupants of the car other than Solis testified. No one witnessed a drug transaction from which the jury could infer those present were working together. While accomplice liability may be proved by circumstantial evidence, the State cannot meet its burden through pure speculation. Allen, 182 Wn.2d at 375; State v. Prestegard, 108 Wn. App. 14, 22, 28 P.3d 817 (2001).

Without evidence that Solis or Delo was knowingly promoting or facilitating the other's possession of methamphetamine with intent to deliver, the State can prove only that they were both present in the same vehicle. This mere presence is insufficient to establish that they were accomplices. As a result, the firearm enhancements, which are dependent on a finding that an accomplice was armed during the commission of the crime, cannot stand.

D. CONCLUSION

The improper admission of opinion testimony violated Solis's right to a jury trial, and his conviction for possession with intent to deliver methamphetamine must be reversed. In addition, there was insufficient evidence to support the firearm enhancements, and they must be vacated.

DATED December 15, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is written in a cursive style with a long horizontal flourish at the end.

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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in  
*State v. Jesus Solis-Vazquez*, Cause No. 47593-6-II as follows:

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P.O. Box 769  
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
December 15, 2015

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