No. 38594-5-II / No. 38500-7-II
(consolidated)

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

STATE OF WASHINGTON,

Respondent,

v.

LANCE ALEXANDER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Bryan Chuschoff, Judge

APPELLANT ALEXANDER'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

1. Procedural facts 3

2. Testimony at trial 4

D. ARGUMENT 16

1. IMPROPER OPINION TESTIMONY DEPRIVED ALEXANDER OF HIS CONSTITUTIONAL RIGHTS TO TRIAL BY IMPARTIAL JURY 16

a. Relevant facts 17

b. The comments were improper explicit or near explicit comments on Alexander's guilt 18

c. Reversal is required 24

2. THE SPECIAL VERDICTS SHOULD BE STRICKEN BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED AND THAT ERROR DEPRIVED ALEXANDER OF HIS CONSTITUTIONAL RIGHT TO THE BENEFIT OF ANY REASONABLE DOUBT AS MANDATED BY THE PRESUMPTION OF INNOCENCE 28

3. ALEXANDER WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL 34

E. CONCLUSION 35

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). 16

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). 34

State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980). 29, 30

In re the Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), superseded by statute on other grounds as noted by In re Detention of Stout, 128 Wn. App. 21, 26 n. 6, 114 P.3d 658 (2005) 28, 29

State v. Ahluwalia, 143 Wn.2d 527, 22 P.3d 1254 (2001). 31

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). 16

State v. Boogard, 90 Wn.2d 733, 585 P.2d 789 (1978). 31

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). 34

State v. Crotts, 22 Wash. 245, 60 P. 403 (1900). 16

State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007) 30

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 16, 20

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 19

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) 2, 29-34

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) 24

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 34

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 19

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) 16

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994). 28

State v. Petrich, 101 Wn.2d 566, 683 P.2d 314 (1992), overruled in part and on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 29

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). 29

State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). 28

State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994). 30

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, __ U.S. __, 129 S. Ct. 2007 (2009). 30, 31

State v. Watkins, 99 Wn.2d 166, 660 P.2d 1117 (1983) 31

WASHINGTON COURT OF APPEALS

Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994) 20

State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451, review granted, 165 Wn.2d 1002 (2008) 33, 34

State v. Binh Thach, 126 Wn. App. 297, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). 24

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). 19

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) 26, 27

State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989) 34

State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). 24-27

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) 35

FEDERAL AND OTHER CASELAW

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 34

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article 1, § 21 . . . . . 1, 16, 28, 30

Article I, § 22 . . . . . 1, 34

CrR 6.15(f). 31

RCW 69.50.401(1)(2)(a) 3

RCW 69.50.435. 3

RCW 9.35.020 3

RCW 9.41.010 3

RCW 9.94A.310 3

RCW 9.94A.370 3

RCW 9.94A.510 3

RCW 9.94A.530 3

RCW 9.94A.533 3

RCW 9A.56.140 3

RCW 9A.56.160 3

RCW 9A.56.310 3

RCW 9A.56.320 3

Sixth Amendment 1, 16, 34

A. ASSIGNMENTS OF ERROR

1. Mr. Alexander's Sixth Amendment and Article 1, § 21, rights to trial by impartial jury were violated by the admission of explicit or nearly explicit improper opinion testimony on his guilt and the constitutional error was not harmless.

2. The special verdicts must be stricken because the jury was improperly instructed, in instructions 44, 45 and 48, that it had to be unanimous to find the state had not proven the enhancements, thus depriving Alexander of the benefit of any reasonable doubt and the presumption of innocence.

3. Alexander was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Improper opinion testimony is constitutionally offensive and violates the state and federal rights to trial by jury if it is an "explicit or almost explicit" statement on guilt or credibility.

In this case, Alexander was on trial for, *inter alia*, unlawful possession of marijuana with intent to deliver. There was marijuana found in many places in the apartment in which he was arrested. Disputed issues at trial were whether Alexander lived at the apartment and was thus responsible for or should have been aware of all of the drugs and whether the marijuana found in the apartment was for personal use only or was being possessed with intent to deliver.

a. An officer testified that the presence of "baggies" in the apartment meant that drugs were being brought in, repackaged and

sold. Is reversal required because of this improper explicit or near explicit opinion on Alexnder's guilt where the untainted evidence was not sufficiently overwhelming that it necessarily leads to a verdict of guilt, as required for the constitutional harmless error test?

b. Another officer testified that a person becomes a suspect in a narcotics investigation when police either buy drugs from them or, through investigation, "figure out what is going on," and that, after someone becomes a suspect, a search warrant is served. The officer then testified about serving the search warrant on the apartment where Alexander was found. Is reversal required based on this improper explicit or near-explicit opinion testimony on Alexander's guilt where the constitutional harmless error test cannot be met?

c. The prosecution argued that Alexander was guilty of possessing drugs with intent to deliver them because he lived at the apartment in which drugs and items the prosecution said showed the drugs were being sold were found and thus was either involved or knew about what was going on. Several officers declared, repeatedly, that Alexander lived at the apartment. Is reversal required because the prosecution cannot prove that the admission of this improper opinion testimony met the constitutional harmless error test?

d. Was counsel prejudicially ineffective in failing to object to the bulk of the improper opinion testimony?

2. Alexander was accused of committing the possession of "Ecstasy" and marijuana with intent to deliver while armed with a firearm and within 1,000 feet of a school bus route stop. Under State v. Goldberg,

149 Wn.2d 888, 72 P.3d 1083 (2003), and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in answering a special verdict "no." Was the jury improperly instructed and did the instruction violate Alexander's constitutional rights where the jury was told that it had to be unanimous in order to find that the state had failed to satisfy its burden of proof?

3. Was counsel prejudicially ineffective in failing to object to the bulk of the improper, prejudicial opinion testimony and in failing to except to the improper, unconstitutional jury instructions on the special verdicts?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Lance Alexander was charged by amended information with unlawful possession of MDMA ("Ecstasy") with intent to deliver and unlawful possession of marijuana with intent to deliver, both with firearm and school bus route stop enhancements. He was also charged with possession of a stolen firearm, second-degree identity theft, unlawful possession of payment instruments, and two counts of second-degree possession of stolen property. CP 14-17; RCW 9.35.020; RCW 9.41.010; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.533; RCW 9A.56.140; RCW 9A.56.160; RCW 9A.56.310; RCW 9A.56.320; RCW 69.50.401(1)(2)(a); RCW 69.50.435.

A jury trial was held before the Honorable Bryan Chushcoff on September 8-10, 15-19, 23-24, 2008. RP 1, 90, 236, 391, 568, 761, 909,

990, 995, 1016, 1166.[1] Prior to the case going to the jury, Judge Chushcoff dismissed the two stolen property counts, the identity theft count and the "payment instruments" count against Alexander as unsupported by evidence. RP 853. After deliberating, the jury found Mr. Alexander not guilty of possessing the Ecstasy with intent to deliver but guilty of simple possession of that substance and of being armed with a firearm at the time of commission of that crime. CP 160-69; RP 1172-76. He was also found guilty of unlawful possession of marijuana with intent to deliver and of committing that crime within 1,000 feet of a school bus route stop but was not found guilty being armed at the time. He was further found guilty of possession of a stolen firearm. CP 160-69; RP 1172-76.

On October 24, 2008, Judge Chushcoff sentenced Alexander to the statutory maximum of 60 months total. CP 177-90; SRP 17-19. Mr. Alexander appealed and this pleading follows. See CP 200.

2. Testimony at trial

Early in the morning, on July 25, 2007, Pierce County Sheriff's Department (PCSD) deputies served a search warrant on Tiffany Harrison's apartment, looking for evidence of drug activity. RP 266, 331. After doing a "knock-and-announce" and not receiving an answer, the officers forced open the door and stormed into the home. RP 267. An

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[1]The verbatim report of proceedings consists of 13 volumes, which will be referred to as follows:

the proceedings of August 9, 2007, as "1RP;"

the 11 chronologically paginated volumes containing the trial proceedings as "RP;"

the sentencing proceedings of October 24, 2008, as "SRP."

officer testified that it took special effort to get the door rammed open, because there was a sofa blocking it. RP 332-33, 721.

Once inside, the officers saw someone head into the bathroom. RP 269. When they started trying to force open that door it was pushed back towards them. RP 269, 426. According to one deputy, it took a "shoving match" with the door for the officers to get inside. RP 269, 426. In fact, the door had to be "literally knocked off its hinges" before police got into the bathroom. RP 270. Once inside, the officers took "control" of the man they found there by punching him repeatedly in the face and using a "hold" called a "lateral vascular neck restraint," which is designed to prevent a person's arteries and veins from letting blood and oxygen get to the brain. RP 270, 427, 446, 456. The officers explained that the man inside was struggling, refusing to put his hands behind his back and did not "quit resisting" even though he was being ordered to do so. RP 271, 444-47.

After the punches and the "hold" were applied, eventually the man was handcuffed, arrested and taken outside, naked but partially covered by a blanket. RP 271-72. He was identified as Lance Alexander. RP 265-79.

Inside the bathroom toilet bowl, there was a large "Ziploc" bag which had smaller "Ziploc" bags inside. RP 273. In each of the smaller bags were about 100 pills, which were starting to melt. RP 273-74, 608. An officer pulled the larger bag out of the bowl and put it into the bathtub to drain. RP 274. The pills later tested positive for "Ecstasy". RP 557-58, 784-85.

The quantity of pills in the separate, smaller bags is called a "roll"

on the street. RP 608. An officer opined that it was a "significant amount to buy. . . in one time" and thought it might be indicative of distribution. RP 610. Another officer, however, admitted that Ecstasy users have told him they sometimes have to ingest multiple pills in order to get high, especially if they have built up a tolerance for it. RP 742-43. That officer also said a person could purchase 100 pills and 10 could have no drugs in them, 10 could be something benign like aspirin and the remaining 80 might be Ecstasy. RP 747. The forensic officer who tested the pills found at the apartment said it was not possible to say their potency. RP 796.

At the same time that some officers were focusing on Alexander, others had followed a woman, later identified as Tiffany Harrison. RP 334-35. When they entered the apartment, Harrison was seen by some officers going from the bathroom area down the hallway to a bedroom. RP 334-35, 339, 804. She then closed the bedroom door. RP 334-35, 339, 804.

Officers who tried to follow said Harrison locked the door, but Harrison said the door had no lock. RP 335-39, 860-76. Once officers had forced down the door and removed Harrison from underneath, Harrison, who was also nude, was handcuffed while kneeling on the ground. RP 337, 366. She was not allowed to put on clothes before being taken out of the apartment to a police car in handcuffs, nor was she allowed to dress until after she was interrogated by police, although she was covered with a sheet at some point. RP 336, 381, 636.

According to an officer, when Harrison was interviewed, she said she lived in the apartment, that Alexander was her boyfriend and that he

was also living there. RP 646. At trial, however, Harrison said that Alexander simply visited a few times a week. RP 865, 961. An officer claimed that Alexander had said, when interrogated, that he lived there and had done so for several months, but that officer admitted he did not recall "exactly" what Alexander had said or been asked and that information was not contained in the officer's report. RP 627-28.

After Harrison and Alexander were removed from the apartment, a "secondary" search was done to make sure no one was hiding in a closet or elsewhere. RP 488. Photos were then taken of the apartment before it was searched. RP 475.

Because Alexander was the focus of the warrant and investigation, when the officers were at the apartment they were "looking for anything that would indicate that that was his apartment." RP 623. Officers testified that they usually search for such things as documents in order to try to establish a suspect's "dominion and control" over the apartment. RP 368, 429-30, 523. Items searched for include clothing that could be identified with a particular person, phones, keys, mail and photos. RP 429-30, 523, 623.

Other than a single pair of pants, officers did not find anything like that in the apartment in relation to Alexander. RP 368-69, 430, 524, 624. The officer who searched the bedroom did not recall finding any men's clothing in Alexander's size there. RP 369. No keys were found indicating Alexander lived in the apartment, nor was there any mail addressed to Alexander there. RP 368, 430, 524. No other documents were found indicating that the place was Alexander's home and officers

did not see a lease with his name on it. RP 624. Harrison testified that Alexander was not on the apartment lease although she let him have access with a key sometimes when she was not there. RP 866, 963.

In the shower, there was no "stuff," like a man's razor, which would indicate that a man lived there. RP 624.

A pair of pants found on the living room floor had Alexander's wallet in them but those pants were all that was found in the apartment which seemed to clearly belong to Alexander. RP 524. The pants were searched and no drugs were found but there was $1,000 in cash, a cell phone and a wallet inside. RP 498-99. Alexander's identification was in the wallet, along with $15. RP 500, 502. Harrison testified that it was not unusual for Alexander to be carrying $1,000 cash on him if it was after a payday. RP 940.

An officer admitted that, when people are involved in drug dealing, their cell phones will often be "going crazy" with people calling and trying to get drugs. RP 524-25. He said that such activity was "consistent with somebody dealing drugs." RP 525. Nothing like that was going on with the phone found in the pants. RP 525. Harrison confirmed that, when Alexander was visiting, his phone did not go "crazy" or ring all of the time with people trying to get ahold of him. RP 962. Alexander also did not have a pager or multiple phones. RP 962.

In the bedroom closet, a purse was found with multiple documents inside, including an expired, voided Korean passport in the name "In Suk Goodwin Chong," a debit card with the name "Shallen Green," a credit card with the name "Ashley Johnson," a debit card for "Brad Goodwin"

and a checkbook which had the names "Billy and Selena Spiva." RP 313, 363, 368, 612-42. None of the documents had Alexander's name on them. RP 368. Some, however, had Harrison's name, including a cable bill and a receipt with Harrison's name. RP 614. The receipt was marked "rent" and the address of the place rented was the same unit number as the apartment the officers searched. RP 614, 44. Also inside the purse was a "plastic baggy with a white substance in it" that an officer declared was "some sort of narcotic." RP 614.

Harrison said she had put papers into the purse after they were left there in a backpack by a cousin of Alexander's. RP 874-914.

When questioned by police, Harrison initially said she did not know anything about drug use in the apartment. RP 599. Ultimately, she admitted that she was a heavy user of marijuana and that she also uses Ecstasy. RP 867, 900-37. Harrison said Alexander was a user of those drugs, too. RP 867, 900-37.

Harrison was clear that neither she nor Alexander were dealing from her apartment. RP 870-72, 924, 943. Instead, they consumed everything they bought. RP 960. Harrison said she smoked marijuana all day every day, using between 7 and 20 grams a day along with Alexander when he was there. RP 869-70. Harrison took 2-3 Ecstasy pills about every other day and said "if somebody got it at a good price, why wouldn't they pick it up and put it away so they didn't have to keep spending money on it?" RP 870, 926. An officer who spoke to Alexander said that Alexander reported that he and Harrison use Ecstasy 3-5 times a day. RP 601.

Harrison said there was marijuana in different places in the apartment because whenever she purchased it, she would "roll, take the remaining scraps, throw it in a bag, and just put it anywhere." RP 933. There was some "shake weed" throughout the apartment and she had at least six different places where she had marijuana stashed. RP 936.

Harrison did not necessarily remember where all of the bags of "shake" or other marijuana were in the apartment. RP 958-59.

Officers indeed recovered several bags of marijuana and other "Ecstasy" pills from the home. In a kitchen drawer were "several gallon-sized Ziploc baggies" which had "some green vegetable-type matter residue" inside, and a "Crown Royal" bag with "some green leafy substance" in it. RP 315, 505. Also in the kitchen, in an upper cupboard drawer, was a bag containing "28 blue or blue-and-red pills" and, in a cabinet, a digital scale. RP 281, 314, 445, 506. A bunch of "Swisher Sweet" cigarillos boxes were found in the kitchen and an officer testified that the boxes appeared to have marijuana residue inside. RP 283, 444.

Regarding the cigarillo boxes, an officer admitted that people use cigarillos to make "blunt," a marijuana/tobacco combination where the cigarillo is opened, the inner tobacco is removed, marijuana is put inside and the cigarillo thus becomes a "joint" with a tobacco outer leaf instead of paper. RP 439. "Blunt" is not considered a dealer's tool but is just something users do in order to ingest marijuana. RP 439.

In the living room entertainment center was a glass marijuana smoking pipe. RP 321. An officer testified that such pipes are used by drug users to ingest drugs. RP 434-35. A "metal grind" commonly used

to grind up marijuana was also found. RP 322, 731. Such grinders are commonly employed by users to grind up "garbage" or "shake" marijuana into a fine powder in order to smoke it. RP 732. It is also often associated with making and smoking "blunt." RP 757.

Harrison confirmed that she used the cigarillos to make blunt and broke down the marijuana for the blunt with the grinder. RP 867-69.

A purse in the living room with Harrison's identification had 37 pills inside, and those pills later tested positive for "Ecstasy." RP 475-505.

In the bedroom, officers found, on the floor by the closet, a bag which had a "green leafy residue" inside. RP 506-508. In a shoe-type organizer in the closet, they found another bag containing marijuana. RP 506-508. A blue file box on the floor near the bed also had a bag of "20-something grams" of leafy matter inside. RP 312-13, 316, 320, 509-11, 542.

An officer testified that he thought "20-something" grams of marijuana was consistent with personal use but could also be "associated with distribution just as easily." RP 542. The officer then said the amount "could go both ways," unlike the example of "say, a pound of marijuana," which he would associate with distribution. RP 543. He later said he had seen marijuana sold by the gram and the "weight" would not "lead" him to believe something was for "personal use or distribution" necessarily. RP 545.

An officer stated that scales are "commonly found" in the possession of "people who distribute narcotics." RP 615. Harrison said

she had scales in the apartment in order to weigh out what she bought and also to weigh out the right amount to put in the cigarillos to make "blunt." RP 871.

A plastic bag which appeared to have been "vacuum-sealed" at some point was found within a shoebox in the bedroom. RP 340, 343-44. An officer testified that he had seen similar bags in the course of his past narcotics investigations and that such bags can be used to transport drugs. RP 343. He said that the sealing keeps moisture and "other containments" out, prevents rotting and holds in the smell of drugs. RP 343. The officer did not smell marijuana in the bag or see anything like that inside it, but Harrison testified that she had bought marijuana for herself and it had been sold to her in that bag. RP 367-68, 960.

No "vacuum seal machine" was found in the kitchen. RP 438, 706. An officer admitted that it would be the seller who would have such a machine if it was being used to seal up marijuana but a buyer could just buy a vacuum-sealed bag and cut it open with scissors. RP 708-709.

In the dining room, officers found a "bag of marijuana" under the dining room table and an "electronic gram scale" next to that bag. RP 475-505.

Also in the bedroom, officers found a loaded Glock handgun which was missing a "sight." RP 304, 307, 512, 526. The photo of the gun had the gun handle "pointing right at the top right corner of the bed," which an officer opined made it "very easy to grab." RP 513. Officers admitted, however, that none of them saw the gun on the floor when they first entered the bedroom, when the "secondary" search was done, when the K-

9 "sniff" search was done or when photos were initially taken. RP 367, 433, 513, 523, 537-38. Ultimately, the officer who found the gun conceded that he did not find it until he went down on his hands and knees and searched under the bed. RP 526, 537-38. He also pulled the gun out in order to take the picture. RP 516, 526. The parties stipulated that the gun was "operable" and had been reported stolen. RP 857.

Notebooks which were found in the entertainment center included somewhere in them a reference to a Glock and the phrase "weed dealer." RP 320, 449, 807-810. The officer who took the notebooks into evidence did not know if that language was just a quote from published songs or if it had anything to do with either Alexander or Harrison. RP 812.

An officer admitted that there were no "crib notes" found anywhere in the apartment. RP 431. "Crib notes" are notes documenting drug sales or purchases. RP 431.

A digital camera found on the floor of the apartment had photos of both Harrison and Alexander, including one of Alexander holding a Glock pistol missing a rear sight. RP 286-305, 308. A photo was introduced at trial which showed Alexander in the bathroom of what appeared to be Harrison's apartment, holding cash. RP 699-703. Another showed him wearing a different shirt, also in what appeared to be the same apartment. RP 699-703. The officer who identified those photos, however, admitted that there were "multiple pictures" of himself taken at places where he did not reside and those just meant he was there on different dates when someone had a camera. RP 703. That officer also conceded that the layout of the apartments in the several buildings in the complex was

"[p]resumably" identical and he did not know whether the apartments were rented furnished or decorated. RP 704. He thus could not say if the photos could have been taken in other apartments in the complex. RP 704.

Harrison testified that some of those pictures of Alexander were taken for a cover for a music CD "demo" recording he was making. RP 972.

An officer who conducted surveillance of the apartment off and on for a month and a half prior to the search warrant being served said he saw Alexander walking into or out of the apartment 3-5 times during that time. RP 591-92, 622. The officer also saw Alexander's car there at some times when Alexander was not seen physically coming or going. RP 594. The officer did not know, however, if Harrison was just driving Alexander's car at those times. RP 629.

Although Harrison's name was on the lease and she was clearly living at the apartment, the officers never once saw Harrison come or go during the surveillance. RP 596. An officer admitted that he was surprised because he would have expected Alexander to have been at the apartment more times than he was seen there if he was actually living there. RP 696-97. That officer thought he saw Alexander use a key to get into the apartment once. RP 697.

An officer said he saw some "high-dollar items" in the apartment, such as a "few laptop computers" and a "flat screen," presumably a television. RP 611. The officer believed these were significant because he thought "neither Ms. Harrison nor Mr. Alexander has a source of income." RP 611. When he spoke to them, neither "volunteered" anything about

employment or any other source. RP 611. On cross-examination, however, the officer conceded that he did not ask them how recently they had worked. RP 630. He also did not remember the "exact words" used and never asked Harrison, for example, if she was a student, if she was looking for work, if she had recently quit a job, if she had been recently fired or how she paid her rent. RP 637.

Harrison testified that she was living off her savings but that Alexander was working for an electrical company at the time. RP 863-65. The officers never asked Harrison about where the computer and other "high ticket" items were from, who owned them or how they were paid for. RP 639. The TV was a birthday/Christmas gift from Harrison's grandmother and Harrison had bought much of the other stuff used. RP 963-65.

Harrison had physical problems which prevented her from working, because she was assaulted during a recent robbery of her apartment. RP 863-64, 874-79. She had been "pistol-whipped" and had her marijuana stolen. RP 874-95. Because of the robbery, every night she put the couch and coffee table against the apartment door, which is why it was there when officers entered. RP 882. An officer admitted that, if someone had previously suffered a break-in at their apartment, he would "expect them to do whatever it takes to keep people out." RP 553.

An officer who interrogated Alexander testified that Alexander said he had been "staying" at the apartment for several months, he "very rarely [sold] Ecstasy" and only "occasionally" sells marijuana to close friends. RP 601. Alexander said he bought the gun after Harrison was

hurt during a robbery of her apartment. RP 601. Alexander suspected the Glock was stolen because he had bought it for $50-80 on the street a few months earlier. RP 601-602.

Alexander told the officer questioning him that there would be some marijuana in the apartment although he did not know exactly where. RP 602-603, 682. Alexander also said that there was a blue box near the bed which would have about 500 Ecstasy pills. RP 602-603, 682. Although no Ecstasy pills were found in that box, an officer tesified that he thought the pills in question were the ones "attempting to be flushed in the toilet." RP 618, 682.

D. ARGUMENT

1. IMPROPER OPINION TESTIMONY DEPRIVED ALEXANDER OF HIS CONSTITUTIONAL RIGHTS TO TRIAL BY IMPARTIAL JURY

Both the Sixth Amendment and Article 1, § 21 guarantee the right to trial by jury, which ensures that the jury is "the sole judge of the weight of the testimony" and credibility of witnesses. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995), quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). As a result, no lay or expert witness is permitted to offer testimony which amounts to an opinion "regarding the guilt or veracity" of the defendant or other witnesses. State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001); see State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). Such testimony is unconstitutional and unfairly prejudicial to the defendant, because it invades the "exclusive province" of the jury to decide guilt or innocence. See State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, this Court should reverse, because several officers gave improper opinion testimony which deprived Alexander of his state and federal rights to trial by jury. Further, the constitutional error was manifest and prejudicial. Finally, the prosecution cannot meet its heavy burden of proving the constitutional error was harmless, because the evidence against Alexander on the relevant count does not satisfy the "overwhelming untainted evidence" test.

a. Relevant facts

At trial, one of the main issues was whether Alexander was living in the apartment or just visited there. RP 1024-27. The prosecution's theory was that he lived there and thus had dominion and control over all of the drugs in the apartment. RP 1027-28, 1050, 1063. The prosecution also claimed that, because he lived there, Alexander must have known about those drugs. RP 1028. The defense claim was that Alexander did not live in the apartment and was not a dealer. RP 1077-78, 1083-89.

At trial, in direct examination, PCSD Deputy Mark Fry was asked if, to his "acknowledge," the apartment "belonged to Ms. Harrison and Mr. Alexander," and the deputy said "[y]es." RP 268.

In addition, at trial, when an officer was testifying about getting the warrant which was served on the apartment that day, the prosecutor asked the officer what he had concluded about Alexander's relationship to the apartment. RP 591-92. The officer stated, "I concluded that he lived there." RP 592. The officer then referred to the apartment as "Mr. Alexander's apartment" and a photo as depicting "Mr. Alexander walking into his apartment." RP 592. Counsel finally objected, declaring, "that is

what the jury needs to determine." RP 593.

A few moments later, the officer admitted that he would have expected Alexander to have been at the apartment more times than he was seen there if he was actually living there because "it was determined that he lived there." RP 696-97.

When asked about the lack of evidence in the apartment showing that Alexander lived there, an officer agreed there was such a lack but went on to declare, "[o]ther than the fact that he lived there and stated that he lived there." RP 624.

Another major issue at trial was whether the marijuana was just for personal use or was being possessed with intent to deliver.

At trial, an officer who was asked about how the officers ended up serving a warrant on the apartment that day testified that someone becomes a suspect in a narcotic investigation when police "either buy from them or, through investigation, [the police]. . . figure out what is going on" and that a search warrant is then served after that. RP 327. He then testified about serving such a warrant at the apartment where Alexander and Harrison were found. RP 327-29.

Another officer testified a little later that the presence of "baggies" in the apartment "shows that there is narcotics coming in, being repackaged, and being sold," and that the "various packaging is used for transport." RP 714.

b. <u>The comments were improper explicit or near explicit comments on Alexander's guilt</u>

All of this testimony was improper opinion testimony which

compels reversal. The question of guilt is reserved solely for the jury and is not the proper subject of either lay or expert opinion. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Impermissible opinion testimony on guilt or credibility violates the defendant's constitutional right to a jury trial, which includes the right to an independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

To amount to an impermissible opinion, a statement need not be direct; a mere "inference" of guilt may suffice. State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). If a comment is not an "explicit or almost explicit witness statement on an ultimate issue of fact," however, the issue will not be deemed a manifest constitutional error which can be raised for the first time on appeal. Kirkman, 159 Wn.2d at 936-38.

In this case, Alexander's attorney stayed mute while nearly all of the improper testimony was admitted, objecting only when an officer repeatedly referred to the apartment as Alexander's. For the testimony to which counsel did not object, however, the issues are properly before this Court, because the testimony was improper opinion testimony which met the "explicit or almost explicit" requirement of Kirkman.

Logically, in order to answer the question of whether testimony meets that standard, this Court must decide if the testimony amounted to an improper opinion on guilty or credibility. To make that determination, a reviewing court looks at the challenged testimony in light of 1) the type of witness involved, 2) the nature of the offending testimony, 3) the nature

of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759, quoting, Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).

A review of those factors in this case leads to the conclusion that all of the testimony was improper, unconstitutional opinion which was highly prejudicial. First, all of the witnesses giving the testimony were police officers. It is well-settled that such testimony is especially likely to be highly regarded by and persuasive to jurors. See Montgomery, 163 Wn.2d at 594; Kirkman, 159 Wn.2d at 928; Demery, 144 Wn.2d at 765. Indeed, such testimony carries an "aura of reliability" which is likely to sway the jury. Demery, 144 Wn.2d at 765.

Further, it is irrelevant that the jury "already knows the defendant was arrested because the officers believed he was guilty," because that "does not justify allowing explicit opinions on intent." Montgomery, 163 Wn.2d at 595.

Second, the nature of the offending testimony was such that it was clearly all improper opinion on Alexander's guilt. Most egregious was the officer's bald declaration that the presence of "baggies" in the apartment "shows that there is narcotics coming in, being repackaged, and being sold" and that the "various packaging is used for transport." RP 714. Obviously, this testimony indicated the officer's clear opinion, conclusively, that drug dealing was going on. This testimony was quite plainly an improper opinion on Alexander's guilt of possession with intent to deliver marijuana.

Only slightly less egregious was the officer's testimony that someone becomes a suspect when police "either buy from them or, through investigation, [the police]. . .figure out what is going on" and a warrant is then gotten and served. RP 327. After first making those declarations, the officer then described having conducted such investigation and securing such a warrant for the apartment in which Alexander was alleged to live. RP 327.

Taken in context, this testimony clearly indicated that the police had either bought from Alexander and Harrison or that police had established, through some other investigation, that Alexander or Harrison were selling drugs i.e., "what is going on." Thus, the testimony not only gave the jury the officer's opinion that Alexander was guilty of possession with intent but also implied that there was some evidence of dealing that police had but the jury was not hearing.

The testimony declaring that Alexander lived at the apartment was also improper, given the prosecution's theory that living there proved Alexander's guilt. Indeed, the issue of Alexander's ties to the apartment was a crucial part of the state's case against Alexander. See RP 1024-30. With officer after officer, the prosecutor sought to elicit testimony that Alexander lived at the apartment. And with officer after officer, she succeeded. The apartment was described as belonging to both Harrison and Alexander. RP 268. An officer stated his "conclusion" that Alexander "lived there." RP 591-92. The apartment was described by that officer, repeatedly, as "Mr. Alexander's apartment." RP 592-93. And an officer included the entire weight of the police when he declared that, after

surveillance by officers, "it was determined that he lived there." RP 696-97. Finally, an officer who conceded there was not evidence at the apartment showing that Alexander lived there declared the "evidence" was "the **fact** that he lived there" and had said as much. RP 624 (emphasis added). Because the prosecution's claims against Alexander depended upon the state proving he lived at the apartment and thus was aware of and involved with the drugs, the testimony stating officer's opinions that Alexander lived at the apartment amounted to improper explicit or near-explicit testimony on guilt.

The impropriety of the improper opinion testimony is especially clear in light of the other evidence in the case. There was no evidence of Alexander or Harrison having engaged in sales with informants or undercover officers at the apartment or elsewhere. There was no evidence of traffic at the apartment consistent with drug dealing there. Alexander's cell phone did not ring off the hook with people looking to buy drugs. Nor did he have a pager, a common tool of dealers. No sales records or "crib notes" were found, either.

In addition, officers themselves conceded that the evidence regarding dealing marijuana was also consistent with mere use. The 20 grams found was an amount which "could go both ways," indicating either just personal use or distribution. The plastic baggies one officer thought could be used for distribution could also have been used for sandwiches. Further, there was evidence of heavy use in the form of the pipe and cigarillo boxes found. While an officer claimed Alexander had admitted

to selling drugs upon occasion, he did not establish that Alexander was *currently* selling drugs or how long it had been since he had done so, and the officer's claim did not include a direct quote from Alexander but was rather the officer's own interpretation of what was said.

Regarding whether Alexander lived at the apartment, the evidence to support that part of the state's case was thin. Other than the pants found in the living room, no men's clothing was found. There was no mail addressed to Alexander there. His name was not on the lease. Officers admitted there was nothing in the apartment, save for the pants, which clearly showed him living there. Harrison said he did not live there, albeit after police said she had told them to the contrary. Again, the officer who claimed Alexander said he lived there did not have a quote so indicating but only his interpretation of what was said.

Even officers who watched the apartment over a span of a month and a half admitted to seeing Alexander only 3-5 times during that entire time - hardly strong evidence of residence. And the photos showing Alexander in the apartment at times could just as easily have been from visits to Harrison, who was his girlfriend.

In short, there was no dispute that there were drugs in the apartment. Nor was there a dispute that Alexander had been there at times. But the crucial questions were whether Alexander lived there and thus would have known about all the drugs and was in possession of them, and whether the drugs were being possessed solely for the purposes of personal use or in order to be sold. The improper comments by the officers went directly to those essential parts of the state's case and were

improper opinion testimony.

In addition, the comments were improper in light of the type of defense. The defense was that Alexander was a user, not a dealer, and did not live at the apartment where all the drug evidence was found. The comments went directly to the charges for which Alexander was on trial and the crucial questions at that trial. There should be no question that all of the testimony was improper explicit or near-explicit opinion testimony on Alexander's guilt.

c. Reversal is required

Reversal is required. Where, as here, improper opinion testimony is admitted in violation of the defendant's constitutional rights, the prosecution bears the heavy burden of proving the constitutional error harmless beyond a reasonable doubt. See State v. Binh Thach, 126 Wn. App. 297, 312-13, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). The prosecution can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

It is important to note that the "overwhelming evidence" test is *not* the same as the test used when a defendant argues that there is insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In that case, the defendant was arrested and charged with first-degree unlawful possession

of a firearm in an incident that occurred after there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight responded and saw Romero coming around the front of a mobile home holding his right hand behind his body. Id.

The officer repeatedly ordered Romero to show his hands. Id. Romero refused and would not step away from the mobile home. Id. Finally, Romero ran around the side of the home and disappeared. Id. He was later found inside the home, as was a shotgun, and shell casings were found on the ground next to the home's front porch. Romero, 113 Wn. App. at 783.

Descriptions of the shooter seemed to point to Romero, and an eyewitness also identified him. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive about the identification, she also said the shooter was wearing a blue-checked shirt. Id. Romero's shirt was grey-checked, not blue, and another man seen with Romero that night had on a blue-checked shirt. Id. When shown the shirt Romero was wearing, however, the eyewitness identified it as that of the shooter. Id.

On appeal, the defendant argued both that there was insufficient evidence to support the conviction for unlawful firearm possession and that comments the officer had made in his testimony were constitutional error compelling reversal. 113 Wn. App. at 783-95. The Court found, taken in the light most favorable to the state, the evidence was sufficient to support the conviction. 113 Wn. App. at 794.

But that very same evidence was insufficient to satisfy the

constitutional harmless error test. 113 Wn. App. at 794. Because the state's evidence was disputed and the jury was "[p]resented with a credibility contest," the Court held, the improper comments "could have" had an effect. 113 Wn. App. at 795-96. The Court could not say that "prejudice did not likely result due to the undercutting effect on Mr. Romero's defense," and the constitutional harmless error test was thus not met. Id.

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), is also instructive on the standard of constitutional harmless error. In Keene, the Court reversed based upon application of that standard, despite the strength of the evidence against the defendant on trial for child rape. The constitutional error claimed was an isolated comment on the defendant's exercise of Fifth Amendment rights. The untainted evidence consisted of a child's testimony that she had been improperly touched in May or June of 1990, and evidence that she had told her sister about it in 1991 and her friend, in 1994. 86 Wn. App. at 594-95. But she also told an investigating officer that it occurred when her father spent the night at a motel, and evidence established he had not done so during the relevant time. Keene, 86 Wn. App. at 594-95. There was also a dispute whether she had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595.

In finding that the constitutional harmless error test was not satisfied, the Court noted that, despite the fact that the state's case was strong, there was also disputing evidence in the defendant's favor. 86 Wn. App. at 594-95. The prosecution's evidence thus did not "necessarily" lead to a finding of guilt as required to meet the "overwhelming evidence"

standard, and the constitutional error was not, therefore, "harmless." 86 Wn. App. at 594-95.

Here, even if the evidence was sufficient to withstand a challenge based on sufficiency of the evidence, the prosecution cannot meet its heavy burden of proving the admission of the testimony meets the standard for constitutional harmless error. The evidence of Alexander's guilt of possession of the marijuana with intent to deliver was far from "overwhelming" under Romero and Keene. The jury had ample evidence from which it could have concluded that Alexander was merely in possession of the marijuana but did not have intent to deliver. Further, the jury could easily have found that Alexander knew about and was involved with the pills because he was in the bathroom when they were being flushed but was unaware of any of the marijuana, if he did not live there. Without the improper opinion testimony, the remaining evidence was not so overwhelming that any jury would have reached the same result, because a reasonable jury could have legitimately found to the contrary, based upon the competing evidence.

The prosecution cannot meet its heavy burden of proving that the admission of the officer's improper opinion testimony was harmless under the constitutional harmless error standard. As a result, because the officers' statements were explicit or near-explicit comments on Alexander's guilt, and because the state's evidence does not satisfy the "overwhelming evidence" standard, reversal and remand for a new trial is required.

2. THE SPECIAL VERDICTS SHOULD BE STRICKEN BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED AND THAT ERROR DEPRIVED ALEXANDER OF HIS CONSTITUTIONAL RIGHT TO THE BENEFIT OF ANY REASONABLE DOUBT AS MANDATED BY THE PRESUMPTION OF INNOCENCE

Even if this Court does not reverse and remand for a new trial based upon the improper opinion testimony and the violation of Mr. Alexander's rights to a fair trial by jury, it should still grant Alexander relief by striking the special verdicts because the jury instructions on those verdicts were improper and the result was that Alexander was deprived of his right to the benefit of any reasonable doubt and the constitutional presumption of innocence.

Article I, § 21 of the Washington Constitution guarantees defendants in a criminal case the right to jury unanimity. See State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994). The Supreme Court has described this right as a "fundamental protection accorded to a criminal defendant." State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Under this right, a defendant cannot be convicted "unless a jury of his peers unanimously agree on his guilt." Smith, 159 Wn.2d at 783.

This right extends not only to finding of guilt for a general verdict but also for a special verdict. Where the state is required to meet the burden of proof beyond a reasonable doubt, the Supreme Court has held, that is an indication that the right to unanimity applies. In re the Personal Restraint of Young, 122 Wn.2d 1, 47-48, 857 P.2d 989 (1993), superseded by statute on other grounds as noted by In re Detention of Stout, 128 Wn. App. 21, 26 n. 6, 114 P.3d 658 (2005). Indeed, the Court noted, "in

Washington, the beyond a reasonable doubt standard generally requires a unanimous verdict." Young, 122 Wn.2d at 47-48, citing, State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 314 (1992), overruled in part and on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). This makes especial sense in the context of a special verdict on an enhancement in a criminal case, because the result of a finding of guilt on such a verdict is the increase of criminal punishment. See State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). Indeed, it is now recognized that an enhancement is the functional equivalent of an element of a greater crime when it increases the sentence which may be imposed and is thus an essential part of the state's case. See State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008).

While unanimity is required to *convict* on a special verdict, however, it is *not* required for the jury to conclude that the state has not satisfied its burden of proving the special verdict. See Goldberg, 149 Wn.2d at 890. Instead, for special verdicts on such things as aggravating factors or enhancements, "the jury **must be unanimous** to find the State has proven the existence of the aggravating factor beyond a reasonable doubt" but, when asked whether the jury had to be unanimous in order to answer the special verdict "no," the Court said, "it is not." 149 Wn.2d at 892-93 (emphasis in original).

Thus, not all jurors have to agree that the prosecution has proven an enhancement in order to answer "no" on a special verdict. See id. This has the practical effect of ensuring that the defendant receives the benefit

of any reasonable doubt - a benefit to which he is clearly entitled as part of the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, __ U.S. __, 129 S. Ct. 2007 (2009).

Thus, just as a jury need not be unanimous in order to fail to convict a defendant on a general verdict, i.e., to "hang," it need not be unanimous in finding that the state did not prove its case on an enhancement. The results are different only because of the difference between a general and special verdict. By definition, a special verdict for an enhancement depends upon the existence of a general verdict, because the special verdict is a finding made only after the jury has unanimously found guilt on the general verdict, for the underlying crime. See, Tongate, 93 Wn.2d at 755. Where there is no unanimity on the general verdict there is no conviction and no resulting punishment, so the state can usually choose to retry the defendant without offending constitutional principles. See, e.g., State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007). Where there is unanimity to convict on the general verdict but no unanimity on the special verdict, there is a conviction and resulting punishment, albeit less than the prosecution sought.

This makes sense because of the nature of the Article 1, §21 right. The right to unanimity is not a mandate for validity of any verdict but rather a personal constitutional right of the defendant. See, e.g., State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994). The state has no *right* to have a unanimous verdict, i.e., to have a jury be required to unanimously decide the state has not proven its case in order for there to be no conviction. To hold otherwise would be to turn the presumption of

innocence on its head. If it is mandated that jury must be unanimous in order to find the state has not met its burden, then there is effectively a presumption that the burden *has* been met, i.e., of guilt. Instead, it is mandated only that the jury must be unanimous in order to find that the state has overcome the presumption of innocence by presenting sufficient evidence to prove, beyond a reasonable doubt, that the defendant committed a crime or that a crime was committed with aggravating factors or enhancements. See, Warren, 165 Wn.2d at 26; Goldberg, 149 Wn.2d at 889-91. If some jurors do not believe that burden has been met while others do, the result is a hung jury, not a conviction. Nor is the jury ordered to continue deliberating in order to reach a unanimous "no." Goldberg, 149 Wn.2d at 889-92; see State v. Boogard, 90 Wn.2d 733, 585 P.2d 789 (1978). To do so would be improperly coercive and risk the jury making a decision based upon that coercion, not the evidence and the law. See e.g., State v. Watkins, 99 Wn.2d 166, 176, 660 P.2d 1117 (1983); CrR 6.15(f).

Instead, the concept of needing unanimity for a "no" comes from a different area of the law. Where the question is double jeopardy, if the jury has not rendered a unanimous verdict, the prosecution may again seek to retry the defendant. See, e.g., State v. Ahluwalia, 143 Wn.2d 527, 538, 22 P.3d 1254 (2001). The concept of requiring unanimity for acquittal is grounded in these principles, which hold that jeopardy is terminated and retrial prohibited when there is a unanimous acquittal but not if the jury is not unanimous in finding that the state had not proven its case. Id. Here, however, the issue is not whether the state would be prohibited by double

jeopardy from seeking the special verdicts again if retrial occurred but rather whether the jury was required to be unanimous to say "no" on the special verdicts. Under Goldberg, it was not.

Thus, here, the jury was improperly instructed when it was told that it had to be unanimous in order to answer the special verdict either "yes" *or* "no." Jury instruction 44, the instruction on the school bus route stop enhancement for the Ecstasy, provided in relevant part:

> If you find a defendant guilty of possessing with the intent to deliver a controlled substance, it will then be your duty to determine whether or not the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose.
>
> . . .
>
> If you find that defendant guilty, you will complete the special verdict form. **Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.**

CP 156 (emphasis added). The jury was then told that the relevant "answer" options were "yes" if the jurors found the state had proved the delivery or possession occurred within 1,000 feet of a school bus route stop and "no" if, "after weighing all of the evidence, you have a reasonable doubt" about whether the defendant had delivered or possessed the controlled substance within the proscribed area. CP 156.

Instruction 45 provided the identical language for the marijuana charge. CP 157. While instruction 48, the special verdict form for the firearm enhancement, did not repeat the language declaring that unanimity was required to "answer" that special verdict, it referred to the decision the

jurors had to make as deciding "a special verdict" and that the state had the burden of proving that special verdict beyond a reasonable doubt. CP 160-61.

Thus, the jurors were explicitly told for the school bus route stop enhancements that they had to be unanimous not only in order to answer "yes" but also to answer "no." And while they were not explicitly reminded of this mandate in relation to the firearm enhancement, the instruction for that enhancement was for a special verdict and the nature of the case - i.e., criminal - was still the same. The jurors therefore were effectively instructed, with the combination of the instructions, that they had to be unanimous in order to answer the firearm special verdict "no."

The jury instructions turned the presumption of innocence on its head, telling the jurors the wrong standard and depriving Alexander of his constitutional right to the benefit of the doubt. This Court should reverse.

In response, any attempt by the prosecution to rely on the recent Division Three case of State v. Bashaw should be rejected. In Bashaw, 144 Wn. App. 196, 182 P.3d 451, review granted, 165 Wn.2d 1002 (2008), Division Three rejected the plain language of Goldberg and declared that Division's belief that the Supreme Court had not intended to hold "that special verdicts were to have unanimity requirements different from general verdicts." 144 Wn. App. at 202-203. The Court concluded that it was in fact proper to tell the jury that it had to be unanimous in order to enter a negative finding on a special verdict. Id.

This Court should refuse to follow Bashaw, for several reasons. First, review has been granted in Bashaw on this very issue. See, e.g., 165

Wn.2d 1002 (2008). Second, Bashaw did not examine the effect of its decision on the presumption of innocence. And Bashaw treats unanimity as if it was something other than the constitutional right of a defendant to be free from conviction upon less than full proof. This Court should reject Bashaw and follow Goldberg, and it should reverse.

3. ALEXANDER WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

Counsel was prejudicially ineffective in representing Mr. Alexander. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical

reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no "tactical" reason for failing to object to the repeated and improper opinion testimony on Alexander's guilt. The testimony went directly to the vital parts of the prosecution's case. And there was certainly no possible, legitimate "tactical" reason to fail to object to the improper instructions, which resulted in violations of his client's constitutional rights. Those failures prejudiced Alexander and this Court should also reverse based upon counsel's ineffectiveness.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 12th day of August, 2009.

Respectfully submitted,

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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Lance Alexander, DOC 324462, McNeil Island Corr. Center, P.O. Box 881000, Steilacoom, WA. 98388-0900.

DATED this 12th day of August, 2009.

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