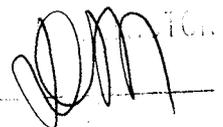


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NO. 33999-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH ALBERT FULLER,

Appellant.

---

BRIEF OF APPELLANT

---

John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

*P.M. 6/5/06*

**ORIGINAL**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it (1) failed to grant a motion for severance of counts, and (2) when it allowed the state to present evidence of similar bad acts.

2. The trial denied the defendant his right to a jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment on all of the elements of the offense charged when it allowed a defense expert to render an opinion on the defendant's guilt.

3. The trial court exceeded the statutory maximum for both counts when it imposed a sentence of 120 months on count I and when it imposed community custody on both counts without limiting the total sentence.

*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 when it (1) fails to grant a motion for severance of counts when the joinder prevents the defendant from obtaining a fair trial on all counts, and (2) when it allowed the state to present prejudicial, inadmissible evidence of similar bad acts?

2. Does a trial court deny a defendant the right to a jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment on all of the elements of the offense charged if it allows a defense expert to render an opinion on the defendant's guilt?

3. Does a trial court err when it imposes sentence in excess of the statutory maximum and when it imposes imprisonment and community custody in excess of the statutory maximum without stating that the term of imprisonment and community custody may not exceed the statutory maximum?

## STATEMENT OF THE CASE

### *Factual History*

On October 27, 2004, Detective Jose Vargas of the Snohomish County Drug Task Force placed a telephone call to Officer Patrick Moore of the Clark County Drug Task Force. RP 277, 414-415. During the conversation Officer Vargas stated that he had made contact with a person called “Jay” at a particular cell phone number and arranged to purchase two ounces of methamphetamine in Vancouver. RP 273-277, 414. Detective Vargas did not know who “Jay” was and had only spoken to him over the telephone after a couple of his informants had identified this person as a methamphetamine dealer. RP 273-277. Officer Moore believed this “Jay” to be Defendant Joseph Fuller, who Officer suspected was selling methamphetamine in Clark County. RP 415. As a result of this telephone conversation, Detective Vargas and a number of other Snohomish County police officers drove to Vancouver that evening. RP 278, 415-417.

Once in Vancouver Detective Vargas and his fellow officers met with Officer Moore and other Clark County Task Force members. RP 278, 415-416. Detective Vargas and Snohomish County Detective Terry Warren then drove to a Walmart in Vancouver where they again called “Jay” to tell him that they were in town. RP 281-282. After calling “Jay”, the two detectives entered an adjacent Arby’s Restaurant and ordered some food. RP 281-282.

After about 30 minutes, two white males drove up in a red Acura Legend with Oregon license YFB559 and entered the Arby's. RP 282-283, 417-418. As the two walked past the table where Detectives Vargas and Warren were seated, Detective Vargas asked if one of them was "Jay." RP 283. One of the men responded that he was and the two of them sat down. *Id.*

When the male identifying himself as "Jay" sat down, he placed an envelope with two ounces of methamphetamine in it next to Detective Vargas' leg, along with a small bundle of one-half gram of methamphetamine that "Jay" said was a "sample." RP 283, 378. In response, Detective Vargas had Detective Warren hand over a paper bag with \$1,700.00 in currency in it, which he gave to "Jay." RP 283-284, 378. "Jay" then engaged the two detectives in conversation, during which he stated that (1) he guaranteed the quality of the drugs and would refund their money if they were unsatisfied, (2) that he was dealing about \$35,000.00 in methamphetamine a week, and (3) that he could provide more drugs in the future. RP 284-305, 380-382. After this conversation, "Jay" and "Josh" left the restaurant and drove away. RP 419.

After "Jay" and "Josh" left, Detectives Vargas and Warren themselves exited the restaurant and drove back to the Vancouver Police Department where they met with Officer Moore and the other officers who were doing surveillance. RP 420. Once back at the police station Detectives Vargas and

Warren looked at a photograph of Joseph Fuller and stated that he was the person who had identified himself as "Jay" at the restaurant. RP 278. In fact, the Clark County officer on the surveillance team who knew Joseph Fuller had not been close enough at the Arby's to identify who had been in the Red Acura Legend. RP 418. At the subsequent trial, Detectives Vargas and Warren identified the defendant Joseph Fuller as the person who delivered the two ounces of methamphetamine to them at the Arby's on October 27, 2004. RP 326.

On April 4, 2005 Vancouver Police Officer Neil Martin received a call from an informant stating that the defendant was at a particular address in Hazel Dell. RP 517. Officer Moore had previously told Officer Martin that there was probable cause to arrest the defendant for delivery of methamphetamine on October 27, 2004. RP 517. In response to the tip from this informant, Officer Martin along with other officers drove out to the address stated and found a red Acura Legend with Oregon license YFB559 parked out front. RP 517. After a short wait, the defendant exited the house, entered the Acura Legend, and drove away. RP 517-518. Officer Martin then followed in an unmarked vehicle and arranged for a marked patrol vehicle to stop the defendant and arrest him. RP 518-521. While this was being arranged, the defendant on the public road facing Columbia River High School and at one point passed about 65 feet from the edge of the school

grounds.. RP 693, 857.

Eventually, a uniformed Vancouver Officer in a marked patrol car stopped the defendant, arrested and handcuffed him, and then put him in his patrol car. RP 483-515. While the defendant was in the patrol car, Officer Martin and other officers searched the defendant's person and vehicle. RP 521. They found the following: (1) \$690.00 in the defendant's front pants pocket, (2) \$1,095.00 in the defendant's wallet along with 25 gift cards, (3) \$8,800.00 in a "hid-a-can" from the rear floorboard which the defendant stated came from the sale of a vehicle, (4) a small amount of methamphetamine and a glass pipe in a gray bag found above the driver's side visor, (5) a black zipper case from the center consol with three ounce of methamphetamine in it, (6) a cell phone in the driver's seat, (7) triple beam scale weights from the center console, and (8) black digital scales located in the right front passenger seat. RP 518-538, 606-651. The defendant later claimed that the money in the hid-a-can came from that sale of a vehicle, that the other money was paid him for work he did installing a stereo, that the drugs in the visor were his, that he had found the scales when cleaning and was going to give it to a friend, that the cell phone belonged to his girlfriend, and that the black zipper case belonged to a person who had been in his vehicle earlier that day. RP 545-552, 882-931.

### *Procedural History*

By information filed April 19, 2005, the Clark County Prosecutor charged the defendant Joseph Albert Fuller with one count of delivery of methamphetamine hydrochloride on October 28, 2004, and two counts of possession of methamphetamine hydrochloride with intent to deliver on October 15, 2004 and April 12, 2005. CP 1. The state later amended the information to drop the October 15<sup>th</sup> charge of possession with intent, and to add school zone enhancements to the remaining counts. CP 36(c), 111-112. Prior to trial, the defendant brought two motions to suppress, arguing that (1) an affidavit given in support of a request for a body wire did not establish probable cause, and (2) Officer Martin did not have probable cause sufficient to order the defendant's vehicle stopped and the defendant arrested. The defendant also brought a motion to sever the delivery charge from the possession with intent. CP 10-12, 13-16, 17-42. Following the reception of testimony and argument by counsel, the trial court denied all of the motions. RP 177, 182-183. The defense renewed its motion to sever at the end of the state's case. RP 877. The court again denies the motion. RP 877.

The case eventually came on for trial before a jury with the state calling 12 witnesses in its case-in-chief and one in rebuttal. RP 268-935. The defendant also took the stand as the sole witness for the defense. RP 882-931. These witnesses testified to the facts contained in the preceding

*Factual History.* During it's case-in-chief, the state twice called Officer Patrick Moore to testify. At one point the state asked Office Moore to give his opinion whether or not the defendant intended to deliver the drugs found in his vehicle at the time of his arrest. RP 717-718. The question and answer went as follows:

Q. Corporal Moore, (inaudible) since you are an expert in this area, if, let's say, a person was found to be in control of a portable digital scale; approximately, give or take, 85 grams of methamphetamine or suspected methamphetamine; large amounts of cash, over \$10,000; cell phone; and some weights for, presumably, for the scale, what would that indicate to you that person --?

A. All those items together found in one area or one location or one arrest would indicate to me, based on my training and experience, that that is a possession with intent to deliver.

RP 717-718.

The defense immediately objected. *Id.* However, without waiting for a ruling from the court, the prosecutor elicited the following:

Q. Please -- please rephrase your -- your answer to what you think or based on your training and experience what the person --

A. That the individual that we had we had came in contact with was selling methamphetamine.

RP 718.

The defense again objected but the court allowed the questions and answers to stand. *Id.* The state later argued to the jury that it should find the defendant guilty based upon Officer Moore's opinion that the defendant had

the intent to deliver. The stated argued:

Now, Corporal Moore testified and it's uncontraverted testimony that this items are indicative when you see them all together in one location like this, it's indicative of someone who is dealing controlled substances, in this case, methamphetamine.

When you only look at -- look at one single -- one single item at a time, they -- they seem okay. But from his training and experience based on years and years of dealing with these people, over several hundred of them, through his -- through his time as a narcotics officer, these are clear indication of someone who is dealing meth.

RP 967.

Following deliberation in this case the jury returned verdicts of "guilty" to both counts, and a special verdict that the defendant committed the crime of possession with intent to deliver within 1000 foot of a school. CP 80-82.

At sentencing the state argued that the defendant had five prior offender points and one concurrent offender point for a total score of 6 points, thus yielding a range of 60 to 120 months on Count I and a range of 84 to 144 months on Count II (which included the 24 month school zone enhancement). CP 151, 163. The court further found the statutory maximum to be 5 years and a \$10,000.00 fine on Count I and 10 years and a \$20,000.00 fine on Count II. The defense did not dispute these claims. RP 106-121. In spite of noticing that Count I had a five year statutory maximum, the court imposed a sentence on Count I of 120 months concurrent with a sentence of

120 months on Count II. CP 153. The court also imposed 9 to 12 months of community custody on each count without including a statement that the combined term of imprisonment and community custody could not exceed five years in Count I and ten years in Count II. CP 154. The defendant thereafter filed timely notice of appeal. CP 164.

## ARGUMENT

### I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this right to a fair trial, a defendant is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court’s refusal to grant a severance of counts denied the defendant the right to a fair trial, the court

considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990).

*State v. Cotten*, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was much stronger on Count I than it was on Count II. In Count I the state had two police officers who testified to the jury that the defendant delivered two ounces of methamphetamine to them on the date in question. Their testimony was supported by numerous other pieces of evidence that supported the claim that the defendant committed the crime. Specifically, the state had the evidence that the person delivering the drugs was called "Jay" as was the defendant and that he drove the defendant's motor vehicle. By contrast, the state's evidence was not as compelling in Count II, particularly given the defendant's admission that he possessed some of the drugs in his car but that

he did not possess the three ounces in the zippered bag. Certainly the state had strong evidence on Count II, but the jury was still entitled to believe the defendant's testimony and find him guilty of possession as opposed to possession with intent. Thus, by failing to sever, the trial court allowed the state to use its overwhelming evidence in Count I to improperly bolster its weaker case in Count II.

The second factor is the clarity of defense on each count. In this case, the defendant took the stand on his own behalf and unambiguously declared diametrically opposed defenses on each count. On the first offense he testified that he was not the person who committed the crime. On the second offense he admitted possessing the smaller quantity of methamphetamine but denied possessing the larger quantity, thereby denying an intent to deliver. By failing to sever the counts in this case the court made it near impossible for the jury to independently review the evidence in Count II and give the defendant a fair trial on this count. The following rhetorical question illustrates this point. If the jury believed that the defendant delivered two ounces of methamphetamine in Count I and that he bragged of selling \$35,000.00 worth of methamphetamine each week, then how would the jury be able to ignore this evidence and fairly evaluate the defense on Count II? Obviously the jury could not make such a distinction.

The third factor is "the propriety of the trial court's instruction to the

jury regarding the consideration of evidence of each count separately.” In

this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 11

A separate crime is charged in each count. You must decide each count separately. You must decide any evidence associated with that count separately. Your verdict on one count should not control your verdict on any other count.

CP 62.

The deficiency in this instruction centers on the use of the phrase “evidence associated with that count.” The jury was not told what evidence was “associated with” a specific count and what evidence was not “associated with” a specific count. Thus, the jury was free to use the evidence that the defendant claimed to be selling \$35,000.00 of methamphetamine per week in multiple ounce amounts to support the state’s argument that the defendant possessed all of the methamphetamine found in his vehicle with the intent to deliver. As was previously mentioned it would be impossible for almost any juror to ignore this evidence when considering the defendant’s claims in Count II even if the jury understood Instruction No. 11 to require it. Thus, this one instruction falls miserably short in attempting to get the jury to parse out which evidence it could consider in Count I and which evidence it could consider in Count II.

The fourth factor this court should consider in determining the issue

of severance of counts is “the admissibility of the evidence of the other crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the delivery in Count I was admissible in Count II because it’s sole purpose would be to convince the jury that the defendant must have been guilty of possession with intent Count II because the evidence in Count I showed the defendant’s propensity to commit such a crime. It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state’s request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: “It’s true that you have had cocaine in your possession in the past, isn’t it?” The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal,

he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence

that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weight the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, Federal Evidence § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similarly crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone."

*State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

*State v. Escalona*, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

*State v. Escalona*, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same time of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. In fact the evidence presented in this case exceeded that in the three cases cited. This evidence from Count I included the following:

(1) that both the Snohomish County officer and the Clark County officers had informants who claimed that the defendant was a drug dealer, (2) that the defendant agreed on more than one occasion to selling drugs, (3) that the defendant did sell two ounces of methamphetamine, (4) that the defendant bragged of dealing \$35,000.00 worth of methamphetamine per week, and (5) that the defendant used the same vehicle to deliver the drugs in Count I as he did in Count II. As in *Pogue*, *Acosta* and *Escalona* the inadmissible evidence of prior offenses (the evidence from Count I in this case when considered in deciding Count II) denied the defendant his right to a fair trial. Thus, under the four factors listed in *Cotton* the trial court denied the defendant his right to a fair trial when it denied the defendant's motion to sever counts.

**II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT ON ALL OF THE ELEMENTS OF THE OFFENSE CHARGED WHEN IT ALLOWED A DEFENSE EXPERT TO RENDER AN OPINION ON THE DEFENDANT'S GUILT.**

Under both Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment a defendant in a criminal case has a near absolute right to have each and every fact necessary to punishment decided by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). In Washington this principle is also

reflected in Washington Constitution, Article 4, § 16 which prohibits judges from commenting or instructing a jury on issues of fact. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Thus, opinion testimony as to guilt, whether given by lay or expert witness, invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001).

In *State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985), 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. at 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 the case at bar, over repeated defense objection, the trial court allowed the state to elicit a police officer’s opinion that at the time his arrest the defendant had the intent to deliver the methamphetamine in his vehicle.

This testimony went as follows:

Q. Corporal Moore, (inaudible) since you are an expert in this area, if, let’s say, a person was found to be in control of a portable digital scale; approximately, give or take, 85 grams of

methamphetamine or suspected methamphetamine; large amounts of cash, over \$10,000; cell phone; and some weights for, presumably, for the scale, what would that indicate to you that person --?

A. All those items together found in one area or one location or one arrest would indicate to me, based on my training and experience, that that is a possession with intent to deliver.

Q. Please -- please rephrase your -- your answer to what you think or based on your training and experience what the person --

A. That the individual that we had we had came in contact with was selling methamphetamine.

RP 718.

Although the prosecutor in this case couched the first question in terms of a hypothetical it was actually a direct reference to the facts of the case before the jury. Thus, when the officer gave the opinion that the person who possessed the items the prosecutor listed had the intent to deliver he was really saying that in his opinion the defendant had the intent to deliver. The purpose of the prosecutor's question was specifically to elicit the officer's opinion that the defendant was guilty. By overruling the defendant's objections to this evidence the trial court allowed the state to invade the province of the jury to decide the facts of the case as is guaranteed under both Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

As an error of constitutional magnitude this should reverse the

defendant's conviction and remand for new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Dahl*, 139 Wash.2d 678, 688, 990 P.2d 396 (1999). Under the facts of this case this error was far from harmless beyond a reasonable doubt. This conclusion follows from the defendant's own testimony that he possessed the drugs found above the visor, that he was addicted to the use of methamphetamine, and that the other drugs in the vehicle did not belong to him. It was well within the jury's right to believe this evidence and find the defendant guilty of the lesser included offense of possession as the jury instructions allowed. Thus, it is not certain beyond a reasonable doubt that the jury would have convicted absent the improper opinion by the officer.

**III. THE TRIAL COURT EXCEEDED THE STATUTORY MAXIMUM FOR BOTH COUNTS WHEN IT IMPOSED A SENTENCE OF 120 MONTHS ON COUNT I AND WHEN IT IMPOSED COMMUNITY CUSTODY ON BOTH COUNTS.**

Under RCW 9A.20.021 the legislature has set statutory maximums for felonies in Washington State. This statute provides:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

RCW 9A.20.021.

In the case at bar the court imposed a sentence of 120 months on both Counts I and II. As the following explains, both counts I and II are Class C felonies with statutory maximums of five years in prison. While a doubling statute applied to Count II to increase the maximum to 120 months no such provision applied to Count I. The following sets out why both counts are Class C felonies.

Under RCW 69.50.101(d), the term “controlled substances” means “a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules.” In RCW 69.50.206(d), Methamphetamine (methamphetamine base), along with its salts (methamphetamine hydrochloride), isomers, and salts of its isomers, are all included as “controlled substances”, specifically defined as Schedule II stimulants. Subsection (d) of Schedule II states as follows:

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

- (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;
- (2) Methamphetamine, its salts, isomers, and salts of its isomers;
- (3) Phenmetrazine and its salts;
- (4) Methylphenidate.

RCW 69.50.206(d).

Under former RCW 69.50.401(1)(a)<sup>1</sup>, it is illegal for a person “to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” Thus, under the definitions for stimulants given in RCW 69.50.206(d), it is illegal to manufacture, deliver, or possess with intent to deliver any form of amphetamine, and any form of methamphetamine. By contrast, it is only illegal to manufacture, deliver, or possess with intent to deliver phenmetrazine base, phenmetrazine hydrochloride, and methylphenidate base. Manufacture, delivery, or possession with intent to deliver the other forms of phenmetrazine (isomers and salts of isomers) and methylphenidate are not included as prohibited acts.

The maximum sentences for violation of RCW 69.50.401(a) vary,

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<sup>1</sup>On July 24, 2005 the legislature amended this statute and expanded the term “methamphetamine” as it is used in RCW 69.50 to include salts, isomers, and salts of isomers. Since the two counts herein predated this amendment, the former language quoted herein applies to this case. See *Stogner v. California*, 539 U.S. 607, 612, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003); *Personal Restraint of Forbis*, 150 Wn.2d 91, 96, 74 P.3d 1189 (2003).

based upon the specific substance involved. Subsections (a)(1)(ii) and (a)(1)(iii) of this statute set out the maximum sentences when the substance involved is a Schedule II stimulant. These subsections state as follows in relevant part:

(1) Any person who violates this subsection with respect to:

. . .

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, . . .

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

RCW 69.50.401(a)(1)(ii)-(iii).

As is apparent from a reading of these subsection, the legislature has created a dichotomy between “methamphetamine” and “amphetamine” on the one side and all other Schedule II stimulants on the other side. The former has a maximum sentence of 10 years in prison, while the latter has a maximum sentence of 5 years in prison.

Under former RCW 9.94A.515, this dichotomy also existed in determining the standard range for the manufacture, delivery, or possession with intent to deliver Schedule II stimulants. Specifically, under Table 2 of this statute, the manufacture, delivery, or possession with intent to deliver

“methamphetamine” or “amphetamine” was a seriousness level VIII offense, while the manufacture, delivery, or possession of all the other Schedule II stimulants was a seriousness level IV offense. In 2002 and 2004 the legislature eliminated this dichotomy when it adopted RCW 9.94A.517 and RCW 9.94A.518 which created three seriousness levels for drug offenses. Under these statutes delivery of methamphetamine and delivery of methamphetamine hydrochloride (as a non-narcotic from schedule 1-5) both have the same standard range as seriousness level II offenses.

In the case at bar, the substances the defendant delivered and possessed with intent to deliver were “methamphetamine salt,” also known as methamphetamine hydrochloride. It was not “methamphetamine,” also known as methamphetamine base. Thus, under former RCW 69.50.401(1), both sentences are Class “C” felonies with maximum sentences of five years imprisonment. It is true that the school zone finding in Count II doubles the five year statutory maximum in Count II to 10 years under RCW 69.50.435(1)(d). However, Count II still remains a Class C felony.

In this case, the language of the statute is clear and unambiguous. Under former RCW 69.50.401(a)(1)(ii), delivery or possession with intent to deliver methamphetamine is only a Class B felony if the substance is “methamphetamine base.” If the legislature had intended the higher penalties to apply to the “salts, isomers, and salts of isomers” of methamphetamine, it

could have and would have written the statute to specifically include these related but different compounds. This conclusion is strengthened by the fact that in RCW 69.50.201(d)(2), the legislature specifically used the language “Methamphetamine, its salts, isomers, and salts of its isomers.” Thus, it is clear that the legislature knows what each of these difference but related substances is. Consequently, when then legislature used the term “methamphetamine” in RCW 9.94A.515 and RCW 69.50.401(a)(1)(ii), it well knew that it was not including the “salt, isomer, or salts of the isomer” of methamphetamine. This court has adopted these conclusions in *State v. Morris*, 123 Wn.App. 467, 98 P.3d 513 (2004). The following examines this case.

In *Morris*, two defendants pled guilty to delivery of methamphetamine and possession of methamphetamine with intent to deliver in Cowlitz County Superior Court. At sentencing, they argued that (1) the substances they delivered and possessed with intent to deliver were methamphetamine hydrochloride, and (2) that the delivery and possession with intent to deliver this substance was a level IV, class C felony, not a level VIII, class B felony. At a sentencing hearing, both the defendant and the state called expert witnesses who testified concerning the properties of the substances involved. At the end of the hearing, the state conceded that the substances were methamphetamine hydrochloride. However, the state none

the less argued that RCW 69.50 did not create a dichotomy between in sentencing between methamphetamine base and salt. The trial court disagreed, adopted the defendants' arguments, and sentenced the defendants under the lower level. The state then appealed.

In the Lewis County case, the defendant pled guilty to deliver of methamphetamine and made the same two arguments as did the defendants in the Cowlitz County cases. In that case the state also conceded that the substance involved was methamphetamine salt and the court initially agreed with the defendant's analysis on sentencing. However the court then changed it's mind and sentenced that defendant upon its legal holding that the defendant had committed a level VIII, Class B felony. The defendant then appealed and all three cases were consolidated on appeal.

In addressing these arguments this court reviewed the decision in *State v. Halsten*, 108 Wn.App. 759, 33 P.3d 751 (2001) and adopted the defendants' arguments, thereby affirming the Cowlitz County cases and reversing the Lewis County case. The court held as follows:

In *Halsten*, 108 Wn.App at 762, we held that former RCW 69.50.440 (2000) was 'plain and clear' when it named pseudoephedrine and not pseudoephedrine hydrochloride. Here, the statutory language is similarly plain and clear; the statute names only methamphetamine, not methamphetamine hydrochloride. In certain sections of the Uniform Controlled Substances Act, chapter 69.50 RCW, the legislature specifies that both a drug and its salts are covered. Specifically, the legislature recognizes that methamphetamine exists in different forms. See RCW 69.50.206(d)(2) (schedule II includes methamphetamine, its salts,

isomers, and salts of its isomers). Thus, when the legislature intends for a statute to cover a drug and its salts, it is capable of saying so. The language of former RCW 69.50.401(a)(1)(ii) is therefore unambiguous; its prohibition only covers methamphetamine in its pure form, its base.

Because the legislature did not list methamphetamine's salts, isomers, and salts of its isomers in the prohibition under former RCW 69.50.401(a)(1)(ii), Morris must be sentenced under former RCW 69.50.401(a)(1)(iii). The trial court erred in sentencing Morris under former RCW 69.50.401(a)(1)(ii), and his sentence must be vacated and the matter remanded for resentencing.

As to Blaylock and Johnson, the trial court did not err when it sentenced them under former RCW 69.50.401(a)(1)(iii).

*State v. Morris*, 123 Wn.App. at 424-425 (footnotes omitted).

In the case at bar the substances the defendant delivered and possessed with intent to deliver were methamphetamine hydrochloride. Under former RCW 69.50.401(a)(1) and the decision in *Morris*, the defendant committed two class “C” felonies. The first has the statutory maximum of 5 years in prison; the second has a statutory maximum of 10 years in prison (five years doubled to 10 years by the school zone enhancement). Thus, when the court sentenced the defendant to 120 months in Count I it exceeded the statutory maximum by 5 years. Consequently, the sentence on Count I should be vacated and remanded with instructions to resentence to 60 months.

In addition, in this case the court sentenced the defendant to 9 to 12 months of community custody without stating in the judgment and sentence

that the actual time in custody plus the community custody may not exceed 60 months in Count I and 120 months in Count II. As a careful review of the decision in *State v. Sloan*, 121 Wn.App. 220, 87 P.3d 1214 (2004) explains this was error.

In *State v. Sloan, supra*, the defendant pled guilty to three counts of third degree rape and one count of third degree child molestation. All of the offenses are Class C felonies with a statutory maximum of five years in prison each. The trial court imposed sentences of 60 months in prison plus 36 to 48 months community custody on each count concurrent. The defendant then appealed arguing that the terms of community custody exceeded the statutory maximum on each count. However, citing to its decision in *State v. Vanoli*, 86 Wn.App. 643, 937 P.2d 1166 (1997) the court rejected this argument. In *Vanoli* the court addressed the same argument and noted that given the realities of good time and early release a person sentenced to the statutory maximum confinement would probably be released prior to serving the statutory maximum. Thus, time would still be available within the statutory maximum for serving community custody.

While the court in *Sloan* rejected the defendant's argument that the trial court had exceeded the statutory maximum at sentencing it did not deny the defendant any relief at all. Rather the court recognized that the statutory maximum would be exceeded if a defendant did serve the entire sentence in

custody or if the amount of earned early release was less than the term of community custody. Given this possibility the court remanded the case for the trial court to include specific instructions in the judgment and sentence that the combined term of imprisonment and community custody could not exceed the statutory maximum. The court held:

Sloan argues Vanoli was wrongly decided. She contends an individual who has served the statutory maximum may be nevertheless forced to comply with conditions of community custody, and may be jailed for non-compliance if her community corrections officer fails to appreciate the situation. While we are inclined to give CCOs more credit than this, we recognize that sentences like Vanoli's and Sloan's may generate uncertainty in some circumstances. To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

“Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course.” *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). Accordingly, we remand for clarification of Sloan's judgment and sentence.

*State v. Sloan*, 121 Wn.App. at 223-224.

In the case at bar just as in *Sloan* the trial court imposed incarceration terms at the statutory maximum for both offenses. The court also imposed a term of community custody on each term that could possibly exceed the statutory maximum when combined with the actual term of incarceration the defendant serves. Finally, as in *Sloan*, the court in this case failed to include

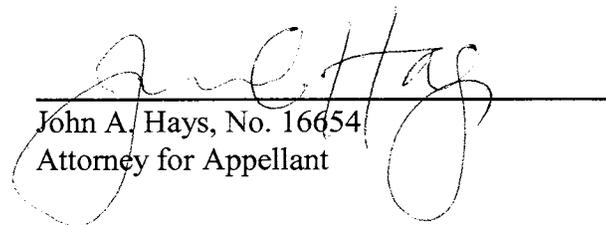
any language in the judgment and sentence that limited the combined actual term of confinement and community custody to the statutory maximum for each offense. As a result, this court should remand this case with instructions that the trial court modify the judgment and sentence to include that language mandated by *Sloan*.

## CONCLUSION

This court should vacate the conviction on Count II because the trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it denied the defendant's motion to sever. In addition this court should vacate the conviction on Count II because the trial court denied the defendant his right to a jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment when it allowed a state's witness to express an opinion on the defendant's guilt. Finally, the sentence in Count I should be vacated and remanded with instructions to sentence the defendant to 60 months. The court should also remand both sentences with instructions to have the trial court note that incarceration and community custody time may not exceed the statutory maximum for each offense.

DATED this 25<sup>th</sup> day of June, 2006.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
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 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**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.

**ER 403**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**ER 404**

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**RCW 9A.20.021**

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

**RCW 69.50.101(d)**

Unless the context clearly requires otherwise, definitions of terms shall be as indicated where used in this chapter:

(a) "Administer" means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(1) a practitioner authorized to prescribe (or, by the practitioner's authorized agent); or

(2) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseperson, or employee of the carrier or warehouseperson.

(c) "Board" means the state board of pharmacy.

(d) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules.

...

**RCW 69.50.206(d)**

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

- (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;
- (2) Methamphetamine, its salts, isomers, and salts of its isomers;
- (3) Phenmetrazine and its salts;
- (4) Methylphenidate.

**RCW 69.50.401(a)**

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty

dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

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COURT OF APPEALS

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BY [Signature]

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

6 STATE OF WASHINGTON, )  
7 Respondent, )  
8 vs. )  
9 JOSEPH ALBERT FULLER, )  
10 Appellant, )

CLARK CO. NO.05-1-00837-7  
APPEAL NO: 33999-4-II  
AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF CLARK ) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 5<sup>TH</sup> day of JUNE, 2006,  
14 affiant deposited into the mails of the United States of America, a properly stamped envelope  
directed to:

15 ARTHUR CURTIS  
16 CLARK COUNTY PROSECUTING ATTORNEY  
17 1200 FRANKLIN ST.  
VANCOUVER, WA 98668

JOE ALBERT FULLER - #727823  
WASH CORRECTION CENTER  
INTENSIVE MGMT UNIT - IMU  
P.O. Box 900  
SHELTON, WA 98584

and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 5TH day of JUNE, 2006.

[Signature]  
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 5th day of JUNE, 2006.



[Signature]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: [Address]  
Commission expires: 10-24-09