

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 36456-5-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ROY DEAN KNUTSON,**

**Appellant.**

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**BRIEF OF APPELLANT**

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 **ORIGINAL**

**TABLE OF CONTENTS**

Page

A. TABLE OF AUTHORITIES ..... iv

B. ASSIGNMENT OF ERROR

    1. Assignment of Error ..... 1

    2. Issue Pertaining to Assignment of Error ..... 2

C. STATEMENT OF THE CASE

    1. Factual History ..... 3

    2. Procedural History ..... 5

D. ARGUMENT

**I. THE TRIAL COURT VIOLATED THE DEFENDANT’S  
RIGHT TO SILENCE UNDER WASHINGTON  
CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES  
CONSTITUTION, FIFTH AMENDMENT WHEN IT  
ADMITTED STATEMENTS THE DEFENDANT MADE  
DURING CUSTODIAL INTERROGATION WITHOUT  
PROOF THAT THE POLICE HAD PROPERLY INFORMED  
THE DEFENDANT OF HIS MIRANDA RIGHTS ..... 9**

**II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN  
THE STATE ELICITED EVIDENCE OF THE  
DEFENDANT’S ARREST AND OTHER BAD ACTS  
VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE  
ASSISTANCE OF COUNSEL UNDER WASHINGTON  
CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES  
CONSTITUTION, SIXTH AMENDMENT ..... 13**

<b>III. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE .....</b>	<b>29</b>
E. CONCLUSION .....	35
F. APPENDIX	
1. Washington Constitution, Article 1, § 3 .....	36
2. Washington Constitution, Article 1, § 9 .....	36
3. Washington Constitution, Article 1, § 22 .....	36
4. United States Constitution, Fifth Amendment .....	37
5. United States Constitution, Sixth Amendment .....	37
6. United States Constitution, Fourteenth Amendment .....	37
7. CrR 3.5 .....	38

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*Bruton v. United States*,  
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) ..... 21

*Church v. Kinchelse*,  
767 F.2d 639 (9th Cir. 1985) ..... 14

*In re Winship*,  
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 29, 30

*Jackson v. Virginia*,  
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... 31

*Miranda v. Arizona*,  
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ..... 9, 11, 12

*Rhode Island v. Innis*,  
446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ..... 10, 11

*Strickland v. Washington*,  
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) ..... 13, 14

*State Cases*

*Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936) ..... 17

*State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004) ..... 26, 27

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996) ..... 30

*State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983) ..... 29

*State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001) ..... 25

*State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) ..... 19

*State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) ..... 9

*State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985) ..... 18-20

*State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956) ..... 15

*State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) ..... 14

*State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990) ..... 15, 16

*State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991) ..... 9, 10

*State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) ..... 27

*State v. G.M.V.*, 135 Wn.App. 336, 144 P.3d 358 (2006) ..... 33

*State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967) ..... 14

*State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983) ..... 10

*State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974) ..... 30

*State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) ..... 14

*State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) ..... 25

*State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972) ..... 30

*State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001) ..... 26

*State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001) ..... 23, 24

*State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984) ..... 15

*State v. Richmond*, 65 Wn.App. 541, 828 P.2d 1180 (1992) ..... 10

*State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963) ..... 22

*State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) ..... 30

*State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950) ..... 16, 18

<i>State. v. Mace</i> , 97 Wn.2d 840, 650 P.2d 217 (1982) .....	31, 32
<i>Warren v. Hart</i> , 71 Wn.2d 512, 429 P.2d 873 (1967) .....	20

***Constitutional Provisions***

Washington Constitution, Article 1, § 3 .....	29
Washington Constitution, Article 1, § 9 .....	9
Washington Constitution, Article 1, § 21 .....	14
Washington Constitution, Article 1, § 22 .....	13, 29
United States Constitution, Fifth Amendment .....	9
United States Constitution, Fourteenth Amendment .....	29
United States Constitution, Sixth Amendment .....	13, 14

***Statutes and Court Rules***

CrR 3.5 .....	11
ER 403 .....	24-26
ER 404 .....	22, 28
ER 609 .....	28
RCW 69.50.4013 .....	32

***Other Authorities***

5 Karl B. Tegland, <i>Washington Practice, Evidence</i> § 114, at 383 (3d ed. 1989) .....	22, 23
M. Graham, <i>Federal Evidence</i> , § 403.1, at 180-81 (2d ed. 1986) .....	25

## ***ASSIGNMENT OF ERROR***

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

1. The trial court violated the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment when it admitted statements the defendant made during custodial interrogation without proof that the police had properly informed the defendant of his *Miranda* rights. RP 53-71, 118, 124.

2. Trial counsel's failure to object when the state elicited evidence of the defendant's arrest and other bad acts violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. RP 82, 113-115.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for an offense unsupported by substantial evidence. RP 53-124.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment if it admits statements the defendant made during custodial interrogation without proof that the police had properly informed the defendant of his right to silence?

2. Does an attorney's failure to object when the state elicits unfairly prejudicial evidence of the defendant's arrest and other bad acts violate the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the jury would have acquitted the defendant but for the admission of the improper evidence?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction for an offense unsupported by substantial evidence?

## STATEMENT OF THE CASE

### *Factual History*

On March 24, 2007, at about 7:00 pm, Castle Rock Police Officer Jeffrey Gann was on routine patrol in a marked police car when he saw the defendant Roy Knutson driving a 1980 Oldsmobile Cutlass with a male in the front seat passenger. RP 74-79. Upon seeing the vehicle, Officer Gann ran the license plates. *Id.* Within a short period of time, dispatch informed Officer Gann that Jennie Harvill and Roy Knutson were the registered owners of the vehicle and Roy Knutson did not have a current driver's license. RP 95-96. After receiving this information, Officer Gann turned on his overhead lights. RP 79-82. The defendant immediately pulled his vehicle to the side of the road. RP 90-95. At no point during his entire contact with the defendant or the defendant's passenger did Officer Gann note any furtive movements. RP 94-95. In fact, the defendant was compliant and cooperative the entire time. *Id.*

After walking up to the vehicle, Officer Gann requested the defendant's license. RP 79-81. When the defendant could only produce a Washington Identification card, Officer Gann ordered the defendant out of the vehicle, put him under arrest, handcuffed him, searched his person, and placed him in the back of the patrol vehicle. RP 82-87. At about the time Officer Gann placed the defendant under arrest, Castle Rock Officer Brandon

McNew arrived as a backup officer and observed everything that happened. RP 100, 109-112. Officer Gann did not find any item of evidentiary value when he searched the defendant. RP 82, 98-99. Neither did he inform the defendant of his *Miranda* rights. RP 54-55.

After Officer Gann placed the defendant into his patrol car, he returned to the defendant's car, ordered the passenger out, and performed a search. RP 82-87. As the officer opened the driver's door, he saw and seized a small (about 1½ inch square) baggie with a small amount of white crystalline substance in it sitting on the floor between the front driver's seat and the door. *Id.* The remainder of the search did not uncover any type of drug paraphernalia, matches, lighters, pipes, or any other item of evidentiary value. RP 98-99.

When Officer McNew saw Officer Gann uncover the small baggie, he went to talk with the defendant. RP 115-117. Prior to asking the defendant any questions, he read the defendant his *Miranda* warnings from a card he keeps in his pocket for that purpose. *Id.* After reading these warnings, he told the defendant that Officer Gann had found a baggie of what looked like methamphetamine during his search of the vehicle. *Id.* The defendant stated that he did not know it was in the car. According to Officer McNew, the defendant then stated: "If I had known it was there, I'd have smoked it already." RP 118, 124.

### ***Procedural History***

By information filed March 28, 2001, the Cowlitz County Prosecutor charged the defendant Roy Dean Knutson with one count of possession of methamphetamine. CP 1-2. Just prior to trial, the court held CrR 3.5 hearing to determine the admissibility of the defendant's alleged statements to the police. RP 53-71. The state's first witness at this hearing was Officer Gann, who testified concerning the facts surrounding his arrest of the defendant. RP 53-56. During this testimony, he admitted that he had never informed the defendant of his *Miranda* rights. RP 54-55.

Following Officer Gann's testimony, the state called Officer McNew. RP 57-69. In his testimony, Officer McNew stated that after he saw Officer Gann find the baggie of suspected methamphetamine in the defendant's car, he went over to Officer Gann's patrol vehicle and read the defendant his *Miranda* rights from a card he keeps in his uniform pocket. RP 59. However, during the CrR 3.5 hearing, Officer McNew admitted that he did not have the card with him in court. *Id.* He did have a "similar" card with him, which he read into the record over defense objection. RP 59-60. When confronted by defense counsel on cross-examination and asked to admit that he could not tell the court the differences between the *Miranda* card he read to the defendant and the one he had in court, Officer McNew stated: "I cannot tell you the exact differences, that's correct." RP 65. In spite of this

testimony, the court ruled that the defendant had been properly advised of his *Miranda* rights and that his statements were admissible at trial. RP 70-71.

After the CrR 3.5 hearing, the parties began the trial, which was heard before a jury. RP 73-189. In its case-in-chief the state called Officers Gann and McNew, who testified to the facts outlined in the preceding *Factual History*. *Id.* The state also called a forensic scientist, who testified that the baggie Officer Gann found in the defendant's car contained about one-fiftieth of a gram of methamphetamine. RP 125-138.

During the officer's testimony, they both repeatedly mentioned that Officer Gann had arrested the defendant for driving while suspended, placed him in handcuffs, searched him, and put him in the back of one of the patrol vehicles. RP 75-79, 82, 113-115. The state never did explain why any of these facts were relevant to the determination whether or not the defendant possessed the methamphetamine Officer Gann found in the car, and the defense raised no objection to this evidence. *Id.* In addition, during trial, the state also twice elicited the fact from Officer McNew that the defendant had stated that had he known the methamphetamine was in his car he would have smoked it. RP 118, 124. The defense made no objection to this evidence. *Id.*

Following the close of the state's case, the defense rested without calling any witnesses. RP 140-143. The court then instructed the jury with

the defense lodging no objections or exceptions to those instructions. RP 143, 143-153. Instruction number 9, proposed by the defense, stated as follows:

Whether a person has dominion and control, and thus constructive possession, is determined by resort to factual determinations. Although exclusive control is not necessary to establish constructive possession, a showing of more than that mere proximity to the drugs is required.

CP 24.

Twice during closing argument, and once during rebuttal, the state argued that the defendant's statement to Officer McNew that he would have smoked the methamphetamine if he had known it was present was evidence that the defendant possessed the methamphetamine Officer Gann found. RP 157, 189. During closing argument, the defense argued that the lack of any type of drug paraphernalia on the defendant's person or in the vehicle supported the defense contention that the defendant did not know the methamphetamine was in his car and did not possess it. RP 160-181.

The jury retired for deliberation at 4:45 pm. RP 189. A little over two hours later, at 6:47 pm, the jury sent out the following question:

Requesting further explanation of Instruction #9

We request further explanation and/or examples of how this instruction is to be applied. More specifically, expand on the statement, "Showing of more than that mere proximity to the drugs is required."

CP 30.

The court responded: “I cannot give you any further instructions in this regard. Please reread the entire instructions.” CP 30.

At 8:44 pm, after about two more hours of deliberation, the jury returned a verdict of guilty. RP 189, CP 31. The court later sentenced the defendant within the standard range, and the defendant filed timely notice of appeal. CP 23, 33-44, 45.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT WHEN IT ADMITTED STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION WITHOUT PROOF THAT THE POLICE HAD PROPERLY INFORMED THE DEFENDANT OF HIS MIRANDA RIGHTS.**

The United States Constitution, Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” Similarly, Washington Constitution, Article 1, § 9 states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In order to effectuate this right, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questioning the police informed the defendant that: “(1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the

burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls, supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogation." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

In *Rhode Island v. Innis, supra*, the court explained the following concerning the definition of the term "interrogation":

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than

those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

*Rhode Island v. Innis*, 446 U.S. at 300-302 (footnotes omitted).

In the case at bar, Officer Gann testified at the CrR 3.5 hearing that he ordered the defendant out of his vehicle, told him he was under arrest for driving while suspended, handcuffed him, searched him, placed him in the back of his patrol vehicle, and then returned to the defendant's vehicle to perform a "search incident to arrest." Under these circumstances there should be no question that following the exchange the defendant was "under arrest" and "in custody" for the purpose of determining the application of *Miranda v. Arizona*. In addition, Officer McNew testified that when Officer Gann found the suspected methamphetamine, Officer McNew went to the back of Officer Gann's patrol vehicle to question the defendant about it. Thus, when Officer McNew approached the defendant, his purpose was to "interrogate" the defendant. Consequently, the facts show that at the time the defendant

made his statement, he was being subjected to “custodial interrogation” requiring the officers to first read the defendant his right under *Miranda v. Arizona*.

In fact, Officer McNew also understood this to be the case because before he began interrogating the defendant he read the defendant what the Officer believed to be the defendant’s *Miranda* rights. The problem in this case is that the state never presented any evidence that Officer McNew informed the defendant that “(1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him,” as is required under *Miranda*. Rather, the best the officer could do was to testify that he read the defendant a card that was “similar to” one he had in court that had each of these warnings. However, as the officer admitted on cross-examination, the cards were not identical and he could not tell the court what the differences were.

As was stated above, the burden of proving compliance with *Miranda* falls upon the state, not the defense. In this case, the evidence does not prove compliance with the requirements of *Miranda*. As a result, the trial court erred when it allowed the state to elicit the defendant’s statements. In addition, under the facts of this case this error was far from harmless. Rather, as the jury’s four hours of deliberation (and their mid-deliberation query) on

a very simple case reveal, the state's evidence of constructive possession was paper thin. With this type of evidence, the improper admission of a statement by the defendant that he was a methamphetamine user more likely than not changed what would have been a verdict of acquittal to a verdict of guilty. As a result, the defendant is entitled to a new trial.

**II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE OF THE DEFENDANT'S ARREST AND OTHER BAD ACTS VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state repeatedly elicited evidence that the officer arrested the defendant for driving while suspended, handcuffed him, searched him, and read him his *Miranda* rights, and when the state elicited evidence that the defendant admitted that he was a methamphetamine user. The following presents this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this

fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn’t want to be labeled a “snitch.” Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-

examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

*State v. Denton*, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant stabbed another person during a fight outside a bar. During the trial the defendant testified and claimed self defense. During cross examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-

examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed, as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

\* \* \*

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar

would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

*State v. Yoakum*, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

*State v. Yoakum*, 37 Wn.2d at 144.

Similarly, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a

question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

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

*State v. Carlin*, 40 Wn.App. 701; *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).

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.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

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

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

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

In this case, the prosecutor repeatedly violated the defendant's right to a fair trial when the state elicited irrelevant evidence that the officers arrested the defendant, handcuffed him, read the *Miranda* warnings to him, and searched him "incident to arrest."<sup>1</sup> Neither the officer nor the state explained why the fact of arrest, the fact of the *Miranda* reading, the handcuffing, or the search of the defendant's person made it any more or less likely that the defendant had committed the crime charged. *Id.* The fact was that none of this evidence was relevant at all in this case. Its sole purpose was to convey to the jury that which both officers were forbidden to voice on the witness stand: that they both believed that the defendant was guilty.

In addition, in this case trial counsel also failed to make a relevance objection when the state twice introduced the defendant's statement that had he known the methamphetamine was present, he would have used it, and when the state elicited the fact that the defendant was driving without a license. The problem with this evidence was that it was irrelevant and also highly prejudicial. The following examines this argument.

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),

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<sup>1</sup>The fact of the search of the vehicle was relevant because it uncovered the baggie. However, the fact that the search was made pursuant to an arrest was not relevant in that it did not make any fact at issue either slightly more or less likely.

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). Under this guarantee of a fair trial, 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.

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 weigh 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 similar 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 analyzing the defendant's claim, 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.

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 type of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. In the case at bar, the state specifically elicited evidence that the defendant was driving while suspended, and that he admitted that he was a methamphetamine user. In the same manner that the defendants in *Pogue*, *Acosta* and *Escalona* were all denied a fair trial by the admission of similar propensity evidence, so the defendant in the case at bar was prejudiced by the admission of evidence which only went to cast the defendant in a bad light, and to then allow the state to argue, *soto voce*, that the defendant must also have committed this offense because he was a bad person who would commit such offenses.

No possible tactical advantage could be obtained from failing to object to any of this evidence. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney. In addition, as was mentioned in Argument I, the evidence of guilt in this case was questionable at best. Under these facts it is more likely than not that the state's actions in eliciting the officer's inferred opinions that the defendant was guilty of crime changed what would have been an acquittal to a conviction. Consequently, counsel's failure to object caused prejudice. As a result, the defendant is entitled to a new trial based upon ineffective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

**III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in

*Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State. v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to

sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with possession of methamphetamine under RCW 69.50.4013. On this charge, the state had the burden of proving beyond a reasonable doubt that the defendant, on the day in question, "possessed" methamphetamine. As in *Mace*, the defense in this case argues that there was no direct evidence that the defendant committed this crime. The following examines this argument.

The only methamphetamine the police found in this case was the residue in the small baggie Officer Gann found on the floor between the driver's seat and the door. While the defendant had joint dominion over the vehicle as one of the two registered owners, there was no further evidence to connect the defendant with the methamphetamine. The defendant denied that he knew it was present or that it was his. The officers found no evidence of recent use by the defendant or the passenger. The officers also found no drug paraphernalia associated with the smoking of methamphetamine or with any other type of methamphetamine ingestion. In addition, the amount of methamphetamine was very small (one fiftieth of a gram). Thus, the fact that the police found the methamphetamine in the car does not constitute

substantial evidence that the defendant exercised dominion and control over the methamphetamine itself. The decision in *State v. G.M.V.*, 135 Wn.App. 336, 144 P.3d 358 (2006), is instructive on this issue.

In *G.M.V.*, the state convicted a juvenile defendant of possession of an illegal firearm after the police searched a bedroom that the defendant had previously occupied in her parent's house. At the time the police found the contraband, the defendant had a bedroom in the basement. Following conviction, the defendant appealed, arguing that the evidence of previous dominion and control over the bedroom where the police found the illegal firearm was not sufficient to sustain the conviction. The court of appeals agree, stating as follows:

To convict G.M.V. of possession of this shotgun, the State had to show that she constructively possessed it. Constructive possession means that the defendant exercised dominion and control. *Id.* Dominion and control over the premises in which contraband is found is but one factor. The defendant must also have dominion and control over the contraband itself. *Roberts*, 80 Wn.App. at 353-54, 908 P.2d 892. By establishing a defendant's dominion and control over the premises in which contraband is found, the State makes out a prima facie case sufficient to raise a rebuttable presumption of constructive possession of the contraband.

When a minor lives with her parents, however, we cannot presume dominion and control from her mere residence in the home. The fact that G.M.V. was a minor living with her parents means additional evidence of dominion and control was necessary.

*State v. G.M.V.*, 135 Wn.App. at 374 (citations omitted).

As this decision indicates, mere dominion and control over a premises

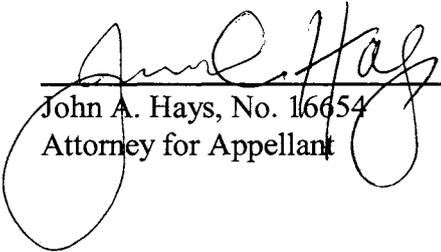
also occupied by another person who also has dominion and control over the premises is not sufficient to prove possession of contraband found in the premises. This is precisely the situation in the case at bar. Both the defendant and another person are the registered owners of the vehicle the defendant was driving. Thus, they both had dominion and control over the vehicle the defendant was driving. Consequently, there was no showing that the defendant even knew that the methamphetamine was present, much less that he exercised constructive possession of it. As a result, in the case at bar, as in *G.M.V.*, the state failed to present substantial evidence that the defendant possessed methamphetamine.

## CONCLUSION

Substantial evidence does not support the conviction in the case at bar. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss. In the alternative, the defendant is entitled to a new trial based upon the trial court's admission of statements the police took in violation of the defendant's right to silence, and trial counsel's failure to object to the admission of irrelevant and prejudicial evidence, which violated the defendant's right to a fair trial and to effective assistance of counsel.

DATED this 17<sup>th</sup> day of December, 2007.

Respectfully submitted,

  
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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, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**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.

**CrR 3.5**  
**Confession Procedure**

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

COURT OF APPEALS  
DIVISION II  
07 DEC 20 11 24 26  
STATE OF WASHINGTON  
BY dn  
DEPUTY

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

STATE OF WASHINGTON, )  
Respondent )  
vs. )  
ROY DEAN KNUTSON, )  
Appellant )

NO. 07-1-00409-0  
COURT OF APPEALS NO:  
36456-5-II  
AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
COUNTY OF COWLITZ ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 17<sup>TH</sup> day of December, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR  
COWLITZ COUNTY PROSECUTING ATTY  
312 S.W. 1ST STREET  
KELSO, WA 98626

ROY DEAN KNUTSON  
1465 Baltimore #20  
Longview, WA. 98632

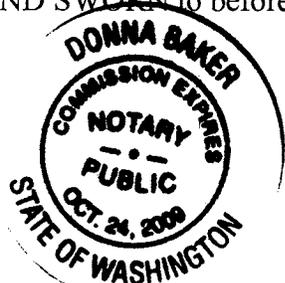
and that said envelope contained the following:

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

DATED this 17<sup>th</sup> day of DECMEBER, 2007.

Cathy Russell  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of DECEMBER, 2007.



Donna Baker  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09

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1402 Broadway  
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