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NO. 36379-8-II

STATE OF WASH  
BY

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

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STATE OF WASHINGTON,

Respondent,

v.

CLINTON THORNTON,

Appellant.

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

The Honorable Theodore F. Spearman, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his due process right to present all relevant and admissible evidence in his defense.

2. Appellant was denied his due process right to a jury trial when a police witness gave an opinion as to his guilt.

3. Appellant was denied his due process right to a public trial.

4. Appellant was denied his due process right to an impartial jury.

5. Appellant's trial was irredeemably tainted by cumulative error.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court erroneously exclude appellant's proffered evidence that another person owned the drugs he was accused of possessing, and did this violate appellant's constitutional right to present a defense?

2. Did the court erroneously exclude appellant's evidence of his reputation for not using methamphetamine, and did this violate appellant's constitutional right to present a defense?

3. A police witness opined that it was obvious that appellant possessed the drugs as charged. Did this deny appellant his right to have a jury determine his guilt?

4. The court voir dired a potential juror in private. Did this violate appellant's right to a public trial?

5. Did the court's refusal to quash the panel following irreparable misconduct by two potential jurors violate appellant's right to a fair and impartial jury?

6. Was the trial irredeemably tainted by cumulative evidentiary error?

C. STATEMENT OF THE CASE

Appellant Clinton Thornton and his friends liked to make music together. RP 273. Thornton made a little money as a musician. RP 358. His only criminal history was a ten-year-old juvenile conviction for possession of stolen property. CP 69.

On November 18, 2006, after an evening making music, Joseph Dill drove Thornton and Christopher King home in his car. Dill was driving, King was in the front passenger seat, and Thornton was in the rear. RP 346-47, 311.

At 11:30 p.m., Dill was pulled over for a license plate infraction. He was arrested for third degree driving with license suspended. RP 264-65, 308.

Thornton was told he was free to leave and got out of the car. He was immediately called back when an officer spotted open alcohol

containers in Dill's trash-littered car. RP 309, 348, 351. Rookie police officer David Walker told Thornton to put his hands on the trunk of Dill's car. RP 267, 306. Thornton complained to the officers that the stop was a "scam". RP 269, 288.

Thornton was holding a bottle of cranberry juice, which Walker poured out on the asphalt. Quite a bit of the juice landed on Thornton's shoe and splashed his pants leg. Thornton reacted by shoving Walker and knocking the bottle out of his hand. RP 291-92, 298. Walker handcuffed Thornton and put him in the patrol car. RP 68, 271-72.

Officer Beth Deatherage searched Dill's car and found marijuana paraphernalia under the front passenger seat. In the rear, shoved deep into the crevice between the seat back and bottom where Thornton had been sitting, was an eyeglasses case containing methamphetamine. RP 20, 26, 318-19.

Thornton was charged with third degree assault for shoving Walker and with possession of the methamphetamine in the eyeglasses case. RP 74. Thornton denied all knowledge of the eyeglasses case or any drugs or paraphernalia in the car. RP 67, 358.

On December 25, 2006, Dill was pulled over again. Thornton was in the front seat. RP 23. This time, Dill had methamphetamine in his

pocket. RP 25. And a marijuana pipe was shoved into the back seat where Thornton had been sitting a month earlier. RP 19.

Thornton was tried by jury. His defense to the assault was lack of intent. RP 447. As to the methamphetamine possession charge, Thornton denied having dominion and control over the eyeglasses case, and to the extent he had possession, he claimed it was unwitting. RP 225, 250, 456.

Thornton proffered two pieces of evidence in support of his unwitting possession defense. First, Thornton repeatedly sought to introduce evidence that drug paraphernalia unrelated to the incident resulting in the charges was found in the back seat of Dill's car a month later when Dill was arrested for possession of methamphetamine. RP 19, 38, 50, 55-58, 383, 408. Second, Thornton sought to introduce evidence of his reputation for not being a methamphetamine user. RP 250. The court excluded both.

The jury convicted Thornton as charged. CP 60. He received a standard range sentence. CP 70. He appeals. CP 79.

D. ARGUMENT

1. THE TRIAL COURT'S EXCLUSION OF 'OTHER SUSPECT' EVIDENCE DENIED THORNTON HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

To support the unwitting possession defense, the defense sought to introduce evidence of the stop of Dill a few weeks after Thornton's arrest and that during that subsequent stop methamphetamine was found in Dill's pocket and a marijuana pipe was found in the same area where the eyeglasses case was found during Thornton's arrest. The trial court erroneously excluded this evidence thereby denied Thornton his right to present a defense.

Criminal defendants have a constitutional right to present all relevant, admissible evidence in their defense. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018, cert. denied, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993). "Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely." ER 401; State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854 (1995). All relevant evidence is admissible unless its probative value is outweighed by potential prejudice or it is likely to confuse the issues, mislead the jury, cause undue delay, or is unnecessarily cumulative. ER 403.

Evidence connecting another person with the crime charged is both relevant and admissible if it establishes a train of facts or circumstances clearly pointing to someone other than the defendant as the guilty party. State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996). The evidence must create a nexus between the other suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031, 877 P.2d 694 (1994).

The defendant has the burden of showing the “other suspect” evidence is relevant and admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986), superseded by rule on other grounds in State v. George, 160 Wn.2d 727, 158 P.3d 1169 (2007). The trial court’s factual determination underlying its nexus ruling is reviewed for abuse of discretion. State v. Howard, 127 Wn. App. 862, 866, 113 P.3d 511 (2005); City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). But whether excluding the evidence was a due process violation is a constitutional question. Clark, 78 Wn. App. at 477; Rehak, 67 Wn. App. at 834. The ultimate resolution of constitutional questions is reviewed de novo. State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994).

Because the Sixth and Fourteenth Amendments guarantee “a meaningful opportunity to present a complete defense,” a ruling that excludes relevant defense evidence must serve some legitimate state

interest. Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006).

These principles apply to evidence proffered by a criminal defendant to show that someone else committed the crime, so long as the proffered evidence sufficiently connects the other person to the crime, is not speculative or remote, and tends to prove or disprove a material fact at issue. Holmes, 126 S. Ct. at 1733. This rule has wide acceptance. Id.

In Washington, a defendant may introduce evidence connecting another person with the crime charged so long as a proper foundation is laid. Rehak, 67 Wn. App. at 162, citing Taylor v. Illinois, 484 U.S. 400, 404-10, 108 S. Ct. 646, 651-53, 98 L. Ed. 2d 798 (1988). A proper foundation is “a train of facts or circumstances” that clearly tends to point to someone besides the defendant as the guilty party. Rehak, 67 Wn. App. at 162. For example, the mere presence of the other person in the city at the time of the crime would be insufficient. State v. Downs, 168 Wash. 664, 667-68, 13 P.2d 1 (1932). Merely showing that another person had a motive is also insufficient. State v. Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (1986).

The trial court referred to a law review article on the subject of the probative value of ‘other suspect’ evidence.<sup>1</sup> RP 55. This study of the case law nation-wide found six varieties of admissible other suspect evidence: evidence showing that another person had (1) *opportunity*, (2) *motive*; and (3) the *propensity* to commit the crime; evidence that the other person (4) bore a close physical resemblance to the defendant; (5) *physical evidence* connecting the other person with the crime and (6) *subsequent conduct* by the other person. The cases reviewed in the article are fact-specific, and the study found no systematic analysis and no “landmark” cases. 63 Tenn. L. Rev. at 939. However, in most of the cases analyzed, the defendant offered two or three of the six varieties of evidence. *Id.* In only two out of the 240 cases studied did the evidence fit four varieties. *Id.*

Thornton’s proffered evidence fits five of the six: *opportunity* – it was Dill’s car; *motive* – Dill needed a place to hide his methamphetamine; *propensity* – Dill had methamphetamine in his pocket; *physical evidence* – drug paraphernalia in the same place; and *subsequent conduct* – Dill was arrested for methamphetamine possession and contraband was discovered in the same hiding place. The only factor that does not apply is physical resemblance between Dill and Thornton, which is not relevant.

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<sup>1</sup> David McCord, BUT PERRY MASON MADE IT LOOK SO EASY!: THE ADMISSIBILITY OF EVIDENCE OFFERED BY A CRIMINAL DEFENDANT TO SUGGEST THAT SOMEONE ELSE IS GUILTY, 63 Tenn. L. Rev. 917 (1996).

In United States v. Morgan, 581 F.2d 933 (C.A.D.C., 1978),<sup>2</sup> the court reversed a conviction on facts similar to those in Thornton's case. Morgan was convicted on circumstantial evidence of possessing phenmetrazine with intent to distribute. 581 F.2d at 934. The trial court excluded evidence of actual sales of phenmetrazine by another person from the same house. Id. at 935-36. The reviewing court held this evidence was "decidedly relevant." Id. at 936. Had the jury believed the other person was dealing from the residence, it might have found the other person exercised dominion and control over seventy-seven pills in the basement upon which the intent to distribute charge was based. Id. There was no hard evidence against Morgan of intent to distribute; the jury was asked to rely "solely on speculative inferences." Id. The court concluded the jury might not have drawn those inferences if the 'other suspect' evidence had been before it. Under the circumstances, the court found no basis to exclude evidence of actual sales by another person on grounds of relevancy. Morgan, 581 F.2d at 936-937.

The facts of Thornton are like those of Morgan. The evidence against Thornton was entirely speculative. If the jury had known Dill was arrested with methamphetamine in his pocket and other drug paraphernalia hidden in the same seat, it might not have drawn the inference that

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<sup>2</sup> Cited in 63 Tenn. L. Rev. 917, 941 at FN 113.

Thornton must have exercised dominion and control over the eyeglasses case merely because he happened to sit in that seat.

By contrast, in Holmes, strong forensic evidence implicated the defendant in the rape and robbery of an 86-year-old woman in her home. His palm print was found above the door knob inside the front door of the victim's house; fibers consistent with his sweatshirt were on the victim's bed sheets and nightgown, and DNA to a 99.99% probability from the victim was on the defendant's underwear and tank top. Holmes, 126 S. Ct. at 1730. Holmes's 'other suspect' evidence was that another man was in the victim's neighborhood on the morning of the assault and had either acknowledged Holmes's innocence or admitted guilt himself. Because of the strong physical evidence, the court did not err in excluding this evidence. Holmes, 126 S. Ct. at 1730.

Thornton's trial court failed to recognize the distinction between the facts of Holmes and those in this case, and erroneously relied on Holmes to exclude Thornton's 'other suspect' evidence. RP 29. There was no forensic evidence against Thornton; the State's evidence was entirely circumstantial.<sup>3</sup> Thornton's other suspect evidence was not weak

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<sup>3</sup> Moreover, the police witnesses' testimony did not inspire confidence. Walker said Deatherage searched the whole car while he held the flashlight and evidence bags. RP 294. Deatherage said she and Walker

or speculative; it established a clear train of facts pointing to Dill as the true owner of the methamphetamine used to charge Thornton. By analogy with Morgan, when drugs are found hidden in the seat of a man's car, the fact that the same man was arrested a few weeks later with drug paraphernalia in the same hiding place is "decidedly relevant". Morgan, 581 F.2d at 936.

When evaluating the probative value of 'other suspect' evidence, the critical inquiry is the strength of the State's case: if the State's evidence against the defendant is strong enough, evidence of third-party guilt is properly excluded because its logical connection to the central issues will be weak. Holmes, 126 S. Ct. at 1734. But if the State's evidence is circumstantial, the defendant may introduce his own circumstantial evidence to show someone else committed the offense. Downs, 168 Wash. at 666.

The judge erroneously characterized Thornton's proposed evidence as a 'reverse 404(b) argument' that would only confuse the jury. RP 56. The court opined that the only issue was whether Thornton had dominion and control over the eyeglasses case, so showing Dill owned it was not relevant because Dill and Thornton both could have had dominion and

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split the search; she did the passenger side, Walker did the driver's side. RP 314.

control. RP 56-57. Therefore, the court excluded evidence of Dill's subsequent arrest. RP 58.

But the evidence Thornton sought to introduce was not character evidence. That Dill was arrested for possession of methamphetamine and had drug paraphernalia secreted in the same place in his car where police found the drugs used to charge Thornton were objective, verifiable facts. The evidence was not offered to prove Dill's character, but as factual support for Thornton's general denial defense and his alternative affirmative defense of unwitting possession.

Any evidence that tends to prove an affirmative defense is relevant. Kennewick, 142 Wn.2d at 10. Unwitting possession is an affirmative defense. Kennewick, 142 Wn.2d at 11. An affirmative defense need only be proved by a preponderance of the evidence. Kennewick, 142 Wn.2d at 11, citing State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

Excluding this evidence was constitutional error that is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985).

The error cannot be deemed harmless under any standard because, had the jury been allowed to consider all of Thornton's evidence, there is a high probability it would have found reasonable doubt that Thornton

possessed the methamphetamine or, in the alternative, found he had met his burden to prove unwitting possession.

2. THE TRIAL COURT'S EXCLUSION OF THORNTON'S REPUTATION EVIDENCE VIOLATED THORNTON'S RIGHT TO PRESENT A DEFENSE.

The court excluded evidence of Thornton's reputation of not being a methamphetamine user. RP 250. This was error because this evidence was relevant to Thornton's unwitting possession defense.

Defense counsel cited City of Kennewick v. Day, supra, for authority that reputation evidence is admissible when an unwitting possession defense is asserted. RP 250. The State distinguished Kennewick, arguing 'intent to use' was an essential element in that case, but not in Thornton's because he was charged with simple possession with no intent element. RP 252. The court agreed with the State's reading of Kennewick and excluded the evidence. RP 253.

The court misread Kennewick as holding character evidence is only relevant to crimes with an intent element. RP 253. Kennewick unambiguously holds that character evidence is admissible to prove the defense of unwitting possession, because possession is essentially a strict liability offense, and character evidence has historically been admissible in defense of strict liability offenses. Kennewick, 142 Wn.2d at 10-11.

Thornton insisted all along he knew nothing about any drugs. RP 67-68. He had the right to offer reputation evidence, which if believed, tended to make it more likely his claim of unwitting possession was true.

3. OFFICER DEATHERAGE'S OPINION OF GUILT VIOLATED THORNTON'S RIGHT TO A JURY TRIAL.

Officer Deatherage searched the back seat incident to Thornton's arrest. She pulled apart the crevice between the seat and the back. RP 330-31. No finger prints were lifted from any of the evidence taken from the car. RP 300. Deatherage explained that she did not bother looking for prints, in part because "the location where the narcotics were found, in my opinion, it was pretty obvious who owned them." RP 335. In other words, the mere fact of Thornton's proximity to the drugs was such conclusive proof of his guilt she deemed it unnecessary to collect additional evidence.

There was no defense objection to this testimony. However, it is manifest constitutional error for the jury to hear testimony that constitutes an opinion of the defendant's guilt. State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). As such, testimony concerning an opinion on guilt may be raised for the first time on appeal. State v. Dolan, 118 Wn. App. 323, 330, 73 P.3d 1011 (2003); Demery, 144 Wn.2d at 759; RAP 2.5(a)(3).

An opinion of guilt is impermissible, whether made by direct statement or by inference. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Such testimony invades “the exclusive province of the finder of fact.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). It is unfairly prejudicial. Demery, 144 Wn.2d at 759. The question of the defendant’s guilt is “not the proper subject of either lay or expert opinion.” Garrison, 71 Wn.2d at 315. A narrow exception is made for a witness who cannot give a clear account of the facts without including some degree of opinion or conclusion. State v. Chemeres, 20 Wn.2d 712, 147 P.2d 815, 150 P.2d 1012 (1944).

This Court recognizes that an opinion of guilt expressed by a police officer is particularly likely to influence the jury and thus violates the defendant’s constitutional right to a jury trial. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003), citing Demery, 144 Wn.2d at 759.

Here, Deatherage expressed her opinion that it was obvious Thornton owned the drugs. This added nothing to her factual testimony about the search. The question of who owned the eyeglasses case in Dill’s car seat was solely for the jury. By telling the jury it was obvious who owned the narcotics, Deatherage violated Thornton’s constitutional right to have his guilt determined by a jury.

4. THE COURT VIOLATED THORNTON'S RIGHT TO A PUBLIC TRIAL.

During a recess, the court accommodated a request by a juror for a private voir dire. Juror 36 had "a private matter" concerning her son's imprisonment that she wanted "to discuss in private." RP 105. She did not want to face this question in public, "in front of the room." RP 106. The prosecutor anticipated the private voir dire would result in excusing Juror 36 for cause. Defense counsel did not object. RP 105. The record includes no mention of a public trial waiver by the defendant, and the judge did not balance the juror's need for privacy against the rights of Thornton and the public to a public trial. After a brief hearing with the judge and both counsel present, Juror 36 was excused for cause. RP 105, 112.

A person accused of crime has a constitutional right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). This includes the right to have all jury voir dire conducted in public. In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2005); Bone-Club, 128 Wn.2d at 259. An accused may waive this fundamental trial right to have jurors examined in public, but only by an affirmative act that is knowing, intelligent,

voluntary, and on the record. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994).

Without a valid waiver, the court may not close any part of any juror voir dire without considering the following criteria: a compelling interest in privacy; the opportunity for objections; the weight of the alleged privacy interest versus public trial interests; and whether closing the proceedings is the least restrictive means available. Orange, 152 Wn.2d at 801-02, 804-07; Bone-Club, 128 Wn.2d at 256-59. Consideration of these factors is essential to protect both the defendant's public trial right and the public's constitutional right to open proceedings. Bone-Club, 128 Wn.2d at 258-59; Orange, 152 Wn.2d at 804-05. The court must therefore address them on the record before holding juror voir dire proceedings in private. Bone-Club, 128 Wn.2d at 260-61; Orange, 152 Wn.2d at 811-12. Failure to address the Bone-Club factors on the record is an error of constitutional magnitude that can be raised for the first time on appeal. Bone-Club, 128 Wn.2d at 257; State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Review is de novo. State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

This error is not subject to harmless error analysis. Bone-Club, 128 Wn.2d at 261-62; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Prejudice is presumed. Bone-Club, 128

Wn.2d at 261-62; Orange, 152 Wn.2d at 812. The only appropriate remedy is to reverse and remand for a new trial. Brightman, 155 Wn.2d at 518; State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

Interviewing Juror 36 in private without a public trial waiver and without addressing the Bone-Club factors on the record denied Thornton his right to a public trial and requires reversal of his conviction. Bone-Club, 128 Wn.2d at 259.

5. THORNTON WAS DENIED A FAIR AND IMPARTIAL JURY.

During jury selection, Juror No. 3 commented that appearance is an important factor in judging credibility. He was not sure he could be impartial. He stated “[Thornton] looks like he does it all the time.” RP 215. “And that’s strictly appearance.” RP 216. “And I have seen it. And I see what it does to families.” RP 216.

In an attempt to rehabilitate the jury panel, defense counsel asked whether any jurors had looked at Thornton that day and wondered what he did. RP 216. Juror No. 24 then announced: “I know exactly what he did. I know exactly what he does. I mean, I’m sorry but you’ve got it written all over your face. And all I can say to you is I will pray for you, my friend... .” RP 216. The court excused Jurors 3 and 24 for cause. RP 223.

Defense counsel felt that a mistrial was appropriate because the two jurors had “said specifically that they think Mr. Thornton uses methamphetamine.” RP 221. Counsel doubted her attempt to rehabilitate the panel succeeded. She believed all the prospective jurors were now speculating that Thornton was a methamphetamine addict. “I have Mr. Thornton crying at counsel table. I want to start over.” RP 221-22. Counsel argued, “we have a jury pool who’s going to use this information and make an assumption on this information, even if you give them a limiting instruction in this case.” RP 225. Counsel had observed some head-nodding and other reactions from other jurors on the panel. She wanted to strike the whole panel for cause. RP 227. Counsel argued this misconduct was especially prejudicial because it eviscerated Thornton’s unwitting possession defense. RP 225.

The court gave counsel 20 minutes to research the issue and a couple of minutes to argue it. The court was inclined to give the jury a curative instruction. RP 222-23. The judge wanted to finish jury selection that day and start trial the next day. RP 235.

The State argued the problem could be cured by excusing the individual jurors, because the situation was analogous to saying all cops are rotten or making an ethnic remark. By contrast, the State conceded opinions based on personal knowledge of Thornton rather than

methamphetamine users in general would be harder to cure. RP 226. Defense counsel repeated her request to strike the entire panel for cause and start over. RP 229.

The court ruled a curative instruction would suffice. RP 228. The judge then instructed the jury that appearances are deceptive and a particular appearance could result from numerous medical causes, such as nutrition. He instructed the jurors to put the comments out of their minds because the opinions were “baseless under the law and the rules of evidence.” He asked for a show of hands from jurors who felt the stricken jurors’ opinions would creep into their decision-making. RP 231-32. Seeing no hands, the court proceeded with jury selection. However, the prosecutor observed that the curative instruction was confusing because the jury would be instructed that appearance is a legitimate factor to consider in reaching the truth. RP 229.

The trial court has considerable latitude in ruling on the limits and extent of jury voir dire. State v. Robinson, 75 Wn.2d 230, 232, 450 P.2d 180 (1969); State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953). And granting or denying a mistrial based on alleged jury misconduct is a discretionary function of the trial court. State v. Kerr, 14 Wn. App. 584, 591, 544 P.2d 38 (1975). The court’s ruling will not be disturbed unless it clearly appears the court abused its discretion. Kerr, 14 Wn. App. at 591.

A juror holding certain preconceptions is not disqualified if he can put these ideas aside and decide the case on the basis of the evidence and the law as instructed by the court. Kerr, 14 Wn. App. at 591, citing State v. White, 60 Wn.2d 551, 374 P.2d 942 (1962). But if a juror reveals a private opinion or impression as to the likely outcome – even one formed during the trial and based on the evidence – this may constitute misconduct sufficient to justify a new trial if the misconduct prejudiced the outcome of the trial. State v. Hatley, 41 Wn. App. 789, 795, 706 P.2d 1083 (1985). And, if a single person serves on a jury who would certainly have been excused for cause or peremptorily challenged if a certain question had been answered truthfully on voir dire, it is an abuse of discretion not to grant a new trial. Smith v. Kent, 11 Wn. App. 439, 445-46, 523 P.2d 446 (1974).

In Kerr, for example, a prospective juror jokingly remarked “here comes the enemy” as defense counsel entered the courtroom prior to voir dire. The remark came to light after the jury was sworn. The court did not err in denying a mistrial because this juror had made jokes throughout the voir dire. Kerr, 14 Wn. App. at 591.

Here, all the jurors heard the impermissible opinions. And, contrary to the prosecutor’s assertion, the improper remarks were not

general statements of bias. Rather, they were specific to Thornton and were based on the jurors' alleged personal experience and knowledge.

The jurors' remarks are comparable to inflammatory pretrial publicity. When the entire jury panel is exposed to pretrial statements that proof of the defendant's guilt is written all over his face and the best that can be done is to pray for him, a defense motion to strike the panel and start over is analogous to a motion for a change of venue.

A trial court's decision to grant or deny a motion for a change of venue based on adverse pretrial publicity is reviewed for abuse of discretion. State v. Jackson, 150 Wn.2d 251, 269, 76 P.3d 217 (2003). The factors applied in determining whether the trial court abused its discretion are: (1) the degree to which the publicity was inflammatory; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time between the dissemination of the publicity and the trial; (4) the care exercised and the difficulty encountered in the selecting an impartial jury; (5) the familiarity of the prospective jurors with the publicity and the resulting effect upon them; (6) the challenges exercised by the defendant, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn. Jackson, 150 Wn.2d t 269-70, citing State v.

Crudup, 11 Wn. App. 583, 524 P.2d 479 (1974). Previous cases applying these factors may be helpful, but are not dispositive because each case is factually unique. Jackson, 150 Wn.2d at 270.

Substituting the offending jurors' statements for pretrial publicity here, eight of the nine Crudup factors support granting the defense motion to strike the panel. Only one does not apply; factor (7) – no government official was involved.

(1) The statements could not have been more inflammatory. (2) They were 'circulated' throughout the jury pool. (3) No time elapsed; the statements were made during jury selection. (4) It was impossible, not merely difficult, to select even a single juror who had not been immediately and directly impacted by the statements. By contrast, striking the panel was a simple and elegant way to ensure an uncontaminated jury. (5) Every prospective juror was familiar with the inflammatory comments. (6) Defense counsel's repeated motions to strike the panel constituted a vigorous challenge to every potential juror. (8) The charge was serious. Possession of methamphetamine is a felony, conviction of which results in the loss of liberty and reputation. (9) The jury panel was the 'area' from which the jurors were drawn.

Supporting the trial court's ruling, by contrast, are only two partial Crudup factors. (4) The court exercised care in selecting an impartial jury

by (a) asking any juror who thought he or she could not be impartial to raise their hand, and (b) attempting to craft a curative instruction. And (5) all the potential jurors passively denied the offending statements had affected them by sitting on their hands in response to the court's group question. RP 230-32.

The show of hands is unconvincing. It would take a juror of exceptional fortitude to risk group disapprobation by raising a lonely hand, allying himself with the two who had just been ignominiously excused, and admitting any possibility that his presumption of Thornton's innocence had been strained or diminished. But it defies probability that not a single member of the jury panel doubted he or she could thenceforth look at Thornton's face and continue to see an innocent man until the State proved him guilty.

As to the instruction, the court did not say Thornton does not, in fact, look like a methamphetamine addict – only that such an appearance can have other causes. Moreover, the prosecutor correctly observed that the instruction would confuse the jury, who would be instructed that appearance and demeanor *are* legitimate factors to consider in reaching a verdict. CP 41.

Under the particular facts of this case, the court abused its discretion by elevating the desirability of avoiding delay over Thornton's

right to a fair trial. The court minimized the negative impact of the misconduct, overlooked well-established principles of group dynamics in relying on a show of hands to discover resulting bias, and overestimated the effectiveness of its curative instruction.

6. THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS DENIED THORNTON A FAIR TRIAL.

Cumulative error may warrant reversal even if the Court finds each error standing alone does not. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, the central question facing the jury was whether to believe Thornton's claim that he did not know drugs were concealed in his seat when he accepted a ride from a fellow musician. Every juror heard two people proclaim Thornton had methamphetamine user written on his face. They were not told the owner of the car was arrested a month later with methamphetamine in his pocket and drug paraphernalia hidden in the very same car seat. They did not hear that Thornton was reputed not to be a methamphetamine user. They did hear a police officer testify that a complete crime scene investigation was unnecessary because it was so obvious Thornton owned the methamphetamine in the eyeglasses case. And one potential juror was dismissed for cause after a private voir dire. These were all errors.

Assuming, arguendo, that none of these errors standing alone warrants reversal, their cumulative impact resulted in an unfair trial. This court should therefore reverse and remand for new trial.

C. CONCLUSION

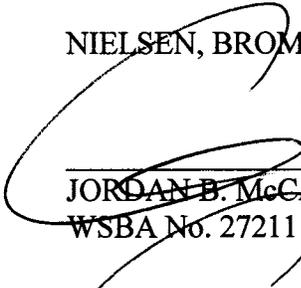
For the reasons stated, this court should reverse Thornton's convictions and remand for a new trial.

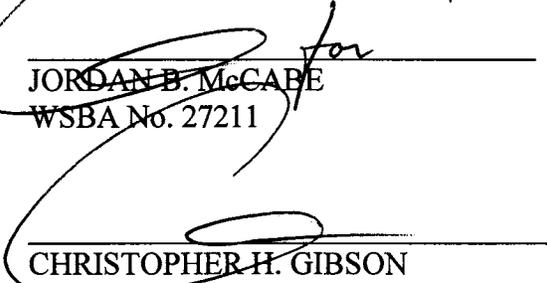
DATED this 3<sup>rd</sup> day of January, 2008.

Respectfully submitted,

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

STATE OF WASHINGTON )

Respondent, )

vs. )

CLINTON THORNTON, )

Appellant. )

COA NO. 36379-8-II

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
[Signature]

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF JANUARY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] RUSSELL HAUGE  
KITSAP COUNTY PROSECUTOR'S OFFICE  
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PORT ORCHARD, WA 98366-4681
  
- [X] CLINTON THORNTON  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF JANUARY 2008.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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