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Court of Appeals
Division III
State of Washington

No. 31506-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD EDWARD FENTON,

Appellant.

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

The Honorable Vic Vanderschoor

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Fenton lacked standing to challenge the search of his apartment.

2. In the absence of substantial evidence, the trial court erred in entering finding of fact 3, which found:

> The application of the rule of automatic standing is limited to situations where the defendant is aggrieved by a search of the premises on which he is on legitimately and the seizure of physical items on that premises.

3. In the absence of substantial evidence, the trial court erred in entering finding of fact 4, which states: "In this application that would mean the car in which Ms. Fuentes was stopped."

4. In the absence of substantial evidence, the trial court erred in entering finding of fact 5, which states: "Since automatic standing applies to things arguably possessed by the defendant, automatic standing does not apply in the instant case."

5. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering conclusion of law 1, which states: "The defendant does not have automatic standing to complain of the seizure of drugs possessed illegally within his apartment."

6. The court's Instruction 8 was an impermissible comment on the evidence in violation of article IV, section 16.

7. Mr. Fenton's right to the effective assistance of trial counsel was violated in light of defense counsel's failure to propose an unwitting possession jury instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has automatic standing to contest the search of his property when he is charged with a possessory offense. Mr. Fenton was charged with one count of possession of marijuana with intent to deliver and one count of possession of methamphetamine. Mr. Fenton moved to challenge the basis of the information contained in the affidavit for the search warrant used to enter and search his apartment. Is Mr. Fenton entitled to reversal of his convictions where the court found he did not have standing despite the fact he met the requirements for automatic standing?

2. Article IV, section 16 of the Washington Constitution bars the court from commenting on the evidence to a jury. A jury instruction which tells the jury that an element had been proven by the State as a matter of law is an impermissible comment on the evidence. The court in Mr. Fenton's matter instructed the jury that it was a crime

to possess a controlled substance, *no matter how small*, in addition to the to-convict instruction which requires the State to prove the defendant possessed a controlled substance. The court gave the instruction in light of defense counsel's questions of the forensic scientist about the minuscule amount allegedly possessed by Mr. Fenton. Was the court's instruction an impermissible comment on the evidence entitling Mr. Fenton to reversal of his conviction and remand for a new trial?

3. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant is entitled to a new trial where he can establish his attorney performed deficiently and that he was prejudiced by the ineffective representation. At trial, Mr. Fenton's attorney argued that one of the three items seized in his apartment that contained methamphetamine residue were found in a pair of women's pants. Two women were also detained inside Mr. Fenton's apartment. Defense counsel did not offer an unwitting possession instruction despite her arguments to the jury. Is Mr. Fenton entitled to a new trial because of his attorney's failure to proffer an unwitting possession instruction, which would have been a complete defense to the charge of possession of methamphetamine?

C. STATEMENT OF THE CASE

On the evening of October 5, 2011, through morning hours of October 6, 2011, Kennewick police officers were sitting outside an apartment building watching for individuals who were wanted by the police. RP 56-58.[1] The officers watched as a woman parked her car in front of the apartment building and entered an apartment later identified as that of appellant, Richard Fenton. RP 61. Approximately five minutes later, the officers saw the woman come out of the apartment, retrieve a grocery sack from the trunk of her car, and reenter the apartment. RP 61-62. Once again, five minutes later she left the apartment, carrying the sack that now appeared empty. RP 62. Nearby officers stopped the woman. RP 62. Based on the information she provided to the officers, they sought and obtained a search warrant for Mr. Fenton's apartment. RP 62-63.

Inside the apartment, the officers seized Mr. Fenton along with two unidentified women. RP 65-66. In addition, the officers seized two bags containing marijuana and two digital scales. The police officers also seized two pipes containing methamphetamine residue as

[1] "RP" refers to the transcript of the trial, which occurred June 18, 2012, to June 19, 2012.

well as a small baggie containing methamphetamine residue seized from a pair of women's jeans. RP 92, 98.

Mr. Fenton was charged with one count of possession of methamphetamine, and one count of possession of marijuana with intent to deliver. CP 1-2. Pursuant to CrR 3.6, Mr. Fenton moved to suppress the items seized from his apartment, challenging the basis for obtaining the probable cause supporting the search warrant. CP 4-8. Without reaching the merits of Mr. Fenton's motion, the trial court found that Mr. Fenton lacked standing to challenge the search. CP 83-85; 5/2/2012RP 13.

Following a jury trial, Mr. Fenton was convicted as charged. CP 68-69.

D. ARGUMENT

1. CONTRARY TO THE TRIAL COURT'S CONCLUSION, MR. FENTON HAD STANDING TO CHALLENGE THE SEIZURE AND INTERROGATION OF MS. FUENTES

a. Mr. Fenton could claim automatic standing to contest the seizure of Ms. Fuentes. Fourth Amendment rights are personal rights that may not be vicariously asserted. *Rakas v. Illinois,* 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Under the Fourth Amendment, a defendant who does not personally claim a legitimate expectation of privacy in the area searched or property seized generally has no standing to challenge the search or seizure. *State v. Gocken,* 71 Wn.App. 267, 279, 857 P.2d 1074 (1993).

To establish standing under the Fourth Amendment, based on an expectation of privacy, a defendant must establish an actual subjective expectation of privacy in the property searched and this expectation must be reasonable. *Gocken,* 71 Wn.App. at 279. "Thus, a defendant seeking to suppress evidence on Fourth Amendment grounds 'must in every instance first establish that he had a legitimate expectation of privacy in the place where the allegedly unlawful search occurred.'" *State v. Jones,* 68 Wn.App. 843, 847-48, 845 P.2d 1358 (1993), *United*

States v. Freitas, 716 F.2d 1216, 1220 (9th Cir.1983), *review denied,* 122 Wn.2d 1018 (1993).

It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996). Under article I, section 7, a person may rely on the automatic standing doctrine if the challenged police action produced the evidence sought to be used against him. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

"To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." *Jones* 146 Wn.2d at 332. *See also State v. Williams,* 142 Wn.2d 17, 23, 11 P.3d 714 (2000) ("Inherent in the conditions for automatic standing is the principle that the 'fruits of the search' bear a direct relationship to the search the defendant seeks to contest.").

The automatic standing doctrine's purpose is to protect defendants forced to choose between their respective rights under the Fourth and Fifth Amendments:

> [W]ithout automatic standing, a defendant will ordinarily be deterred from asserting a possessory interest in

> illegally seized evidence because of the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment. For a defendant, the only solution to this dilemma is to relinquish his constitutional right to testify in his own defense.

State v. Simpson, 95 Wn.2d 170, 180, 622 P.2d 1199 (1980) (footnote omitted).

Here, Mr. Fenton met the two required factors; he was charged with possession of marijuana with the intent to deliver and in possession of methamphetamine. *Jones*, 142 Wn.2d at 322-23. Further, there was a direct relationship between the challenged police action and the marijuana and methamphetamine residue used to charge and convict Mr. Fenton. *Id.* at 334. The police were able to obtain the search warrant only after obtaining Ms. Fuentes' confession, which allowed the police to search Mr. Fenton's residence and seize the marijuana and methamphetamine. Without Ms. Fuentes' confession, the police did not have probable cause to search Mr. Fenton's residence.

The court below fundamentally misunderstood the Supreme Court's decision in *Williams*. CP 84-85. The court included an additional element in the automatic standing rule that neither the *Jones* nor *Williams* Courts recognized. Instead of focusing on the police

action and whether there was a direct relationship between that and the evidence seized, the court incorrectly focused on the place searched. CP 84-85. The court required Mr. Fenton to show he was lawfully *in Ms. Fuentes' car.* CP 84-85. That is an incorrect statement of the law of automatic standing. Mr. Fenton established a direct relationship between the search of his residence and the resulting seizure of the marijuana, and the illegal seizure of Ms. Fuentes. That is all he had to establish here to obtain automatic standing.

The trial court erred in finding Mr. Fenton did not have automatic standing to challenge the search.

b. The police lacked reasonable suspicion to stop Ms. Fuentes. Although the trial court never reached the merits of Mr. Fenton's argument on why the evidence should have been suppressed, it was clear the police lacked reasonable suspicion to stop Ms. Fuentes, thus tainting the probable cause used to support the search warrant.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. 1, § 7. "Authority of law" means a warrant, unless one of the few "jealously and carefully drawn" exceptions applies. *State v. Martinez*, 135 Wn.App. 174, 179, 143 P.3d 855 (2006). Under the Fourth

Amendment, the United States Supreme Court has also afforded police officers the ability to conduct warrantless investigatory stops. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). These investigatory stops, however, must be supported by reasonable, objective, and articulable suspicion of criminal activity. *Id.* at 21. The level of articulable suspicion required to justify a *Terry* stop is a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "[A] hunch does not rise to the level of a reasonable, articulable suspicion." *State v. O'Cain*, 108 Wn.App. 542, 548, 31 P.3d 733 (2001). "Innocuous facts do not justify a stop." *Martinez*, 135 Wn.App. at 180; *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). When the "reasonable suspicion" standard is not strictly enforced, the exception swallows the rule and "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Furthermore, an investigatory stop must be "reasonably related in scope to the justification for [its] initiation." *Terry*, 392 U.S. at 29.

Additionally, if the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible. *Wong Sun v. United*

States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Kennedy*, 107 Wn.2d at 4. Lastly, the State bears the burden of proving the reasonableness on an investigatory stop. *State v. Hopkins*, 128 Wn.App. 855, 862, 117 P.3d 377 (2005).

The facts of Mr. Fenton's case are very similar to the facts in *State v. Doughty*, where the Supreme Court found the police lacked reasonable suspicion to stop Mr. Doughty. 170 Wn.2d 57, 60, 239 P.3d 573 (2010). In *Doughty,* the police stopped Walter Doughty's car after he briefly visited a suspected drug house at 3:20 a.m. *Id.* at 60. The police had information that the house was used to distribute drugs, based on complaints from neighbors and information provided by an informant. *Id.* The officer arrested Mr. Doughty after a records check revealed that his license was suspended. *Id.* The subsequent search of Mr. Doughty's car revealed a pipe containing methamphetamine residue. Additional methamphetamine was found in Mr. Doughty's shoe at booking. *Id.*

The Supreme Court concluded that the officer's actions were based on his own "incomplete observations." *Id.* at 64. The Court noted that the officer did not hear any conversations or observe any

suspicious activities other than Mr. Doughty leaving a house in the middle of the night. The court reasoned:

> [P]olice never saw any of [Mr.] Doughty's interactions at the house . . . The two-minute length of time [Mr.] Doughty spent at the house - albeit a suspected drug house - and the time of day do not justify the police's intrusion into his private affairs.

Id.

Similarly, here, the only information the police were in possession of prior to the stop of Ms. Fuentes was that they observed her come and go from Mr. Fenton's apartment. The police, though, were present only because they were looking for people who they had information were "wanted subjects" that may be present at the apartment. CP 14. While engaging in this surveillance, the police observed Ms. Fuentes park in front of Mr. Fenton's apartment, retrieve a grocery sack, and enter the apartment. CP 15. About five minutes later, Ms. Fuentes left the residence carrying what appeared to be the same sack, only this time it appeared "empty," place it in her car, then drive off. CP 15.

As in *Doughty*, the police information here was incomplete. The police did not see what happened inside the apartment, nor hear any conversations or observe any suspicious activities other than Ms.

Fuentes leaving an apartment in the middle of the night. The police had no idea what, if anything, she did inside the apartment. The police lacked reasonable suspicion to stop Ms. Fuentes.

"All evidence obtained as a result of an unlawful seizure is inadmissible." *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Thus where officers obtain evidence as a result of an improper *Terry* stop, the evidence must be suppressed. *Armenta*, 134 Wn.2d at 17. "[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henever the right is unreasonably violated, the remedy must follow." *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009), *quoting State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, Ms. Fuentes' statement that she delivered drugs to Mr. Fenton should have been suppressed.

2. THE COURT'S INSTRUCTION 8 CONSTITUTED AN IMPERMISSIBLE COMMENT ON THE EVIDENCE CONTRARY TO THE WASHINGTON CONSTITUTION

Defense counsel cross-examined the forensic scientist regarding the amount of methamphetamine contained in one of the two glass pipes and one of the two containers, which contained what was characterized by the forensic scientists as "residue." RP 150-52.

> Q Miss Ricci, we're talking about a very small amount of drugs, are we not?
>
> A Generally, residues are smaller amounts of material, yes.
>
> Q You indicated it wasn't enough to weigh?
>
> A Well, in this situation, if there was an easy way to remove all of the residue from the smoking device, it may be a weighable amount, but again, it's going to be a small amount.
>
> Q Okay. And you didn't attempt to remove all the material?
>
> A No. I just scraped a small portion of the material that I needed for my analysis.
>
> Q Moving to Item 9, you indicated you also tested material in that item, is that correct?
>
> A That is correct.
>
> Q Okay. You indicated that that was a very small amount, is that correct?

> A I was able to weigh the material, but I found that it weighed less than a tenth of a gram.

RP 151-52.

In response, the State proposed an instruction regarding residue, which the trial court agreed was appropriate in light of defense counsel's questioning. The court overruled Mr. Fenton's objection to the instruction:

> I read the case -- I read the case, and given the questioning of the expert witness with regard to significantly small amount, I think it's appropriate to give that instruction to clarify it for the jury.

RP 157 (emphasis added).

The court instructed the jury in Instruction 8:

> It is a crime to possess any amount of controlled substance *no matter how small.*

CP 56 (emphasis added). This instruction was in addition to the "to-convict" instruction, Instruction 13, which instructed the jury it had to find Mr. Fenton "possessed a controlled substance." CP 62.

a. The trial court is barred from commenting on the evidence to the jury. Under article IV, section 16 of the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "'conveying to the jury his or her personal

attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Jackman,* 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), *quoting State v. Becker,* 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "'All remarks and observations as to the facts before the jury are positively prohibited.'" *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (emphasis added), *quoting State v. Walters*, 7 Wn. 246, 250, 34 P. 938 (1893). A court may comment on the evidence when it incorporates specific facts in a jury instruction. *State v. Levy*, 156 Wn.2d 709, 721-23, 132 P.3d 1076 (2006).

"A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *Lane,* 125 Wn.2d at 838. While a trial court "may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence," *State v. Young,* 48 Wn.App. 406, 415,

739 P.2d 1170 (1987), an instruction "improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury." *Becker,* 132 Wn.2d at 64-65. Judicial comments in jury instructions are presumed prejudicial and the State has the burden to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy,* 156 Wn.2d at 725.

Even though Mr. Fenton did not object to the instruction at trial, he may still raise the issue on appeal as it involves a manifest constitutional error that this Court may consider for the first time on appeal. *Levy,* 156 Wn.2d at 719-20, *citing State v. Lampshire,* 74 Wn.2d 888, 893, 447 P.2d 727 (1968) (because a comment on the evidence invades a constitutional provision, failure to object does not foreclose raising the issue on appeal); *Bogner,* 62 Wn.2d at 252 (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

This Court reviews whether the instruction was legally correct *de novo*. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008); *State v. Johnson*, 152 Wn.App. 924, 935, 219 P.3d 958 (2009).

b. The court's instruction 8 was a comment on the evidence. Instruction 8 instructed the jury that any amount of a controlled substance "no matter how small" constituted possession. CP 56. This was in addition to the standard WPIC which instructs the jury that possession of a controlled substance was a crime. CP 55. This comment by the court commented directly upon Mr. Fenton's defense and violated article IV, section 16 of the Washington Constitution.

The court based its decision on the decision in *State v. Larkins,* 79 Wn.2d 392, 486 P.2d 95 (1971). In *Larkins,* the Supreme Court ruled that possession of residue constituted possession of a controlled substance. *Id.* at 394-95. The decision was not about jury instructions and the Supreme Court did not authorize a jury instruction on this point.

In *Becker,* a disputed factual issue was whether a "Youth Education Program" was a school. *Becker,* 132 Wn.2d at 56. The special verdict form asked: was the defendant "within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime." *Becker,* 132 Wn.2d at 64. The Supreme Court held that the special verdict form effectively removed a disputed issue of fact from the jury's

consideration, relieving the State "of its burden to prove all elements of the sentence enhancement statute." *Becker,* 132 Wn.2d at 65. *Accord Jackman,* 156 Wn.2d at 742-44 (inclusion of victims' birth dates in "to convict" jury instructions, where crimes required victims to be minors, was an impermissible comment on the evidence); *Levy,* 156 Wn.2d at 716, 718-723 (jury instructions defining "building" as the apartment at issue and "deadly weapon" as a crowbar were impermissible comments on the evidence); *Lane,* 125 Wn.2d at 835-839 (judge's comment regarding the reason for the early release of a prosecution witness from jail was an impermissible comment on the evidence); *State v. Eisner,* 95 Wn.2d 458, 460-63, 626 P.2d 10 (1981) (judge's questioning of prosecution witness, which elicited elements of the charged crime, was an impermissible comment on the evidence); *Lampshire,* 74 Wn.2d at 891-93 (judge's comment when ruling on objection made by the prosecution during direct examination of the defendant was an impermissible comment on the evidence); *Risley v. Moberg,* 69 Wn.2d 560, 561-65, 419 P.2d 151 (1966) (judge's questioning of personal injury plaintiff's physician regarding the cause of her injuries was an impermissible comment on the evidence).

Mr. Fenton's defense at trial was a general denial putting the State to its burden of proving all of the elements beyond a reasonable doubt. The jury was instructed on possession of a controlled substance. By instructing the jury that residue was possession, the court commented on the evidence by taking away from the jury the disputed fact of whether Mr. Fenton possessed methamphetamine thereby relieving the State of the burden of proving that fact. Thus, Instruction 8 was an impermissible comment of the evidence. *Levy,* 156 Wn.2d at 726 ("The fundamental question underlying our analysis of judicial comments is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true").

c. The instruction prejudiced Mr. Fenton because it relieved the State of its burden of proof. A judicial comment on the evidence is presumed prejudicial, and the State must demonstrate that the defendant was not prejudiced by the comment, unless the record affirmatively shows that no prejudice occurred. *Levy,* 156 Wn.2d at 723, *citing Lane,* 125 Wn.2d at 838-39; *State v. Stephens,* 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part,* 83 Wn.2d 485 (1973) (the State has the burden of showing that the jury's decision

was not influenced, even when the evidence is undisputed or overwhelming).

In *Levy*, the Supreme Court found the court's comment on the evidence harmless because it did not relieve the jury of determining all of the elements of the offense. *Levy,* 156 Wn.2d at 727. In contrast, here the trial court relieved the jury from finding that Mr. Fenton possessed methamphetamine. In *Becker,* the Supreme Court ruled the court's comment that the alternative school was a school for enhancement purposes was tantamount to a directed verdict and resulted in reversal of the conviction. *Becker,* 132 Wn.2d at 65. Further, the Court noted that whether or not the State produced enough evidence was simply not the issue and did not cure the error. *Id.* Mr. Fenton's matter is no different from *Becker* in that in both cases the court, in its instruction to the jury, conveyed that a disputed element had been proven as a matter of law. Mr. Fenton is entitled to the same result as in *Becker*: reversal of his conviction for possession of methamphetamine.

3. THE FAILURE TO OFFER AN UNWITTING POSSESSION JURY INSTRUCTION BY DEFENSE COUNSEL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel's closing argument consisted of an attack on the possession of methamphetamine count; pointing out that at least one way for proving that count was a small baggie containing white residue which was seized from a woman's pair of jeans. Defense counsel noted that two women were also detained inside Mr. Fenton's apartment, and one of them could have possessed this envelope. RP 174-77. The State in its closing argument, told the jury this was not a case of unwitting possession because the jury had not been instructed on that defense. RP 171-72. The State did not elect which item it was proceeding on to prove Mr. Fenton's possession.

Defense counsel did not propose an "unwitting possession" jury instruction and did not object when the State withdrew the unwitting possession instruction it had proposed.

In closing argument, the State took advantage of counsel's failure to seek an unwitting possession instruction by conceding that such an instruction was warranted:

> Now, with respect to possession again, there can be an issue. It's called unwitting possession, and that is, "It was so small I couldn't see it. I didn't know it was

> there," or, "I thought it was something else." And that's not before you in this case. If that had been before you, there would be an instruction on unwitting possession. There is no instruction in that regard, and you will find no -- no instruction that has anything to do with knowledge. That is because possession of drugs does not require knowledge.

RP 171-72.

a. Mr. Fenton had the constitutionally protected right to the effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;[2] Const. art. I, § 22;[3] *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams*

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[2] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[3] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"), *quoting*

Strickland, 466 U.S. at 688. While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. Mr. Fenton's trial counsel rendered ineffective assistance of counsel by failing to offer a jury instruction on unwitting possession. Mr. Fenton's theory at trial was that his possession was unwitting: the amount was so small that he was unaware of it, and/or, at least one item containing residue was discovered in the jeans of a

woman detained inside the apartment when the police entered. To that end, defense counsel never offered a jury instruction on unwitting possession. Thus, Mr. Fenton's attorney was ineffective.

In order to convict a defendant for possession of a controlled substance, the State must prove that the person possessed a controlled substance and, specifically, what the substance was. RCW 69.50.4013. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw,* 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004), *cert. denied,* 544 U.S. 922 (2005). Washington has adopted the affirmative defense of unwitting possession in drug possession cases in order to ameliorate the harshness of a strict liability offense. *Bradshaw,* 152 Wn.2d at 538; *State v. Staley,* 123 Wn.2d 794, 799, 872 P.2d 502 (1994); *State v. Cleppe,* 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied,* 456 U.S. 1006 (1982). Because unwitting possession is an affirmative defense, it falls on the defendant to prove the unwitting possession. *Cleppe,* 96 Wn.2d at 381; *State v. Michael,* 160 Wn.App. 522, 527, 247 P.3d 842, 844 (2011). When deciding whether to give an instruction, a trial court must consider all of the evidence presented, regardless of which party presented it. *State v. Fernandez-Medina,* 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); *State v.*

Olinger, 130 Wn.App. 22, 26, 121 P.3d 724 (2005). In determining whether the evidence is sufficient to support such an instruction, the trial court interprets the evidence most strongly in the defendant's favor. *State v. Otis,* 151 Wn.App. 572, 578, 213 P.3d 613 (2009). If the defendant affirmatively establishes that "his 'possession' was unwitting, then he had no possession for which the law will convict." *Cleppe,* 96 Wn.2d at 381.

To determine whether counsel was deficient by failing to propose a jury instruction, the court considers whether the defendant was entitled to the instruction and whether there was a strategic or tactical reason not to request the instruction. *McFarland,* 127 Wn.2d at 336; *State v. Powell,* 150 Wn.App. 139, 154-55, 206 P.3d 703 (2009).

Mr. Fenton's defense at trial to the possession of methamphetamine count was that he possessed the drugs unwittingly. Thus, Mr. Fenton was entitled to the instruction because there were facts which supported this theory, a fact conceded by the State in closing argument. Under these facts, Mr. Fenton could show by a preponderance of evidence that his possession was unwitting, entitling him to an unwitting possession instruction.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *Staley* 123 Wn.2d at 802-03; *State v. Hughes,* 106 Wn.2d 176, 191, 721 P.2d 902 (1986). When there is sufficient evidence to instruct on this defense, it is the prosecution's obligation to disprove the defense beyond a reasonable doubt. *State v. Hicks,* 102 Wn.2d 182, 187, 683 P.2d 186 (1984); *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011).

It was not objectively reasonable for defense counsel to fail request the instruction. Defense counsel repeatedly argued before the jury during closing argument that given the fact two women were detained in the apartment as well as Mr. Fenton, the jury could not find that he had dominion and control over the drugs when he was not aware of their presence, yet defense counsel sought no instruction supporting that argument. There was no tactical reason why defense counsel did not seek an unwitting possession instruction because the defense theory was primarily that Mr. Fenton was not aware of the drugs. RP 174-77. Further, although defense counsel argued an unwitting possession theory, the jury was instructed that the attorneys' arguments were not the law. CP 48. Without an unwitting possession instruction, the

defense could not properly argue its theory of the case and have the jury consider it. *See State v. Willis,* 153 Wn.2d 366, 370, 103 P.3d 1213 (2005) (jury instructions are proper when they, in part, permit the parties to argue their theories of the case). Under these circumstances, defense counsel's failure to request an unwitting possession instruction was not objectively reasonable.

c. Mr. Fenton suffered prejudice from counsel's deficient performance. Trial counsel's deficient performance alone "does not warrant setting aside the judgment . . . if the error had no effect on the judgment." *Strickland,* 466 U.S. at 691. In order to establish prejudice, Mr. Fenton "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant is not required to establish his innocence or even demonstrate "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland,* 466 U.S. at 693. In order to establish prejudice, Mr. Fenton need only show that had his attorney proposed an unwitting possession jury instruction, there was a

reasonable probability that the jury's verdict would have been different. *Id.* at 694.

Here, the jury essentially had no choice but to find him in possession because the apartment where the officers found the methamphetamine was his apartment. The only chance he had for the jury to acquit him of possession was an unwitting possession defense. Further, the State used the fact that defense counsel failed to provide an unwitting possession instruction to its advantage and argued to the jury that it could not find unwitting possession because it must deliberate only on the law as provided in the jury instructions. RP 171.

Defense counsel was ineffective for failing to propose an unwitting possession instruction. This Court should reverse Mr. Fenton's conviction for possession of methamphetamine.

E. CONCLUSION

For the reasons stated, Mr. Fenton asks this Court to reverse his convictions and find that he had standing to challenge the seizure and interrogation of Ms. Fuentes. Mr. Fenton then asks this Court to either suppress the evidence seized in his apartment, or remand for a CrR 3.6 evidentiary hearing.

Alternatively, Mr. Fenton asks this Court to reverse his conviction for possession of methamphetamine and remand for a new trial.

DATED this 11th day of September 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31506-1-III
	)	
RICHARD FENTON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	RICHARD FENTON 929310 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF SEPTEMBER, 2013.

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