

No. 44763-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Laronzo Murphy,**

Appellant.

---

Clark County Superior Court Cause No. 12-1-01393-4

The Honorable Judge Daniel Stahnke

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Skylar T. Brett  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iv**

**ISSUES AND ASSIGNMENTS OF ERROR..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 5**

**ARGUMENT..... 9**

**I. The court violated Mr. Murphy’s right to present a defense..... 9**

A. Standard of Review..... 9

B. The Constitution guarantees the right to present a defense consisting of relevant admissible evidence..... 9

**II. The evidence admitted at trial was unlawfully seized in violation of the Fourth Amendment and Wash. Const. art. I, § 7..... 15**

A. Standard of Review..... 15

B. Search warrants must be supported by probable cause and must particularly describe the things to be seized..... 16

**III. Mr. Murphy was denied his state constitutional right to a unanimous verdict..... 21**

A. Standard of Review..... 21

B. Mr. Murphy was denied his state constitutional right to a unanimous verdict because the prosecution relied on

two distinct acts to prove possession with intent, and the court did not provide a unanimity instruction. .... 22

**IV. Mr. Murphy was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. .... 26**

A. Standard of Review ..... 26

B. Defense counsel unreasonably failed to raise an affirmative defense to Mr. Murphy’s school bus route stop aggravating factor. .... 26

C. Defense counsel provided ineffective assistance by failing seek suppression of evidence seized pursuant to an unconstitutionally overbroad search warrant. .... 28

D. Defense counsel provided ineffective assistance by failing to request a unanimity instruction relating to the possession with intent charge..... 29

**V. The court violated Mr. Murphy’s right to be free from double jeopardy..... 31**

A. Standard of Review..... 31

B. Mr. Murphy’s robbery and assault convictions merge for double jeopardy purposes..... 31

**VI. The sentencing court improperly calculated Mr. Murphy’s offender score and sentence. .... 33**

A. Standard of Review ..... 33

B. The prosecution failed to prove the comparability of Mr. Murphy’s out-of-state for attempted delivery of an imitation controlled substance. .... 33

C. The court erred by adding 24 months to Mr. Murphy’s robbery and assault sentences based on an enhancement that only applies to drug convictions. .... 36

**CONCLUSION ..... 38**

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Apodaca v. Oregon</i> , 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) .....	23
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	37, 38
<i>Descamps v. United States</i> , 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) <i>reh'g</i> <i>denied</i> , 11-9540, 2013 WL 4606326 (2013).....	34
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	9
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....	16
<i>Stanford v. Texas</i> , 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)...	18
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	26
<i>United States v. McMurtrey</i> , 705 F.3d 502 (7 <sup>th</sup> Cir. 2013).....	19
<i>Zurcher v. Stanford Daily</i> , 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).....	18

### **WASHINGTON STATE CASES**

<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	33
<i>State v. Brown</i> , 166 Wn. App. 99, 269 P.3d 359 (2012).....	9, 10, 13, 14, 15
<i>State v. Chesnokov</i> , 175 Wn. App. 345, 305 P.3d 1103 (2013).....	31, 32
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2007)	22, 23, 24, 25, 30
<i>State v. Elliott</i> , 121 Wn. App. 404, 88 P.3d 435 (2004) .....	9

<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005) .....	22
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....	10
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	34, 35
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	17
<i>State v. Hayes</i> , 43207-2-II, 2013 WL 6008686 (Wash. Ct. App. Nov. 13, 2013) .....	33
<i>State v. King</i> , 75 Wn. App. 899, 878 P.2d 466 (1994) .....	23, 24
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009) .....	22
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988) .....	23
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	26, 28, 30
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007) .....	9, 10, 13
<i>State v. Lyons</i> , 174 Wn.2d 354, 275 P.3d 314 (2012) .....	16
<i>State v. Maddox</i> , 116 Wn. App. 796, 67 P.3d 1135 (2003) .....	17, 21
<i>State v. Meneese</i> , 174 Wn.2d 937, 282 P.3d 83 (2012) .....	16
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.3d 658 (2008) .....	15
<i>State v. Nguyen</i> , 165 Wn.2d 428, 197 P.3d 673 (2008) .....	22
<i>State v. Otis</i> , 151 Wn. App. 572, 213 P.3d 613 (2009) .....	10
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992) .....	17, 18, 19, 21
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009) .....	26, 27, 28, 29
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 81 P.3d 157 (2003) ...	11, 12, 15
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	28, 29
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993) .....	17, 19
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011) .....	15, 22

<i>State v. Swetz</i> , 160 Wn. App. 122, 247 P.3d 802 (2011) <i>review denied</i> , 174 Wn.2d 1009, 281 P.3d 686 (2012).....	15
<i>State v. Tewee</i> , --- Wn. App. ---, 309 P.3d 791 (Sept. 24, 2013).....	33
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	17, 20, 21, 28, 29
<i>State v. Thieffault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	34, 35
<i>State v. Turner</i> , 102 Wn. App. 202, 6 P.3d 1226 (2000).....	31
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 962 (1998).....	17
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	21, 33

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.....	1, 18, 28
U.S. Const. Amend. II.....	20
U.S. Const. Amend. IV.....	1, 2, 15, 16, 19, 28
U.S. Const. Amend. V.....	3, 31
U.S. Const. Amend. VI.....	1, 2, 3, 4, 9, 26, 34, 37, 38
U.S. Const. Amend. XIV.....	1, 2, 3, 4, 9, 16, 26, 28, 31, 37
Wash. Const. art. I, § 21.....	4, 22, 23
Wash. Const. art. I, § 22.....	4, 22, 23
Wash. Const. art. I, § 7.....	1, 2, 15, 16, 17, 19, 28
Wash. Const. art. I, § 9.....	31

**WASHINGTON STATUTES**

RCW 69.50.204.....	36
RCW 69.50.401.....	27, 36

RCW 69.50.410 .....	36
RCW 69.50.435 .....	4, 27, 36, 37
RCW 69.51A.010.....	12
RCW 69.51A.040.....	10
RCW 69.52.020 .....	35
RCW 9.94A.525.....	33

**OTHER AUTHORITIES**

ER 801 .....	11
ER 802 .....	11
ER 803 .....	11
ORS 475.912.....	34, 35
RAP 2.5.....	15, 22, 26, 31

## ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Murphy's Sixth and Fourteenth Amendment right to present a defense.
2. The trial court infringed Mr. Murphy's right to present a defense by excluding evidence that he was the designated provider of a qualified medical marijuana patient.

**ISSUE 1:** An accused person has the right to present a defense. The trial court refused to instruct the jury on Mr. Murphy's validly raised medical marijuana defense and excluded the evidence necessary to support it. Was Mr. Murphy denied his Sixth and Fourteenth Amendment right to present a defense?
3. The trial court erred by admitting evidence obtained in violation of Mr. Murphy's right to be free from unreasonable searches and seizures under the Fourth Amendment.
4. The trial court erred by admitting evidence obtained in violation of Mr. Murphy's right to privacy under Wash. Const. art. I, § 7.
5. The trial court erred by allowing the jury to consider evidence seized pursuant to an overbroad search warrant.
6. The police violated Mr. Murphy's right to privacy under Wash. Const. art. I, § 7 by seizing evidence under authority of an overbroad warrant.
7. The police violated Mr. Murphy's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
8. The search warrant was overbroad because it authorized police to search for and seize items for which the supporting affidavit did not establish probable cause.
9. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
10. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.

**ISSUE 3:** A search warrant must be based on probable cause, and must describe the items to be seized with particularity. The court admitted evidence against Mr. Murphy that had been seized pursuant to a warrant describing broad categories of materials unrelated to any crime. Was the warrant unconstitutionally overbroad, in violation of the Fourth and Fourteenth Amendments and Wash. Const. art. I, § 7?

11. Mr. Murphy's conviction was entered in violation of his state constitutional right to a unanimous jury.
12. Mr. Murphy's state constitutional right to a unanimous jury was violated by the court's failure to give a unanimity instruction.
13. Mr. Murphy's state constitutional right to a unanimous jury was violated by the prosecutor's reliance on two distinct acts of possession of marijuana.

**ISSUE 4:** The state constitutional right to a unanimous verdict prohibits the jury from aggregating evidence of multiple acts to convict for a single charge. Here, the state presented evidence of two distinct acts of possession of marijuana but the court failed to provide a unanimity instruction. Did the court violate Mr. Murphy's right to a unanimous verdict?

14. Mr. Murphy was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
15. Defense counsel unreasonably failed to pursue an affirmative defense as to the school zone enhancement.

**ISSUE 5:** The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to raise an available statutory defense to the school zone enhancement. Was Mr. Murphy denied the effective assistance of counsel?

16. Defense counsel unreasonably failed to seek suppression of evidence unlawfully seized.
17. Defense counsel unreasonably failed to argue that the search warrant was overbroad.

**ISSUE 6:** To be effective, defense counsel must seek suppression of prejudicial evidence seized in violation of the constitution. Here, a successful motion to suppress would have significantly weakened the evidence against Mr. Murphy. Did counsel provide ineffective assistance under the Sixth and Fourteenth Amendments by failing to move to suppress evidence unlawfully seized pursuant to an unconstitutionally overbroad search warrant. Did counsel provide ineffective?

18. Defense counsel was ineffective for failing to propose a unanimity instruction regarding the possession with intent charge.
19. Defense counsel unreasonably allowed jurors to consider multiple distinct acts of possession when considering the marijuana charge.

**ISSUE 7:** To be effective, defense counsel must propose jury instructions necessary to the defense. Mr. Murphy's counsel did not propose a unanimity instruction in this multiple acts case. Was counsel ineffective under the Sixth and Fourteenth Amendments?

20. Mr. Murphy's convictions for assault and robbery infringed his Fifth and Fourteenth Amendment prohibition against double jeopardy.
21. Mr. Murphy's assault and robbery convictions merged.

**ISSUE 8:** Convictions for first degree robbery and second degree assault merge for double jeopardy purposes if the underlying conduct shared the same purpose. Here, the same act and purpose supported Mr. Murphy's assault conviction and raised his robbery charge to robbery in the first degree. Did the court violate the Fifth and Fourteenth Amendment prohibition against double jeopardy by entering convictions for both robbery and assault?

22. The sentencing judge erred by sentencing Mr. Murphy with an offender score of six.
23. The prosecution failed to prove the comparability of Mr. Murphy's out-of-state convictions.

24. The sentencing judge erred by including Mr. Murphy's Oregon convictions in the offender score.
25. The sentencing judge erred by (implicitly) concluding that Mr. Murphy's Oregon convictions were comparable to Washington felonies.

**ISSUE 9:** An out-of-state conviction contributes to the offender score if the state proves comparability to a Washington offense. Here, the court added four points to Mr. Murphy's offender score based on Oregon convictions that were not comparable to any Washington felony. Did the court miscalculate Mr. Murphy's offender score?

26. The sentencing court exceeded its statutory authority by adding school zone enhancements to Mr. Murphy's assault and robbery sentences.
27. The sentencing court violated Mr. Murphy's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22 by enhancing the assault and robbery sentences in the absence of a jury finding.

**ISSUE 11:** RCW 69.50.435 establishes a sentencing enhancement for drug-related convictions occurring within one thousand feet of a school bus stop. Here, the court added 24 months to Mr. Murphy's robbery and assault convictions based on the statute. Did the court exceed its statutory authority by adding the enhancement to Mr. Murphy's robbery and assault convictions?

**ISSUE 10:** The Sixth and Fourteenth Amendments prohibit a sentence beyond the standard range based on "facts" that have not been proven to a jury beyond a reasonable doubt. Here, the court added 24 months to Mr. Murphy's robbery and assault sentences, but the jury did not find he'd committed those offenses in the vicinity of a school bus stop. Did the court violate Mr. Murphy's constitutional right to a jury trial?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Laronzo Murphy's cousin owed him \$150. RP 449. She agreed to repay him if he came to her home one evening at an appointed time. RP 453.

When Mr. Murphy arrived, his cousin's husband, Ricky McKeen was outside the house. RP 458. Mr. Murphy stayed in his car and asked McKeen for the \$150. RP 459-60. McKeen threw the money into Mr. Murphy's car. RP 460.

The next morning, McKeen called the police and said that Mr. Murphy had robbed him. RP 148. McKeen claimed that Mr. Murphy had pulled a gun and demanded the money. RP 336-37. Later, McKeen changed his story and said that he voluntarily gave Mr. Murphy \$100. RP 145. He said that Mr. Murphy then pulled the gun and asked for \$50 more. RP 145-46.

The police arrested Mr. Murphy. RP 350-51. He had a small baggie of marijuana in his pocket when he was arrested. RP 351.

The officers talked to Mr. Murphy's girlfriend, Sariat Durosimi RP 422. Durosimi explained that she is authorized to use medicinal marijuana. CP 43. Durosimi suffers from Lupus, Grave's disease, bladder

disease, and arthritis. RP 278; 436. Mr. Murphy grows the marijuana that she uses. RP 437-38.

The officers got a warrant to search Mr. Murphy's girlfriend's apartment. CP 36-37; RP 255. Mr. Murphy lived at the apartment part-time. RP 256. The affidavit seeking the warrant included information from interviews with McKeen and Durosimi. CP 38-44. The affidavit also provided that:

Your Affiant is aware that people involved in these types of crimes often arm themselves with rifles, pistols, shotguns and other dangerous weapons. Firearms are used as a common method of intimidation to discourage others from providing information about the illicit business to law enforcement. Your Affiant is aware that these weapons, particularly when illegally possessed, are often hidden in the vehicle or residence of a person close to them who is NOT a prohibited possessor of firearms, in order to provide a plausible defense.  
CP 43-44 (emphasis in original).

The warrant authorized the officers to search for and seize:

Photographs, of the listed location, and of drugs, firearms or other potential evidence in the case, including still photos, negatives, digital images, digital video, video tapes, slides, films, undeveloped film, and the contents therein, in particular, photographs of suspects, co-conspirators, assets, and controlled substances, particularly marijuana.  
CP 37.

It also listed the gun allegedly used in the robbery as well as:

... any other firearms to which ownership thereof is questionable or disputed, and also to include any ammunition, holsters, cleaning kits, instruction manuals, boxes, paperwork or other items connected to firearms at the listed residence/vehicles.

CP 36.

Pursuant to the warrant, the officers seized several growing marijuana plants, a gun catalog, a digital scale, plastic baggies, and bottles used to package medicinal marijuana. RP 195-203, 384. The police also seized a notebook with three names and dollar amounts as well as notes about growing marijuana. RP 203-04.

The state charged Mr. Murphy with first degree robbery, second degree assault, and possession of a controlled substance with intent to deliver. CP 1-2. The state also alleged that he used a firearm in the robbery and assault, and that he committed the drug offense within one thousand feet of a school bus route stop. CP 1-2.

At trial, Mr. Murphy sought to introduce evidence proving that he was a designated medical marijuana provider for Durosimi. RP 214-37, 484-90. He presented a doctor's letter approving Durosimi's medical marijuana use and designating him as her provider. RP 70-72; 220-27. The court held that the letter was inadmissible hearsay. RP 231, 235. The court pointed out that the letter did not specify whether Durosimi was a "qualifying patient" under the statute and that the doctor who signed it could have misunderstood the law. RP 224, 226-27. The court also prohibited Durosimi from testifying that a doctor had diagnosed her with her medical conditions. RP 436. The court also said that

Durosimi's full time work calls into doubt whether she has a debilitating condition. RP 486. The court refused to instruct the jury on the medical marijuana defense. RP 487, 513.

The jury found Mr. Murphy guilty of each charge and answered yes to each special verdict. RP 620-22; CP 6-7. The court entered convictions for the robbery, assault, and possession with intent charges. CP 6.

At sentencing, the court found that Mr. Murphy's prior Oregon convictions for delivery (and attempted delivery) of an imitation controlled substance were comparable to the Washington statute for delivery of an imitation controlled substance. RP 644; CP 18.

The court added 24 months for the school bus route stop enhancement to Mr. Murphy's sentence on the drug charge. The court also added 24 months for this enhancement to the robbery and assault sentences. RP 645-46; CP 6.

This timely appeal follows. RP 19.

## ARGUMENT

### **I. THE COURT VIOLATED MR. MURPHY’S RIGHT TO PRESENT A DEFENSE.**

#### A. Standard of Review.

Whether the trial court erred in prohibiting the accused from raising a medical marijuana defense is a question of law reviewed *de novo*. *State v. Brown*, 166 Wn. App. 99, 104, 269 P.3d 359 (2012).

#### B. The Constitution guarantees the right to present a defense consisting of relevant admissible evidence.

Under the Fourteenth Amendment to the United States Constitution, a state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). This includes the right to introduce evidence that is relevant and admissible. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be established beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004). It is also reversible error for a court to refuse to instruct

the jury on a properly-raised defense. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

In evaluating whether the evidence is sufficient to support an affirmative defense, trial court must interpret the evidence most strongly in favor of the defendant. *Brown*, 166 Wn. App. at 104. The trial court may not weigh the evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Failure to abide by these principles denies the jury the deference it deserves. *Id.* A judge who weighs the evidence invades the fact-finding province of the jury. *Id.*

RCW 69.51A.040 creates an affirmative defense to crimes

“relating to marijuana.” Under the statute:

any designated provider who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter.

RCW 69.51A.040(2).

1. The court erred by prohibiting Durosimi from testifying about her medical diagnoses and by excluding the letter designating Mr. Murphy as Durosimi’s designated medical marijuana provider.

The due process right to present a defense includes the right to present relevant, admissible evidence in support of that defense. *Lord*,

161 Wn.2d at 301. The trial court erred by excluding admissible evidence necessary to Mr. Murphy's medical marijuana defense. *Id.*

The rules of evidence prohibit the admission of hearsay unless an exception applies. ER 802. Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A statement is an "oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a).

"Verbal acts" are not hearsay because they are not offered for the truth of the matter asserted. *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003). A "verbal act" is a statement whose significance lies in the fact that it was made. *Id.*

The court refused to allow Mr. Murphy to question Durosimi about whether a doctor had diagnosed her medical issues, sustaining the state's hearsay objection. RP 436. A medical diagnosis, however, is not hearsay.<sup>1</sup>

First, Durosimi's testimony would not have contained a statement from the doctor. Defense counsel simply asked Durosimi whether she had

---

<sup>1</sup> Even if it were hearsay, it would be admissible under the exception for a then-existing physical condition. ER 803(a)(3).

been diagnosed by a doctor. RP 436. Durosimi's answer would not have contained an oral, written, or nonverbal assertion.

Second, even if Mr. Murphy did seek to introduce a statement, it was not hearsay because it was a "verbal act." *Rangel-Reyes*, 119 Wn. App. at 498. Whether a doctor had diagnosed Durosimi was relevant for the fact that the statement was made. *Id.* Durosimi had already testified that she had Lupus, Grave's disease, bladder disease, and arthritis. RP 278. The testimony about diagnosis was not offered for the truth of the matter asserted but to meet the statutory element of having been diagnosed by a doctor. RCW 69.51A.010. The court erred by ruling that the proffered testimony contained hearsay. *Rangel-Reyes*, 119 Wn. App. at 498.

Likewise, the court excluded a letter designating Mr. Murphy as Durosimi's designated medical marijuana provider. RP 235. The court held that the letter was hearsay and did not fall within the exception for medical records. RP 231. Like Durosimi's testimony, however, the letter was not offered for the truth of the matter asserted. Rather, the letter was significant simply because it existed. *Rangel-Reyes*, 119 Wn. App. at 498. In order to establish his defense, Mr. Murphy had to show that a doctor had found that Durosimi would benefit from the use of medical marijuana.

Whether or not she would, in fact, benefit, was not at issue. The court erred by excluding the letter from Durosimi's doctor. *Id.*

The court violated Mr. Murphy's right to due process by excluding admissible evidence necessary to establish his medical marijuana defense. *Lord*, 161 Wn.2d at 301.

2. The court erred by failing to instruct the jury on the affirmative defense for designated providers of medical marijuana.

In order to raise the medical marijuana defense, the accused need only make a *prima facie* showing that his/her possession was lawful under the statute. *Brown*, 166 Wn. App. at 104. Once the accused has presented some evidence that s/he is entitled to raise the medical marijuana defense, it becomes a jury question. *Id.* at 105. The trial court may not weigh conflicting factual issues to deny the accused the opportunity to present the defense. *Id.* at 104-05. This includes issues relating to whether the patient has a qualifying medical condition. *Id.*

A letter from a doctor authorizing the accused to be the designated provider of medical marijuana for a patient establishes *prima facie* that s/he is entitled to raise the defense. *Id.* at 579-80. The language of the letter does not have to strictly adhere to the language of the statute. *Id.*

Mr. Murphy presented sufficient *prima facie* evidence to raise the medical marijuana defense. Like the defendant in *Brown*, he presented a

doctor's letter designating him as the lawful provider for Durosimi's medical marijuana needs. RP 70-72; 220-27. Durosimi also testified that she uses medical marijuana to treat her Lupus, Grave's disease, bladder disease, and arthritis. RP 278; 436. She testified that Mr. Murphy is her designated provider and that he grows the marijuana she uses. RP 437-38.

Nonetheless, the court refused to instruct the jury on the medical marijuana defense. RP 487, 513. The court noted that the letter did not prove that Durosimi was a "qualifying patient" as defined by the act. RP 90, 224. The court also pointed out that the doctor who signed the letter could have misapprehended the law of medical marijuana. RP 226-27. Finally, the court stated that the fact that Durosimi works full time called into doubt whether she had a debilitating condition. RP 486.

The court erred by weighing conflicting factual issues in denying Mr. Murphy his right to raise the defense. *Brown*, 166 Wn. App. at 104-05. Once Mr. Murphy had met his *prima facie* burden, the question of whether he had proven the defense by a preponderance of the evidence – including whether Durosimi was a "qualifying patient" -- was a factual issue for the jury. *Id.*

The court violated Mr. Murphy's constitutional right to present a defense by refusing to instruct the jury on the law regarding medical

marijuana. *Brown*, 166 Wn. App. at 104-05. Mr. Murphy's marijuana conviction must be reversed. *Id.*

The trial court violated Mr. Murphy's right to present a defense by precluding him from validly raising the statutory defense for designated providers of medical marijuana. *Brown*, 166 Wn. App. at 104. The court abused its discretion by excluding defense evidence as hearsay when it was not offered to prove the truth of the matter asserted. *Rangel-Reyes*, 119 Wn. App. at 498. Mr. Murphy's marijuana conviction must be reversed. *Brown*, 166 Wn. App. at 106.

**II. THE EVIDENCE ADMITTED AT TRIAL WAS UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I, § 7.**

**A. Standard of Review.**

The validity of a search warrant is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). An unconstitutional search can constitute manifest error affecting a constitutional right, raised for the first time on review.<sup>2</sup> RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012).

---

<sup>2</sup> The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

- B. Search warrants must be supported by probable cause and must particularly describe the things to be seized.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>3</sup>

Similarly, art. I, § 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. Art. I, § 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>4</sup> *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012).

Under both constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the

---

<sup>3</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

issuing magistrate.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generalizations about what drug dealers generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Id.* at 147-148.

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers’ discretion to those items for which probable cause exists, and to inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wn.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.<sup>5</sup> *State v. Maddox*, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003).

The search warrant in this case was overbroad.

---

<sup>4</sup> Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>5</sup> One aim of the particularity requirement is to prevent the issuance of warrants based on facts that are “loose, vague, or doubtful.” *Perrone*, 119 Wn.2d at 545. The requirement also prevents law enforcement officials from engaging in a “general, exploratory rummaging in a person’s belongings...” *Id.*, at 545 (citations omitted). Conformity with the rule “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Id.*, at 546.

1. The search warrant was overbroad because it authorized police to search for and seize items protected by the First Amendment that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone* 119 Wn.2d at 547. In keeping with this principle, the particularity requirement “is to be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford*, 379 U.S. at 485.

In this case, the warrant authorized police to search for and seize:

Photographs, of the listed location, and of drugs, firearms or other potential evidence in the case, including still photos, negatives, digital images, digital video, video tapes, slides, films, undeveloped film, and the contents therein, in particular, photographs of suspects, co-conspirators, assets, and controlled substances, particularly marijuana.  
CP 37.

These items are protected by the First Amendment. Accordingly, the heightened standards outlined above apply. *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 547.

The warrant was overbroad with regard to these materials. First, the majority of these broad categories—“photos, negatives, digital images, digital video, video tapes, slides, films...”—were not actually evidence of a crime. Neither the Fourth Amendment nor art. I, § 7 allow police to search for or seize items that are not themselves contraband or evidence of a crime, no matter how helpful they might be to the government. *See, e.g. United States v. McMurtrey*, 705 F.3d 502 (7<sup>th</sup> Cir. 2013).

Second, the affidavit provides no specific information suggesting that any photos, digital media, slides, etc. existed or would be found in the home.

Finally, the warrant did not include *any* language limiting the officers in their search through the photos and digital media in the home. Under these circumstances, officers were permitted to rummage through all of the family’s photos and digital media regardless of whether they had anything to do with the crimes under investigation. The absence of any limiting language renders the warrant invalid for failure to comply with the particularity requirement. *Riley*, 121 Wn.2d at 27.

Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d at 547.

2. The search warrant was overbroad because it permitted the police to search for items for which the affidavit did not provide probable cause

Under *Thein*, generalizations and boilerplate regarding the activities of drug dealers are insufficient to establish probable cause.

*Thein*, 138 Wn.2d at 147-48.

The warrant authorized search of the home for the firearm allegedly used in the robbery as well as:

... any other firearms to which ownership thereof is questionable or disputed, and also to include any ammunition, holsters, cleaning kits, instruction manuals, boxes, paperwork or other items connected to firearms at the listed residence/vehicles.  
CP 36.

The affidavit did not provide any information about specific firearms other than the one allegedly used in the robbery.<sup>6</sup> CP 38-44.

Rather, this portion of the warrant appears to be supported by the following generalizations at the end of the affidavit:

Your Affiant is aware that people involved in these types of crimes often arm themselves with rifles, pistols, shotguns and other dangerous weapons. Firearms are used as a common method of intimidation to discourage others from providing information about the illicit business to law enforcement. Your Affiant is aware that these weapons, particularly when illegally possessed, are often hidden in the vehicle or residence of a person close to them who is NOT a prohibited possessor of firearms, in order to provide a plausible defense.

---

<sup>6</sup> This section of the warrant also raises Second Amendment concerns. U.S. Const. Amend. II. The affidavit in support of the warrant stated that Durosimi had no felony convictions and was legally entitled to own firearms. CP 43.

CP 43-44 (emphasis in original).

The affidavit did not include particularized information providing probable cause for an exploratory search for firearms or related materials, other than the one gun allegedly used in the offense. Instead, the police relied on conclusory predictions and blanket inferences, “substitute[ing] generalities for the required showing of reasonably specific ‘underlying circumstances.’” *Thein*, 138 Wn.2d at 147-148.

Because the affidavit relied entirely on the officer’s general knowledge for these items, and because it contained no particularized information relating to any firearms other than the one allegedly used in the robbery, it was overbroad. *Perrone*, 119 Wn.2d at 547; *Maddox*, 116 Wn. App. 796.

The court denied Mr. Murphy his state and federal constitutional rights by admitting evidence that had been seized pursuant to an overbroad search warrant. *Thein*, 138 Wn.2d at 147-48. Mr. Murphy’s convictions must be reversed. *Id.*

**III. MR. MURPHY WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.**

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a

constitutional right may be raised for the first time on review.<sup>7</sup> RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *Id.* at 823. An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

B. Mr. Murphy was denied his state constitutional right to a unanimous verdict because the prosecution relied on two distinct acts to prove possession with intent, and the court did not provide a unanimity instruction.

An accused person has a state constitutional right to a unanimous verdict.<sup>8</sup> Wash. Const. art. I, §§ 21, 22; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

When the state relies on evidence of multiple acts of similar misconduct to prove a single charge, the court must provide a unanimity

---

<sup>7</sup> In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *Russell*, 171 Wn.2d at 122. This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

instruction. *Id.* This requirement “protect[s] a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *Id.* Failure to provide a unanimity instruction violates the state constitutional right to a unanimous jury. Wash. Const. art I, §§ 21, 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The absence of a unanimity instruction creates “the possibility that some jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Coleman*, 159 Wn.2d at 512. Such a possibility creates the risk that jurors will improperly aggregate evidence of multiple acts in convicting for a single count. *Id.*

Failure to provide a unanimity instruction requires reversal when the state relies on multiple acts of possession of a controlled substance to prove a single charge. *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). In *King*, the court concluded that the defendant’s possession constituted multiple acts rather than an ongoing course of conduct. *Id.* In reaching this conclusion, the court noted that the acts occurred “at different times, in different places, and involv[ed] two different

---

<sup>8</sup> The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

containers.” *King*, 75 Wn. App. at 903. Additionally, one of the alleged instances of possession was constructive and the other was actual. *Id.*

Presentation of evidence of multiple acts without a unanimity instruction gives rise to a presumption of prejudice. *Coleman*, 159 Wn.2d at 510. The presumption is only overcome if no rational juror could have a reasonable doubt as to any incident for which evidence was presented. *Id.*

The state presented evidence that Mr. Murphy possessed marijuana on his person when he was arrested and that he constructively possessed marijuana plants found in Durosimi’s apartment. RP 195, 351. As in *King*, these two alleged acts of possession occurred at different times and different places. *King*, 75 Wn. App. at 903. One act was of processed marijuana while the other was of growing plants. Also like the defendant in *King*, one instance involved actual possession; the other involved constructive possession. *Id.* Mr. Murphy’s two alleged instances of possession constituted multiple acts rather than a continuing course of conduct. *Id.*

The state relied on both acts in closing argument. RP 575. The court erred by failing to instruct the jury that they must be unanimous as to which alleged instance of possession they relied upon. *Id.*; CP 56-81.

The presumption of prejudice is not overcome in Mr. Murphy's case because a rational juror could have had reasonable doubt as to either alleged instance of possession. *Coleman*, 159 Wn.2d at 510. The police found only a small amount of marijuana on Mr. Murphy's person when they arrested him. RP 351. A rational juror could have had reasonable doubt that this small quantity demonstrated intent to deliver.

Likewise, the plants were found in Durosimi's apartment where Mr. Murphy only lives part-time. RP 256. Durosimi testified that the plants were for her exclusive use. RP 438. A rational juror could have had a reasonable doubt that Mr. Murphy constructively possessed the marijuana plants.

The jury could have aggregated the evidence against Mr. Murphy, rather than unanimously finding that he had committed a single act of possession. *Coleman*, 159 Wn.2d at 512. The court's failure to provide a unanimity instruction denied Mr. Murphy his right to a unanimous verdict. *Id.* Mr. Murphy's marijuana conviction must be reversed. *Id.*

**IV. MR. MURPHY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review**

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Killo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Killo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

**B. Defense counsel unreasonably failed to raise an affirmative defense to Mr. Murphy's school bus route stop aggravating factor.**

To be minimally competent, an attorney must research the relevant law. *Killo*, 166 Wn.2d at 862. The accused is denied a fair trial when defense counsel fails to identify the sole defense available and present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

The state charged Mr. Murphy with the aggravating factor of committing a drug offense within one thousand feet of a school bus route stop under RCW 69.50.435. RP 1-2. That statute provides an affirmative defense for circumstances if the accused can show:

[T]hat the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit.

RCW 69.50.435(4).

Mr. Murphy's attorney provided ineffective assistance by failing to raise this affirmative defense. The marijuana plants were found in Durosimi's private residence. RP 195-203. There was no evidence that any children were present. There was no evidence that Mr. Murphy made a profit by selling marijuana. Indeed, the only evidence of delivery suggested Mr. Murphy gave marijuana to Durosimi for free (for her medical use) or bartered it with other family members. RP 438, 446-48. Defense counsel had no valid tactical reason for failing to raise the available defense. The failure constituted deficient performance. *Powell*, 150 Wn. App. at 156.

Defense counsel's deficient performance prejudiced Mr. Murphy. Without the benefit of information about the affirmative defense, the jury

was left believing that it had a duty to find the school bus stop aggravating factor based solely on the state's evidence of the location of the bus stop.

*Id.* There is a substantial likelihood that counsel's failure to raise the defense affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Mr. Murphy's attorney provided ineffective assistance of counsel by failing to raise an available affirmative defense. *Powell*, 150 Wn. App. at 156. Mr. Murphy's convictions must be reversed. *Id.*

C. Defense counsel provided ineffective assistance by failing seek suppression of evidence seized pursuant to an unconstitutionally overbroad search warrant.

Failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel absent a tactical justification. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

As outlined elsewhere in this brief, police seized much of the evidence against Mr. Murphy pursuant to an unconstitutionally overbroad search warrant. *Thein*, 138 Wn.2d at 147-148. Defense counsel challenged the portion of the warrant related to Mr. Murphy's cell phone, but failed to challenge the overbroad sections related to firearms and first amendment materials. CP 44-45, 24-44. Counsel had no valid tactical reason for failing to protect Mr. Murphy's rights under the First, Fourth, and Fourteenth Amendments and art. I, § 7. *Kyllo*, 166 Wn.2d at 862.

Defense counsel's deficient performance prejudiced Mr. Murphy.

*Id.* The vast majority of the evidence in this case – the marijuana plants and packaging, the scale, the firearm, the items connecting Mr. Murphy to the apartment – was seized pursuant to the unconstitutional warrant.

*Thein*, 138 Wn.2d at 147-48. If Mr. Murphy's attorney had successfully moved for suppression, the robbery and assault charges would have been based exclusively on McKeen's word against Mr. Murphy's. The state would likely have dismissed the marijuana charge.<sup>9</sup> There is a substantial likelihood that the attorney's deficient performance affected the outcome of the case. *Id.*

Mr. Murphy's defense counsel provided ineffective assistance by failing to move to suppress evidence seized pursuant to an unconstitutionally overbroad search warrant. *Reichenbach*, 153 Wn.2d at 137. Mr. Murphy's convictions must be reversed. *Id.*

D. Defense counsel provided ineffective assistance by failing to request a unanimity instruction relating to the possession with intent charge.

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *Powell*, 150 Wn. App. at 158.

---

<sup>9</sup> At worst, the state would have proceeded based solely on the small quantity of marijuana found in Mr. Murphy's pocket.

The state presented evidence of two distinct instances of alleged possession. The prosecutor did not rely on only one act in support of the marijuana charge. RP 195, 351, 575. Mr. Murphy's attorney failed to propose a unanimity instruction informing the jury that it must unanimously find that Mr. Murphy committed one act of possession beyond a reasonable doubt. RP 513-38.

Counsel's failure to propose a unanimity instruction constituted deficient performance. The failure fell below an objective standard of reasonableness and had no tactical justification. *Kyllo*, 166 Wn.2d at 862. By not proposing a unanimity instruction, Mr. Murphy's attorney neglected to protect his client's constitutional right to a unanimous verdict. *Coleman*, 159 Wn.2d at 510.

Defense counsel's deficient performance prejudiced Mr. Murphy. Absent a unanimity instruction, the jury likely aggregated the evidence of multiple alleged acts in finding Mr. Murphy guilty. *Id.* This permitted conviction upon less than proof beyond a reasonable doubt that Mr. Murphy had committed a single act of possession. There is a substantial likelihood that counsel's deficient performance affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Mr. Murphy's attorney provided ineffective assistance by failing to propose a unanimity instruction relating to the marijuana charge. *Id.* Mr. Murphy's conviction for possession with intent must be reversed. *Id.*

**V. THE COURT VIOLATED MR. MURPHY'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.**

A. Standard of Review.

The issue of whether two convictions merge for double jeopardy purposes is reviewed *de novo*. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013). Double jeopardy issues can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

B. Mr. Murphy's robbery and assault convictions merge for double jeopardy purposes.

The state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9; *Chesnokov*, 175 Wn. App. at 348. The merger doctrine provides that "when the degree of one offense is raised by conduct separately criminalized by the legislature, the court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime." *Chesnokov*, 175 Wn. App. at 349. Second-degree assault merges into first-degree robbery when the offenses share the same purpose. *Id.* at 350.

Here, as in *Chesnokov*, the conduct that constituted Mr. Murphy's assault conviction was identical to that used to elevate the robbery charge to first degree. The court instructed the jury that, in order to find Mr. Murphy guilty of first degree robbery, it had to find that "in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon." CP 68. The jury also had to find that Mr. Murphy used force or fear against McKeen. CP 68.

The assault conviction required a finding that Mr. Murphy assaulted McKeen with a deadly weapon. CP 71. The court defined assault as "an act done with the intent to create in another apprehension and fear of bodily injury." CP 69.

The only evidence the state presented to meet these elements of both charges was McKeen's testimony that Mr. Murphy pulled a gun and demanded an additional \$50. The conduct comprising the assault charge had no purpose independent from that comprising the robbery charge. *Chesnokov*, 175 Wn. App. at 350. The robbery and assault convictions merge for double jeopardy purposes. *Id.*

The court entered convictions for both robbery and assault in violation of the prohibition against double jeopardy. *Id.* Mr. Murphy's assault conviction must be vacated. *Id.* at 348.

**VI. THE SENTENCING COURT IMPROPERLY CALCULATED MR. MURPHY'S OFFENDER SCORE AND SENTENCE.**

A. Standard of Review

An offender score calculation is reviewed *de novo*. *State v. Tewee*, --- Wn. App. ---, 309 P.3d 791, 793 (Sept. 24, 2013). Comparability of out-of-state convictions for sentencing purposes is also reviewed *de novo*. *Id.* Constitutional errors are, likewise, reviewed *de novo*. *Zillyette*, 178 Wn.2d at 161. An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744-745, 193 P.3d 678 (2008); *State v. Hayes*, 43207-2-II, 2013 WL 6008686 (Wash. Ct. App. Nov. 13, 2013).

B. The prosecution failed to prove the comparability of Mr. Murphy's out-of-state for attempted delivery of an imitation controlled substance.

Out-of-state convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law... If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges out-of-state convictions, the prosecution bears the burden of proving comparability. *State v. Ford*, 137

Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves comparability. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state and Washington statutes are not comparable, it would “(at least) raise serious Sixth Amendment concerns” to attempt to discern the underlying facts that were not necessarily found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied*, 11-9540, 2013 WL 4606326 (2013).

Mr. Murphy’s criminal history includes four Oregon convictions for delivery or attempted delivery of an imitation controlled substance under ORS 475.912. CP 18. Because the analogous Washington scheme adds an additional element not present in the Oregon statute, Mr. Murphy’s convictions are not comparable and should not add points to his offender score. *Thieffault*, 160 Wn.2d at 415.

The Oregon statute under which Mr. Murphy was convicted makes it a crime if one knowingly:

- (a) Delivers, other than by administering or dispensing, a substance that is not a controlled substance upon the express or implied representation that the substance is a controlled substance; or
- (b) Delivers a substance that is not a controlled substance upon the express or implied representation that the substance is of such nature or appearance that the recipient of the delivery will be able to distribute the substance as a controlled substance.

ORS 475.912(1). The statute requires only that the accused represent that the substance is a controlled substance or can be sold as one. *Id.*

The corresponding Washington statutes, on the other hand, also require proof of circumstances such that a reasonable person would believe the material to be a controlled substance:

“Imitation controlled substance” means a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance.

RCW 69.52.020(3).

The Oregon statute defines the offense more broadly than Washington law. The Oregon offense is not legally comparable to the Washington offense. *Thiefault*, 160 Wn.2d at 416.

The court erred by adding points to Mr. Murphy’s offender score based on out-of- state convictions that are not comparable to any Washington statute. *Ford*, 137 Wn.2d at 480. Mr. Murphy’s case must be remanded for resentencing. *Id.*

C. The court erred by adding 24 months to Mr. Murphy's robbery and assault sentences based on an enhancement that only applies to drug convictions.

3. The school bus stop sentencing enhancement is not applicable to convictions for robbery or assault.

RCW 69.50.435 provides for a sentencing enhancement for:

Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana to a person... within one thousand feet of a school bus route stop... The plain language of the statute permits enhancement only of

drug-related convictions. RCW 69.50.435.

By its plain language, the statute only creates a sentencing enhancement for drug-related convictions occurring near a school bus stop. *Id.* Nonetheless, the court added 24 months to Mr. Murphy's robbery and assault convictions based on the statute. CP 8; RP 645, 653. The standard range for Mr. Murphy's robbery conviction was 77-102 months. RP 645; CP 8. The court sentenced him to the presumptive mid-range. CP 653. The mid-range would have been 89.5 months. This term, plus the 60-month firearm enhancement, would place his sentence at 149.5 months. CP 6. But the court sentenced him to 173 months. RP 653; RP 8. This appears to be because the court erroneously added 24 additional

months based on the school zone enhancement. The prosecutor made this same mistake during sentencing argument. RP 645.

The court made the same mistake when sentencing Mr. Murphy for his assault conviction. The standard range for the assault conviction was 33-43 months. RP 645; CP 8. The court sentenced him to the presumptive mid-range, which would have been 38 months. RP 653. With 36 months for the firearm enhancement, Mr. Murphy's assault sentence should have been 74 months. Nonetheless, the court sentenced him to 98 months for assault. RP 653; CP 8. Again, this appears to be based on the erroneous addition of 24 months for the school zone enhancement. The state also made this error during argument for the assault sentence. RP 645.

The court erred by increasing Mr. Murphy's robbery and assault convictions based on a statute applicable only to drug offenses. RCW 69.50.435. Mr. Murphy's case must be remanded for resentencing. *Id.*

1. The court violated Mr. Murphy's right to a jury trial by increasing his robbery and assault convictions based on "facts" that were not proven to the jury.

The Sixth Amendment prohibits increasing a sentence beyond the standard range based on facts that have not been proven to a jury beyond a reasonable doubt. U.S. Const Amends. VI, XIV; *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The jury was not asked to find beyond a reasonable doubt that the robbery and assault had occurred within one thousand feet of a school bus stop. The court's increase of Mr. Murphy's sentence based on facts not proven to the jury violated the Sixth Amendment. *Blakely*, 542 U.S. at 303.

### **CONCLUSION**

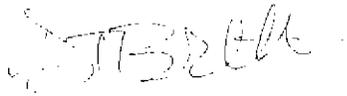
The court violated Mr. Murphy's right to a unanimous verdict by failing to instruct the jury that they must be unanimous regarding which alleged act of possession had occurred. The court violated Mr. Murphy's federal and state constitutional rights by admitting evidence that had been seized pursuant to an overbroad warrant. The court violated Mr. Murphy's constitutional right to present a defense by prohibiting him from validly raising a medical marijuana defense. Mr. Murphy's defense attorney provided ineffective assistance by failing to raise a statutory defense to the school zone enhancement statute, failing to move to suppress unlawfully seized evidence, and failing to request a unanimity instruction. Mr. Murphy's convictions must be reversed.

In the alternative, the sentencing court erred by adding points to Mr. Murphy's offender score for Oregon convictions that were not comparable to Washington felonies. Furthermore, the court exceeded its

statutory authority and violated Mr. Murphy's right to a jury trial by adding a 24 month enhancement to his robbery and assault sentences. Mr. Murphy's sentence must be vacated and the case remanded for resentencing.

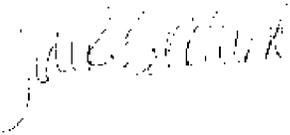
Respectfully submitted on November 27, 2013,

**BACKLUND AND MISTRY**



---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Laronzo Murphy, DOC #365669  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

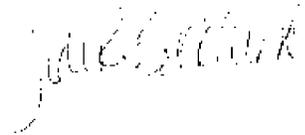
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 27, 2013.



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**November 27, 2013 - 10:11 AM**

## Transmittal Letter

Document Uploaded: 447631-Appellant's Brief.pdf

Case Name: State v. Laronzo Murphy

Court of Appeals Case Number: 44763-1

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:  
[prosecutor@clark.wa.gov](mailto:prosecutor@clark.wa.gov)