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COURT OF APPEALS

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STATE OF WASHINGTON

BY [Signature]

NO. 33420-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JODI LYNN GRANT,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant her right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to give the defendant's proposed instruction on unwitting possession.

2. Trial counsel's failure to object when a deputy testified that (1) he applied for a search warrant based upon the statements of two trial witnesses, (2) that a judge issued a search warrant based upon these statements, and (3) that following execution of the warrant he arrested the defendant, denied the defendant her right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

3. The trial court's failure to prevent the jury from viewing the evidence stamps denied the defendant her right to a fair trial under Washington Constitution, Article 1, § 21, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it refuses to give a defendant's proposed instruction on unwitting possession when the evidence presented at trial supports this defense?

2. Does a trial counsel's failure to object when a deputy sheriff testifies that (1) he applied for a search warrant based upon the statements of two trial witnesses, (2) that a judge issued a search warrant based upon these statements, and (3) that following execution of the warrant he arrested the defendant deny that defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

3. Does a trial court's failure to prevent a jury from viewing prejudicial, inadmissible evidence stamps deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 21, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

In November of 2004, Lewis C. Smith along with his girlfriend Jessica Alexander and her children moved from Lewis County to a residence on West Side Highway in Longview. RP I 29-30.¹ Upon moving they stored a number of their personal items in a shop belonging to the defendant Jodi Grant, who is Jessica Alexander's niece. RP I 30-33. Ms. Grant lives in a detached trailer. RP 77. These personal items included a number of growing marijuana plants which Mr. Alexander possessed pursuant to a medical marijuana permit. RP I 30-31. After a few weeks, Lewis Smith and Jessica Alexander got into a fight and Jessica moved into the defendant's trailer with her children. RP I 34, 49. Within a few days of this move the defendant and Jessica got into an argument and the defendant ordered Jessica to leave. RP I 36. In addition, during this time period Mr. Lewis went to the shop next to the defendant's residence to tend to his marijuana plants and found the doors to the shop locked. RP I 36, 40.

After the defendant ordered Jessica to leave the residence, Jessica met with Mr. Lewis and the two of them went to the Cowlitz County Sheriff's

¹The record in this case includes 10 volumes of verbatim reports, which include one volume for the first day of trial on May 23, 2005, and one volume for the second day of trial on May 24, 2005. The former is designated herein as "RP I" and the latter as "RP II."

Office to report that the defendant had taken possession of Mr. Lewis's marijuana plants. RP 36. Specifically, Jessica claimed that during the few days that she was living at the trailer, she and a number of other people helped the defendant move the marijuana plants and other paraphernalia for growing them from the shop into the defendant's bedroom and bathroom. RP I 52. Jessica also claimed that her aunt possessed a large quantity of methamphetamine which she kept in a small red jewelry box in her bedroom. RP I 63.

Based upon the information Mr. Lewis and Ms. Alexander provided, the Cowlitz County Sheriff's officer obtained a warrant to search the defendant's trailer and shop for a marijuana grow, a red jewelry box, and methamphetamine. RP I 76. Upon execution of the warrant the officers found a number of people present in the trailer, including the defendant and her boyfriend Norman Schmidt. RP I 78-82. The defendant was in bed and Mr. Schmidt was standing in the room with nothing but a towel covering him. RPI 78. During the search of the trailer the officers did find a marijuana pipe on the coffee table in the living room, a small baggie of methamphetamine under the cushion of a chair next to a computer desk in the bedroom, and a methamphetamine pipe in Norman Schmidt's pants. RP I 82-87, 99-100. The pipe had methamphetamine residue in it. RP I 100. The officers did not find any growing marijuana, any paraphernalia for growing marijuana, or a

red box. RP I 112.

During the search of the shop the officer found a white car registered to the defendant and a locked van registered to Mr. Schmidt. RP I 104, 111, 122; RP II 30. The defendant's vehicle was wet and had apparently been driven earlier in the day. RP II 15, 59-60. Mr. Schmidt's van, which was locked, had lights in it along with growing marijuana plants. RP II 16-17. The officers did not find the defendant's fingerprints in the van or on any item in the van. RP II 47 After finding these items the officer arrested the defendant and Mr. Schmidt. RP I 111.

Procedural History

By information filed December 9, 2004, the Cowlitz County Prosecutor charged defendant Jodi Lynne Grant with one count of manufacturing marijuana and one count of possession of methamphetamine. CP 3-4. The case later came on for trial before a jury with the state calling seven witnesses and the defense calling two. RP I 1-123; RP II 1-113. These witnesses testified the facts included in the preceding factual history. *Id.* One of the state's witnesses was Deputy Sheriff Nathan Hockett. RP I 70. Deputy Hockett's testimony included the following two facts: (1) that based upon the information that Lewis Smith and Jessica Alexander provided to him he applied for a search warrant and a judge granted his application and issued a warrant to search the defendant's residence, and (2) that based upon

what he and the other officers found during the execution of the search warrant, he and the other officers arrested the defendant and Mr. Schmidt. RP I 76, 111. The defense did not object to this evidence. *Id.*

Following the reception of evidence in this case the state proposed and the court gave instructions under which the jury was allowed to find the defendant guilty of either crime as a principle or as an accomplice. CP 75-95. The defense did object to these instructions, although the defense did take exception to the court's refusal to give an instruction on unwitting possession. CP 119. This proposed instruction was taken from WPIC 52.01 and stated as follows:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 74.

After argument, the jury retired for deliberation and the defense then requested that the defendant's name be redacted from any evidence bag going to the jury. RP II 175. Although the court appeared to agree with the request, none the less 16 separate evidence bags went to the jury with the defendant's

name on them, as well as other identifying information. SCP 1-16. These bags each identify the defendant as the “suspect,” the crime the defendant committed as “VUCSA,” the name of the officer who seized the item, and a description of what the officer claimed he found. *Id.*

Following deliberation the jury returned verdicts of guilty on both counts. CP 96. 97. The jury then sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 103-111, 113-114.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HER RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON UNWITTING POSSESSION.

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Consequently, the trial court's failure to instruct on a defense allowed under the law and supported by the facts violates due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). In the case at bar the defense argues that the trial court violated the defendant's right to due process when it refused to give the defendant's proposed instructions on unwitting possession.

In evaluating whether the evidence is sufficient to support a jury instruction the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury. *State v. Williams*, 93 Wash.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 38 Wash.2d 1002, 984 P.2d 1034 (1999). A valid instruction, improperly denied, constitutes reversible error. *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).

In a prosecution for unlawful possession under RCW 69.50.401(d), the State must establish two elements: the nature of the substance and the fact of possession by the defendant. *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982). Possession is defined in terms of personal custody or dominion and control. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that the possession of the drug was unwitting. *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). The defense of unwitting possession may be supported by a showing that the defendant did not know she was in possession of the controlled substance. *Cleppe*, 96 Wn.2d at 381. The defendant may also

show that she did not know the nature of the substance he possessed. *Staley*, 123 Wn.2d at 799. If the defendant affirmatively establishes that “his ‘possession’ was unwitting, then she had no possession for which the law will convict.” *Cleppe*, 96 Wn.2d at 799.

For example, in *State v. Buford*, 93 Wn. App. 149, 152-53, 967 P.2d 548 (1998), the defendant was convicted of possession of cocaine residue scraped from a pipe the police found under the defendant’s hat. At trial, the defendant requested an unwitting possession instruction based upon his argument that the amount of drugs was so small that his possession of the drugs was unwitting. The trial court refused to give the instruction and the jury convicted. The defendant then appealed arguing error from the trial court’s refusal to give the requested instruction.

In reviewing the denial of the unwitting possession instruction, the court of appeals noted that the only evidence that Buford unwittingly possessed the cocaine was that the amount of cocaine seized was small and actually had to be scraped with a scalpel from the crack pipe. Given the limited facts, the court felt that an unwitting possession instruction invited the jury to engage in speculation or conjecture. The court stated:

Without receiving some basic facts – such as where did the defendant get the pipe, how long had he been carrying the pipe, did he express dismay that he possessed the pipe, why was he carrying the pipe under his hat, did he know what the pipe was used for, and did he know what cocaine looked like – the jury could not have properly

utilized [Buford's proposed unwitting possession] instruction.

Buford, 93 Wn. App. at 153.

In the case at bar the defendant proposed a written instruction on unwitting possession from WPIC 52.01. It stated:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 74.

In the case at bar the evidence presented at trial did support a conclusion that the defendant unwittingly possessed the methamphetamine. This evidence included the following facts. First, the police found a methamphetamine pipe with methamphetamine residue in Mr. Schmidt's clothing, which suggested that he was a methamphetamine user. Second, Mr. Schmidt was standing in the area where the police found the small baggie of methamphetamine. While it might have been in this location with the defendant's knowledge, it might also have been in this location because Mr. Schmidt put it there without the defendant's knowledge.

In addition, the police found the other small baggie of

methamphetamine in a locked van belonging to Mr. Schmidt. The logical inference from its location was that Mr. Schmidt possessed it without the defendant's knowledge. Thus, while all of the methamphetamine and the pipe were found in the defendant's residence and shop, the record has more than sufficient evidence to support an inference that the defendant did not knowingly possess these items. These facts stand in stark contrast to the facts in *Burford*. With all of this affirmative evidence of unwitting possession, the court violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to give the proposed instruction on unwitting possession.

In this case the evidence was very strong that Mr. Schmidt possessed the methamphetamine the police seized although relatively weak that the defendant knew that it existed. In fact, the only evidence that connected the defendant to the methamphetamine was Jessica Anderson's highly questionable claim that the defendant possessed a large quantity of methamphetamine in a red jewelry box. This evidence was "highly questionable" because the police failed to uncover any such box in the residence in spite of Jessica Anderson's claim that the defendant always had it in her custody. Thus, it is more likely than not that had the court given the instruction the jury would have acquitted on the possession of

methamphetamine charges. However, this is not the appropriate standard under which this error should be evaluated. Since the failure to give this instruction violated the defendant constitutional right to a fair trial, it is an error of constitutional magnitude. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). An error of constitutional magnitude is only harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985). In this case the error was far from harmless. As a result the defendant is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A DEPUTY TESTIFIED THAT (1) HE APPLIED FOR A SEARCH WARRANT BASED UPON THE STATEMENTS OF TWO TRIAL WITNESSES, (2) THAT A JUDGE ISSUED A SEARCH WARRANT BASED UPON THESE STATEMENTS, AND (3) THAT FOLLOWING EXECUTION OF THE WARRANT HE ARRESTED THE DEFENDANT, DENIED THE DEFENDANT HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as

having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when (1) the state elicited in improper opinion evidence of guilt, and (2) when a state’s witness commented on the credibility of other witnesses. The following presents these arguments.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to assure a defendant a fair trial under these constitutional guarantees, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wn.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

To the expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin*, *supra*, the defendant was charged

with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

In addition, under these same constitutional guarantees, the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing

that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent's negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

Finally, under both Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the opinions of attorneys, the courts or the witnesses concerning the credibility of witnesses, the evidence, or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus, it is

improper for the prosecutor to elicit evidence of any person's personal opinion about a witness's credibility. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). As part of this right, it is also improper for the state to attempt to get the defendant to comment on the credibility of the state's witnesses. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

For example, in *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of Rape of a Child and Child Molestation after a trial in which the trial court permitted the state to ask the defendant's wife whether or not she believed that her children were telling the truth. The defendant appealed his convictions arguing that this line of questioning denied him his right to a fair trial. In addressing this argument, the Court of Appeals first noted that it was error for the court to allow a witness to comment on the credibility of another witness. The court stated:

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused.

State v. Jerrels, 83 Wn.App. at 507-508 (citations omitted).

As the court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Thus, it was error in *Jerrels* for the prosecutor to ask the defendant's wife whether or not she believed her children when they testified against their father.

In the case at bar, there were two instances in which the state elicited opinion evidence on the guilt of the defendant and when the state elicited evidence that both a police officer and a judge believed that two state's witnesses were telling the truth. The first instance occurred at the end of Deputy Hockett's testimony when the state asked Deputy Hockett what he did after searching the defendant's residence and shop. His response was that he arrested the defendant and took her to jail. RP I 111. The state placed this question and answer at the end of Deputy Hockett's direct testimony as a matter of strategy and importance. It is relevant for one reason and one reason only: to best express to the jury Deputy Hockett's opinion that the defendant is guilty without having him say it explicitly. Having spent the beginning of Deputy Hockett's testimony extolling his training and experience as a police officer, the state thereby emphasized for the jury the reason why it should give great weight to Deputy Hockett's decision to arrest.

Put another way, one is left to ask the following questions: What was the relevance of eliciting the fact that following the culmination of the search

Deputy Hockett decided to and did arrest the defendant? In fact, the state not only elicited the fact that Deputy Hockett not only arrested the defendant, but he took her to jail. What fact at issue before the jury did this evidence make more or less likely? The answer is immediately apparent. The sole relevance of this evidence is that it stands as the officer's opinion that the defendant is guilty. In so eliciting this evidence the state directly and intentionally violated the defendant's right under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment to have the jury decide guilt based upon the facts.

In the case at bar, the state also elicited the opinion of two persons that Lewis Smith and Jessica Alexander were credible witnesses whose testimony the jury should believe. The two witnesses giving this opinion were Deputy Hockett and the unnamed judge who signed the warrant to search the defendant's home. These opinions were given though Deputy Hockett when testified that (1) Lewis Smith and Jessica Alexander came to him with allegations identical to that given at trial, (2) that based upon these allegations he applied for a search warrant (based upon his belief that they spoke the truth), and (3) that some unnamed judge also believed Lewis Smith and Jessica Alexander because he or she issued a search warrant in reliance upon their claims. RP I 76.

As with Deputy Hockett's testimony that he arrested the defendant,

one is left to ask: what is the relevance at trial to the fact that (1) Lewis Smith and Jessica Alexander came to Deputy Hockett with criminal allegations against the defendant, (2) that Deputy Hockett then applied for a search warrant in reliance upon their statements, and (3) that a judge then issued a search warrant in reliance of their statements? The relevance of this evidence comes in only one form: that both Officer Hockett and the unnamed judge believed that Lewis Smith and Jessica Alexander were telling the truth. This evidence served no other purpose at trial. Thus, in eliciting this evidence the state also violated the defendant's right under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment to have the jury decide the credibility of the witnesses.

No possible tactical reason exists to failure to object to such evidence that is at once both inadmissible and highly prejudicial. Thus, this failure fell below the standard of a reasonably prudent attorney. This failure also caused prejudice because the key issue on the possession charge on Count I was the credibility of Jessica Alexander's allegation in the light of the paucity of evidence to support the defendant's claim that the drugs belonged to Norman Schmidt. Thus, a timely objection by counsel would have cut off this prosecutorial misconduct and probably resulted in verdicts of acquittal on Count I, if not Count II. As a result, trial counsel's failure to object denied the defendant effective assistance of counsel under Washington Constitution,

Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT DENIED THE DEFENDANT HER RIGHT TO A FAIR TRIAL UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT, AND WASHINGTON CONSTITUTION, ARTICLE 1, § 21 WHEN IT DENIED DEFENDANT'S MOTION TO EXCLUDE EVIDENCE TAGS FROM THE JURY'S VIEW.

As was stated in Argument II, in order to assure a defendant a fair trial under both Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985); *see also* Argument II.

In this case at bar, over defense objection, the trial court allowed the exhibits admitted into evidence to go to the jury in 16 separate bags upon which the deputies had placed their "evidence stamps." On these evidence stamps, the police wrote numerous comments that spoke testimonially to the jury, including a statement of opinion by the officer as to what "crime" they believed the defendant had committed. In this case the crime designated was "VUCSA" or violation of the uniform controlled substances act. These stamps also included statement by the deputies as to the "description of Property or Evidence" the officer seized, as well as their claims as to when

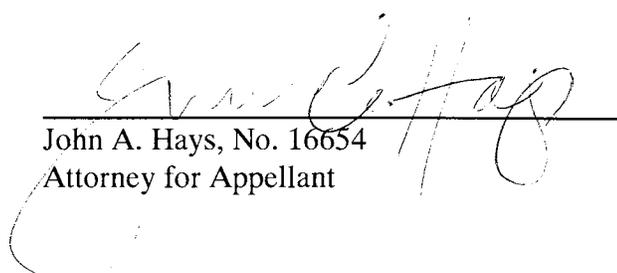
the evidence was allegedly seized.. While the information concerning case number, date, and item number included with the evidence stamps is not objectionable other than being repetitive and in written form, the other items on each stamp are highly improper. Whereas no officer would be allowed to stand before the jury and testify that he or she “believed” that the defendant had committed a specific offense, these evidence stamps and the information contained in them had the same effect as such improper opinions of guilt. The trial court’s failure to prevent the jury to seeing them denied the defendant her right to a fair trial.

CONCLUSION

The trial court's denial of the defendant's request for an instruction on unwitting possession and failure to prevent the evidence tags from going to the jury denied the defendant her right to a fair trial and entitles her to a new trial. In addition, trial counsel's failure to object when the state elicited grossly prejudicial and inadmissible evidence denied the defendant her right to effective assistance of counsel and also entitles her to a new trial.

DATED this 9th day of November, 2006.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Defendant's Proposed Jury Instruction No. 1

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

WPIC 52.01

