SUPREME COURT NO. 101940-8
COA NO. 55897-1-II

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY RASMUSSEN,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR
GRAYS HARBOR COUNTY

The Honorable Katherine Svoboda, Judge

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Timothy Rasmussen asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

## B. COURT OF APPEALS DECISION

Rasmussen requests review of the decision in State v. Timothy Lynn Rasmussen, Court of Appeals No. 55897-1-II (slip op. filed March 28, 2023), attached as an appendix.

## C. ISSUES PRESENTED FOR REVIEW

1. Was defense counsel ineffective in failing to object to opening statement and evidence that the Grays Harbor Drug Task Force targeted Rasmussen as a drug dealer based on information obtained from others, where such testimony constituted inadmissible testimonial hearsay and improper opinion on guilt in a case where the disputed issue was whether the State proved possession with intent to deliver a controlled substance?

2. Evidence of an accused person's financial state is generally inadmissible as evidence of a crime because it is irrelevant and highly prejudicial. Was defense counsel ineffective in (1) failing to object to evidence that Rasmussen and his wife did not have a job and (2) failing to object to the prosecutor's closing argument that the lack of employment was evidence that Rasmussen committed the crime?

3. Was defense counsel ineffective in failing to object to the prosecutor's misstatement of the evidence that (1) the safe containing a controlled substance was open and (2) the controlled substance tested by the lab weighed 8.45 "ounces" rather than 8.24 "grams," where the status of the safe and the amount of controlled substance factored into whether the State proved its possession with intent to deliver charge?

4. The to-convict instruction must include all elements of proof and, where the defendant is charged with

possessing a controlled substance with intent to deliver, must identify the substance that the jury needs to find in order to convict. Where the to-convict instruction in this case did not require the jury to find possession with intent to deliver the substance of heroin, is remand for resentencing on a class C felony required because the jury made no finding that Rasmussen possessed heroin?

## D. STATEMENT OF THE CASE

The Grays Harbor Drug Task Force executed a search warrant on the Rasmussen residence. 5RP[1] 51-52, 85. Timothy Rasmussen and his wife Shelly emerged from the back bedroom when law enforcement arrived. 5RP 88. Inside a closed dresser drawer in the bedroom, officers found an unlocked safe in a dresser drawer that contained heroin packed in baggies and two pre-loaded

[1] The verbatim report of proceedings is cited as follows: 1RP 1/28/21, 3/1/21, 3/15/21, 3/31/21; 2RP 2/1/21; 3RP 5/3/21, 5/17/21; 4RP 5/24/21; 5RP 5/25/21, 5/26/21; 6RP 5/25/21 (excerpt from jury selection); 7RP 6/4/21.

syringes. 5RP 102, 106, 108-09, 122-23. They found a bowl containing heroin under the bed. 5RP 102, 111-12. A disguised storage container holding syringes and a blackened spoon was found on top of the dresser. 5RP 103-04. A digital scale and baggies were found on a bookshelf. 5RP 113-16. Shelly had a purse in the bedroom that contained $909 in cash. 5RP 118-20. One bag of heroin collected at the scene weighed 8.24 grams. 5RP 66. The State charged Mr. Rasmussen with possession of heroin with the intent to deliver. CP 1.

Shelly, testifying for the defense, admitted to being a daily user of heroin, but not a drug dealer. 5RP 144. She maintained the heroin and other drug-related items in the bedroom belonged to her and no one else. 5RP 137-40. Shelly shared the bedroom with her husband but he did not have access to the safe. 5RP 141. She bought the safe "to keep my drugs and my paraphernalia in there away from Tim, because I didn't want him to know that I

was still using." 5RP 142. Her husband was trying to get her clean. 5RP 142.

In closing, defense counsel argued to the jury that that the State did not prove Mr. Rasmussen possessed the drugs, as Shelly testified that the drug and drug items in the back bedroom were hers. 5RP 157-59. The jury returned a guilty verdict. CP 16. The court sentenced Mr. Rasmussen to 10 years in prison. CP 22.

Rasmussen raised various arguments on appeal. The Court of Appeals affirmed. Slip op. at 1-2.

## E. WHY REVIEW SHOULD BE ACCEPTED

### 1. COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO PREJUDICIAL EVIDENCE AND STATEMENTS MADE BY THE PROSECUTOR.

The State elicited evidence that the Grays Harbor Drug Task Force targets drug dealers and that Rasmussen became a target of their investigation after

receiving testimonial hearsay information from tips and informants.

The State also elicited unfairly prejudicial testimony that Rasmussen did not have a job and then argued to the jury that this was evidence that Rasmussen dealt drugs.

The State also misstated the evidence regarding the bedroom safe being open and the amount of heroin at issue.

The right to the effective assistance of counsel is guaranteed. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Rasmussen's counsel was ineffective in failing to object to the challenged evidence and statements because the evidence was inadmissible, the statements were improper, and confidence in the outcome is undermined as a result. This case presents a

significant question of constitutional law warranting review under RAP 13.4(b)(3).

**a. Defense counsel was ineffective in failing to object to statements and evidence that Rasmussen was targeted by the Grays Harbor Drug Task Force.**

In opening statement, the State told the jury that the Grays Harbor Drug Task Force opened an investigation into the delivery of heroin in the area and "the focus of that investigation was eventually narrowed down" to Rasmussen and his wife. 5RP 43. Counsel did not object.

The State called Detective King, supervisor for the Grays Harbor Drug Task Force, as the first witness in its case. 5RP 47. King described the task force as a multi-jurisdictional agency whose "main goal is to get mid to upper level dealers, and build cases on them. Sometimes we start at the bottom and have to work up to get higherup the food chain, but that's our primary purpose, is

attacking and going after the mid to upper level dealers, and trying to make a difference and make our community safer." 5RP 49.

The task force identifies its targets through a drug tip line. 5RP 50. The tips come from officers, "agencies outside of this area, business people, neighbors, anyone that sees something that's something they think might be drug-related." 5RP 50. Upon receiving a tip, "then we start doing surveillance and get information from, confidential of course, sources of information, run them by the prosecutor, make sure that we are getting people that are trustworthy, and then we start building cases on these people if we believe that it's there, and it merits an investigation." 5RP 50-51. Detective King was aware that there was a task force investigation into Mr. Rasmussen, and that he had been identified as a target. 5RP 51-52. Counsel did not object to the task force testimony.

Testimony regarding the Drug Task Force and its targeting of Rasmussen as a drug dealer was objectionable for three reasons.

First, testimony about sources identifying Rasmussen as a drug dealer constituted inadmissible hearsay because even though the out-of-court statements were not reproduced verbatim, their substance was presented to the jury. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001); State v. Hudlow, 182 Wn. App. 266, 280-81, 331 P.3d 90 (2014). Testimony conveys hearsay when "the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt . . . notwithstanding that the actual statements made by the non-testifying witness are not repeated." State v. Johnson, 61 Wn. App. 539, 546, 811 P.2d 687 (1991).

Second, admission of the substance of out-of-court statements violated the Sixth Amendment right to

confrontation because they were testimonial, no tipster or informant testified at trial, and Rasmussen had no prior opportunity to cross-examine any tipster or informant. Hudlow, 182 Wn. App. at 281, 284

Third, the detective's testimony constituted an impermissible opinion on guilt because he stated by inference that Rasmussen was a drug dealer in telling the jury that the Drug Task Force targets drug dealers and the Drug Task Force targeted Rasmussen for investigation. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

The Court of Appeals did not dispute that the testimony was objectionable and that, had an objection been made, it would have been sustained.

Counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. "[C]ounsel performs deficiently by failing to object to

inadmissible evidence absent a valid strategic reason." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541, review denied, 193 Wn.2d 1038, 449 P.3d 664 (2019). "[I]f defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence." State v. Vazquez, 198 Wn.2d 239, 248-49, 494 P.3d 424 (2021).

The Court of Appeals opined counsel's decision not to object to the testimony was tactical because "an objection likely would have emphasized the fact that the drug task force had reason to believe Rasmussen was selling drugs." Slip op. at 7.

But Rasmussen also argued on appeal that counsel was deficient in failing to move to exclude this testimony outside of the jury's presence before the detective took the stand. This course of action would have avoided

emphasizing any objectionable testimony to the jury by precluding it altogether. See State v. Shaver, 116 Wn. App. 375, 381-85, 65 P.3d 688 (2003) (counsel ineffective in failing to move in limine to exclude evidence of defendant's prior convictions); State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) ("The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.").

The Court of Appeals did not claim counsel's failure to do so was a justifiable tactical decision. Instead, the Court of Appeals pivoted to the prejudice prong, claiming there was no prejudice because the detective "did not give any specific details about how Rasmussen came to their attention" and "even though King said the task force targets mid to upper level dealers, he also said they sometimes 'start at the bottom and have to work up.'" Slip op. at 8.

Rasmussen need only show a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. It doesn't matter that the detective did not detail how Rasmussen came to their attention. What matters is that the jury heard that the Drug Task Force targeted drugs dealers and, based on information received, targeted Rasmussen as one. It doesn't matter that the jury may have inferred Rasmussen was only a low lever drug dealer at the bottom, as opposed to a mid to upper level dealer. The damage is in being identified as a drug dealer at any level.

The possession with intent to deliver charge turned on whether the jury believed Rasmussen was a drug dealer, as opposed to someone who possessed drugs for personal use, or who didn't possess them at all.

Rasmussen's wife testified that the heroin in the safe and other drug items belonged exclusively to her. 5RP 137-40. No evidence was admitted of any actual

drug deliveries perpetrated by Rasmussen. The circumstantial evidence of possession with intent to deliver allowed for varying inferences, one of them being that Rasmussen's wife, not Rasmussen, was the one who committed the crime.

Another available inference is that the heroin, while possessed, was not possessed with intent to deliver it. The evidence does not necessarily show such intent. The scale and loaded syringes are consistent with personal use, especially given Shelly's admission that she was a daily heroin user. 5RP 144. The presence of the cook spoon, commonly used to consume heroin for personal use, lends credence to this inference. 5RP 104. Shelly, meanwhile, explained the small baggies were used for jewelry sales. 5RP 144.

The testimonial hearsay and opinion on guilt increased the probability that the jury would convict because they went to the core issue in the case — the

element of whether Rasmussen possessed with intent to deliver. The failure to object undermines confidence in the outcome.

**b. Defense counsel was ineffective in failing to object to evidence of Rasmussen's lack of employment and the State's subsequent argument that his lack of unemployment showed Rasmussen committed the charged crime.**

The prosecutor cross-examined Rasmussen's wife as follows:

Q Are you employed?
A No.
Q Is Tim employed?
A No. 5RP 142-43.

In closing argument, the prosecutor argued circumstantial evidence showed Rasmussen intended to deliver the controlled substance, pointing to the presence of the small baggies and the scale. 5RP 153-54. The prosecutor then told the jury:

> You also have the cash, $909 of cash. Shelly testified she doesn't have a job. He doesn't have a job. Where does the cash come from?

> And that's a lot of cash. $909 for somebody who doesn't have a job? All of these things together is what gives you the picture of, did the defendant intend to deliver this? 5RP 154.

The prosecutor followed up by emphasizing "He didn't have a job." 5RP 155.

The law in Washington has long condemned evidence of poverty to show motive to commit a crime. Such an argument "assumes that a poor man is more likely than a rich man to commit a crime for the purpose of obtaining money, and is as contrary to human experience as it is to the law." State v. Lazzaro, 100 Wash. 562, 567, 171 P. 536 (1918).

The general rule, therefore, is that evidence of poverty is not admissible to show motive or to "create an inference that a defendant's financial status alone would suggest that he or she is more likely to commit a financially-motivated offense." State v. Kennard, 101 Wn.

App. 533, 541, 6 P.3d 38, review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000).

Proof of poverty on its own "is likely to amount to a great deal of unfair prejudice with little probative value." United States v. Mitchell, 172 F.3d 1104, 1109 (9th Cir. 1999). "The problem with poverty evidence without more to show motive is not just that it is unfair to poor people . . . but that it does not prove much, because almost everyone, poor or not, has a motive to get more money." Id. Most people, rich or poor, do not commit a crime to get more money. Id.

On the other hand, the State may submit evidence regarding a defendant's financial state if the defendant experienced an unexplained, abrupt change in financial circumstances or lived beyond their means. Kennard, 101 Wn. App. at 540-41; State v. Matthews, 75 Wn. App. 278, 287, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022, 890 P.2d 463 (1995).

Unlike in Matthews and Kennard, the evidence in Rasmussen's case did not show he experienced an unexplained, abrupt change in financial circumstances or lived beyond his means around the time of the charged offense. Yet the prosecution used evidence of Rasmussen's lack of a job as circumstantial evidence that he committed the crime.

The Court of Appeals held counsel was not ineffective in failing to object because nothing was objectionable, relying on State v. Jones, 93 Wn. App. 166, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003, 984 P.2d 1033 (1999). Slip op. at 9-10. Jones is distinguishable.

In Jones, the probative value of the money itself was clear because it was found on Jones immediately after a drug deal. Jones, 93 Wn. App. at 169-70, 175-76. In Rasmussen's case, the money found in the wallet was not connected to any drug deal that had just taken place.

The money happened to be in a wallet when the police got around to executing a search warrant on the residence. The probative value of the money itself is less than in Jones.

In Jones, the State presented evidence that affirmatively ruled out a lawful source of income from unemployment compensation or a public benefit due to poverty or disability. Jones, 93 Wn. App. at 169-70, 175-76. No such evidence was presented in Rasmussen's case. Not having a job did not necessarily mean that he or his wife lacked a lawful source of income.

The Court of Appeals opined: "Introducing evidence that neither Shelly nor Rasmussen was employed at the time rebutted a potential argument that the large amount of cash came from a lawful source." Slip op. at 9. Unlike in Jones, there is no reason to believe the State was anticipating a likely defense argument that Rasmussen acquired this money from a lawful source. The defense

offered no such theory before trial or in opening statement. Rasmussen made no statement to police claiming a lawful source of income. There was no basis to rebut a defense that didn't exist. Critically, the defense called Rasmussen's wife as a witness but did not ask her about sources of income. It was the State, in cross examining the wife, that elicited the lack of employment. 5RP 142-43. There is no anticipated rebuttal of a defense argument here.

Jones cautioned if evidence of a defendant's financial status were routinely admitted in drug dealing cases, the jury would be invited to impermissibly infer, "solely on the basis of a defendant's income, that he or she is more or less likely to have committed a financially-motivated offense." Jones, 93 Wn. App. at 175. The prosecutor drew an impermissible inference that Rasmussen committed the offense because cash was found but neither he nor his wife had a job. 5RP 154-55.

There is no legitimate reason not to object to the improper testimony about unemployment as irrelevant under ER 401 or unduly prejudicial under ER 403. Even if defense counsel had lodged no objection to the evidence, counsel should have prevented the State from capitalizing on that evidence by objecting to the prosecutor's closing argument on the subject.

As for prejudice, the evidence against Rasmussen on the possession with intent to deliver element was not overwhelming. Evidence of Rasmussen's lack of employment presented to the jury, and the prosecutor's argument based on that evidence, prejudiced the outcome because it invited the jury to find Rasmussen guilty because he didn't have a job.

Even if the lack of objection to evidence and argument regarding the lack of employment did not alone undermine confidence in the outcome, it must be considered in conjunction with counsel's ineffectiveness

set forth in section E.1.a., supra and E.1.c., infra. For an ineffective assistance of counsel claim, a defendant may be prejudiced as result of cumulative impact of multiple deficiencies in defense counsel's performance. Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Vazquez, 198 Wn.2d at 268-69.

**c. The prosecutor misrepresented the safe was open and inflated the amount of heroin, and defense counsel was ineffective in failing to object to these misstatements of the evidence.**

A prosecutor may not "mislead the jury by misstating the evidence." State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991).

The prosecutor misled the jury in claiming the safe containing the heroin was open, both in opening statement and closing argument. 5RP 45, 152, 155-56. The evidence showed the safe was closed. 5RP 102, 106-08; Ex. 15.

The State also misstated the evidence by claiming the bag of heroin weighed 8.45 ounces. RP 155. The evidence showed the heroin weighed 8.24 grams, a much smaller amount.[2] 5RP 66.

The failure to object to procedural misconduct can constitute ineffective assistance of counsel. State v. Stotts, __Wn. App. 2d_, __P.3d__, 38822-1-III, 2023 WL 3012555, at *1 (slip op. filed April 20, 2023).

Using a divide and conquer approach instead of considering the cumulative prejudice arising from multiple deficiencies in counsel's conduct, the Court of Appeals held there was no prejudice from the failure to object because "it is undisputed that the safe was unlocked and accessible by anyone in the house" and the jury was instructed that comments and argument from legal counsel did not amount to evidence. Slip op. at 10-11.

[2] 8.45 ounces is 239.5 grams.

In a case where a crucial issue was whether the State proved Rasmussen possessed the heroin in the safe, the State's misstatement that the safe was open lent unfair strength to the State's argument that Rasmussen had dominion and control over the drug. In a case where one of the disputed issues was whether the evidence showed possession with intent to deliver as opposed to mere possession without such intent, the gross misstatement of the amount of heroin lent misleading strength to the State's case.

Even if the lack of objection to the misstatements of evidence did not alone undermine confidence in the outcome, it must be considered in conjunction with counsel's ineffectiveness set forth in section E.1.a., supra and E.1.b., supra. Harris, 64 F.3d at 1438; Vazquez, 198 Wn.2d at 268-69.

## 2. THE JURY DID NOT FIND THE SUBSTANCE POSSESSED AS AN ELEMENT IN THE TO-CONVICT INSTRUCTION, REQUIRING REMAND FOR IMPOSITION OF A CLASS C FELONY SENTENCE.

The to-convict instruction did not identify the controlled substance possessed with intent to deliver as an element of the offense. The jury did not make a factual finding that Rasmussen possessed heroin with intent to deliver. In light of the Sixth Amendment right to a jury trial, the jury's finding of guilt does not authorize a class B felony sentence because it did not require a factual finding on what particular controlled substance Rasmussen possessed with intent to deliver. The case must be remanded for sentencing as a class C offense.

The jury was instructed in relevant part as follows:

- "The Defendant has been charged by Information with the crime of Violation of the Uniform Controlled Substances Act - Possession of Heroin with Intent to Deliver." CP 10.

- "It is a crime for any person to possess a controlled substance with the intent to deliver that controlled substance." CP 10.

- "Heroin is a controlled substance." CP 11.

The to-convict instruction provides:

> To convict the Defendant of the crime of Violation of the Uniform Controlled Substances Act - Possession of Heroin with Intent to Deliver, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 27, 2021, the Defendant possessed a controlled substance;
> (2) That the defendant possessed the controlled substance with the intent to deliver the controlled substance; and
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.
> CP 11.

The jury verdict form states: "We, the jury, find the Defendant Guilty of the crime of Violation of the Uniform Controlled Substances Act - Possession of Heroin with Intent to Deliver as charged." CP 16.

The question is whether the jury made a factual finding that Rasmussen possessed heroin with intent to deliver or whether it merely found Rasmussen possessed an unidentified controlled substance with intent to deliver. Neither the to-convict instruction nor the verdict form reflect an express factual finding that Rasmussen possessed heroin. The sentence for a class B felony, predicated on the erroneous premise that the jury found Rasmussen possessed heroin with intent to deliver, is therefore unauthorized by the jury's factual finding.

This argument is grounded in constitutional law. The Sixth Amendment right to a jury trial provides a constitutional limit on the facts that a sentencing court can use to support a sentence. Blakely v. Washington, 542

U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Under the Sixth Amendment, any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 301. "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id. at 303-04.

"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Elements are "the things the 'prosecution must prove to sustain a conviction.'" Mathis v. United

States, 579 U.S. 500, 504, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016) (quoting Black's Law Dictionary 634 (10th ed. 2014)).

Where the identity of a controlled substance increases the statutory maximum sentence, the identity of the substance is an element of the crime. State v. Goodman, 150 Wn.2d 774, 785, 83 P.3d 410 (2004). Possession with intent to deliver heroin is a class B felony, punishable by sentences up to 10 years, whereas crimes involving possession with intent to deliver certain other controlled substances are class C felonies, punishable by sentences up to 5 years. RCW 69.50.401(2)(a), (c); RCW 9A.20.021.

"[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913

(2010). If a court imposes a sentence not authorized by the jury's verdict, harmless error analysis does not apply. Id. at 900-01.

For example, in State v. Recuenco, the jury "did not explicitly find beyond a reasonable doubt that Recuenco committed assault with a firearm; it found only the use of a deadly weapon. Without an explicit firearm finding by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial right as defined by Apprendi and Blakely — Recuenco's sentence was greater than that allowed solely based on the facts found by the jury." State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005), rev'd and remanded, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), aff'd on remand, 163 Wn.2d 428, 180 P.3d 1276 (2008). The same thing happened in Williams-Walker. Williams-Walker, 167 Wn.2d at 899-900.

The Court of Appeals held "reading the entire to convict instruction in context, . . . the to convict instruction sufficiently required the jury to find that Rasmussen possessed 'the' controlled substance, heroin. And reading the plain language of the verdict, the jury *did* find Rasmussen possessed *heroin* with intent to deliver and not some other controlled substance." Slip op. at 13.

This holding is infirm. The to-convict instruction does not specify the identity of the controlled substance as an element of the offense that needed to be found beyond a reasonable doubt in order to convict. CP 11. The prefatory language in the to-convict instruction that refers to the charge is not an element that the jury needed to find to convict.

The verdict form does not reflect an express finding that Rasmussen possessed heroin either. While the verdict form states "We, the jury, find the Defendant Guilty of the crime of Violation of the Uniform Controlled

Substances Act - Possession of Heroin with Intent to Deliver as charged," (CP 16), the to-convict instruction permitted this verdict merely by finding that Rasmussen possessed an unidentified controlled substance. CP 11. The verdict form reflects no independent jury finding that Rasmussen possessed heroin. Writing "guilty" on the verdict form is simply the result of what the jury found pursuant to the to-convict instruction.

The dispositive question under the Sixth Amendment is what finding did the jury make that authorizes the sentence? In Rasmussen's case, there is only one instruction that calls for the jury to make explicit factual findings — the to-convict instruction. And that instruction does not require the jury to find the identity of the controlled substance.

This case presents a significant question of constitutional law warranting review under RAP 13.4(b)(3). Imposition of a class B felony sentence, predicated on a

fact that the jury did not find, violated Rasmussen's Sixth Amendment right to a jury trial. The remedy is remand for imposition of a class C felony sentence. State v. Clark-El, 196 Wn. App. 614, 624-25, 384 P.3d 627 (2016).

## F. CONCLUSION

For the reasons stated, Rasmussen respectfully requests that this Court grant review.

**I certify that this document was prepared using word processing software and contains 4843 words excluding those portions exempt under RAP 18.17.**

DATED this 27th day of April 2023.

Respectfully submitted,

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Filed
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Court of Appeals
Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TIMOTHY LYNN RASMUSSEN, SR.<br><br>Appellant. | No. 55897-1-II<br><br>UNPUBLISHED OPINION |

GLASGOW, C.J.—Timothy Rasmussen appeals his conviction and sentence for possession of heroin with the intent to deliver. He argues that he received ineffective assistance of counsel based on counsel's failure to object to the State's comments regarding the drug task force's investigation during opening argument, counsel's failure to object to evidence that Rasmussen did not have a job, and counsel's failure to object to the State's misstatements of the evidence during closing argument. Rasmussen also argues that remand is needed to impose a class C felony sentence because the to convict instruction did not identify heroin as the controlled substance at issue. Finally, Rasmussen argues we should remand for the trial court to remove simple possession of controlled substance convictions from his criminal history and to reduce the community custody term because he asserts the total length of confinement imposed exceeds the statutory maximum for his conviction.

We hold that Rasmussen did not receive ineffective assistance of counsel. We further hold that remand is not required based on the to convict instruction because reading the entire instruction in context, it required the jury to find that Rasmussen possessed heroin with intent to deliver. We further hold that remand is not required to remove simple possession of controlled substance convictions from his criminal history or to reduce the community custody term imposed. Accordingly, we affirm Rasmussen's conviction and sentence.

## FACTS

Law enforcement executed a search warrant on Rasmussen's home. Inside Rasmussen's bedroom, officers found a small unlocked black safe in a dresser drawer. The safe contained heroin packed in baggies and pre-loaded syringes. They also found a glass bowl with heroin in it. A storage container holding multiple syringes and drug paraphernalia was found on top of the dresser. A digital scale and dozens of baggies were found on a bookshelf. Rasmussen's wife, Shelly, had a purse in the bedroom that contained $909 in cash. One bag of heroin collected at the scene weighed 8.24 grams.

The State charged Rasmussen with possession of heroin with the intent to deliver.[1]

In its opening statement, the State told the jury, "In order [to] prove the defendant guilty, the State has to prove a couple of things. That first, on or about January 27, 2021, the defendant possessed a controlled substance, that substance being heroin. The defendant possessed that heroin with the intent [to] deliver it to another person." Rep. of Proc. (RP) (May 25, 2021) at 42. The State also previewed for the jury the testimony they would likely hear during trial: "These

[1] The State initially also charged Rasmussen with possession of methamphetamine. That charge was dismissed pursuant to the Supreme Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

witnesses are going to testify that the Grays Harbor Drug Task Force opened an investigation into the delivery of heroin within Aberdeen and Hoquiam areas. You are going [to] hear that the focus of that investigation was eventually narrowed down to Timothy Rasmussen, the defendant, and his wife, Shelly Rasmussen." RP (May 25, 2021) at 43.

Detective Sergeant Darrin King, the supervisor for the task force, testified at trial. He explained some background about what the task force does and how it uses a drug tip line to get tips from people in the community about potential drug activity. King testified that once they receive a tip they sometimes begin surveillance and information gathering to build a case on suspects. King testified that the task force investigated Rasmussen beginning in 2020.

Detective Ryan Tully, a member of the drug task force, also testified at trial. He testified that he was familiar with the investigation into Rasmussen. He prepared the search warrant for the case, setup the execution of the warrant, led the briefing, and controlled the search of Rasmussen's home.

Shelly testified in Rasmussen's defense at trial. She testified that all of the drugs, paraphernalia, items in the safe, and cash were hers. Shelly testified that Rasmussen did not have access to the safe because she did not want him to know that she was using drugs. On cross-examination, the State asked Shelly, "Are you employed?" to which she responded, "No." RP (May 25, 2021) at 142. The State asked, "Is [Rasmussen] employed?" to which she also responded, "No." *Id.* at 142-43.

The trial court instructed the jury, in relevant part:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You

> must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.
>
> . . . .
>
> To convict the Defendant of the crime of Violation of the Uniform Controlled Substances Act—*Possession of Heroin* with Intent to Deliver, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 27, 2021, the Defendant possessed a controlled substance;
>
> (2) That the defendant possessed *the* controlled substance with the intent to deliver *the* controlled substance; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 9, 11 (emphasis added). The court also instructed the jury that heroin is a controlled substance, and heroin was the only controlled substance mentioned in the jury instructions.

During closing argument, the State argued that Rasmussen had dominion and control over the drugs found in his bedroom. It noted, "They were in his bedroom. The safe that they were in was unlocked. And on top of that, there was an ashtray on the floor with controlled substances in that, just out in the open." RP (May 25, 2021) at 151. Rasmussen objected, claiming the State was arguing facts not in evidence. The trial court commented "It's argument. The jury will disregard any facts presented that are not supported by the testimony." RP (May 25, 2021) at 151. The State resumed its argument that Rasmussen had access to the drugs:

> Then again, the safe was open. He still had access. Yes, even considering the fact that that could have been her dresser drawer, it's a bedroom shared by a married couple. There were drawers in that that belonged to everybody. It wasn't just here, and there wasn't a lock on it. And the safe that was in there that was intended, or said to be intended to exclude him, was wide open.

RP (May 25, 2021) at 152.

In arguing that the evidence supported a finding that Rasmussen intended to sell the drugs, the State noted the small baggies and scale as well as the $909 cash found in the bedroom. "Shelly testified she doesn't have a job. He doesn't have a job. Where does the cash come from? And that's a lot of cash. $909 for somebody who doesn't have a job? All of these things together is what gives you the picture of, did the defendant intend to deliver this?" RP (May 25, 2021) at 154. The State also pointed out the amount of heroin that was found, referencing testimony that one of the baggies weighed 8.45 ounces and testimony that that amount was indicative of sales, not personal use. The testimony was actually that one bag that the lab tested contained 8.24 grams of heroin.

The jury found Rasmussen guilty "of the crime of Violation of the Uniform Controlled Substances Act—Possession of Heroin with Intent to Deliver as charged." CP at 16.

Rasmussen's criminal history listed on the judgment and sentence was extensive, including five prior convictions for possession of a controlled substance. The State's sentencing memorandum, however, did not include the prior possession convictions and calculated Rasmussen's offender score to be 6. The trial court also calculated Rasmussen's offender score to be 6. The trial court sentenced Rasmussen to 120 months confinement and 12 months of community custody. The State alerted the trial court that Rasmussen's community custody period could only be whatever time remains between when he was released and 120 months because the

conviction carried a 10 year statutory maximum. The trial court explained that the statutory "doubler" applied, and the maximum sentence for Rasmussen was actually 20 years.

Rasmussen appeals his conviction and sentence.

## ANALYSIS

### I. INEFFECTIVE ASSISTANCE OF COUNSEL

Rasmussen argues that he received ineffective assistance of counsel based on his counsel's failure to object to testimony that he was the subject of a drug task force investigation, to evidence of Rasmussen's unemployment, and to the State's misstatements of the evidence during closing argument. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To demonstrate that he received ineffective assistance of counsel, Rasmussen must show both that defense counsel's performance was deficient and that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Prejudice ensues if the result of the proceeding would have been different had defense counsel not performed deficiently. *Id*. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end this court's inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

We strongly presume that defense counsel's performance was not deficient. *Emery*, 174 Wn.2d at 755. To overcome this presumption, Rasmussen must show "'the absence of legitimate

strategic or tactical reasons supporting the challenged conduct by counsel.'" *Emery*, 174 Wn.2d at 755 (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

A. Drug Task Force Investigation Evidence

Rasmussen argues that his counsel rendered ineffective assistance by failing to object to testimony from Detectives King and Tully regarding the drug task force and its investigation into Rasmussen as a drug dealer. He argues that his counsel should have objected because the testimony constituted inadmissible hearsay, it was testimonial hearsay under the confrontation clause, and it constituted impermissible opinion on guilt. Because Rasmussen cannot show that counsel's decision not to object was not tactical, his claim fails.

Decisions on whether and when to object are "classic example[s] of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (quoting *Madison*, 53 Wn. App. at 763).

Here, defense counsel's decision not to object to the detectives' background testimony about the drug task force, how it operates, and that Rasmussen became subject to an investigation by the task force, is a clear example of trial tactics. The testimony Rasmussen takes issue with was elicited as the State laid a general groundwork for how the drug task force operates. The testimony did not include anything related to the content of tips from informants that led to the investigation into Rasmussen. Instead the testimony explained more generally that the task force has a system in place to receive tips from a wide variety of sources. In context, an objection likely would have emphasized the fact that the drug task force had reason to believe Rasmussen was selling drugs.

Opting not to object and permitting the State to quickly move on with its direct examination of the witnesses was a tactical decision that does not rise to the "egregious circumstances" under which the failure to object constitutes deficient performance.

Moreover, to the extent that Rasmussen argues counsel should have moved to exclude this testimony outside of the jury's presence, even if we were to agree, there was no prejudice. Although King testified generally about how the task force became aware of the targets of its investigations, he did not give any specific details about how Rasmussen came to their attention. And even though King said the task force targets mid to upper level dealers, he also said they sometimes "start at the bottom and have to work up." RP (May 25, 2021) at 49. King's testimony did not explain how the task force became aware of Rasmussen or how they viewed him, as a mid to upper level dealer or someone "at the bottom." *Id.* Had counsel gotten this testimony excluded, it is not reasonable to conclude that the result of trial would have been different. Rasmussen's claim fails.

B. Unemployment Evidence

Rasmussen also argues that he received ineffective assistance of counsel based on his counsel's failure to object to evidence that Rasmussen was unemployed. He contends that the State improperly used this evidence to show Rasmussen's motive to commit crime. Rasmussen cannot show that an objection on this basis would have been sustained and his claim fails.

"Evidence of poverty is generally not admissible to show motive" or to create an inference that a defendant's financial status alone would suggest that he or she is more likely to commit a financially-motivated offense. *State v. Kennard*, 101 Wn. App. 533, 541, 6 P.3d 38 (2000). But evidence of a defendant's unemployment or poverty status is not per se prejudicial.

For example, in *State v. Jones*, the trial court admitted documents from the Department of Employment Security that showed Jones had no reported income and did not apply for unemployment compensation for a two year period during which at least one of the alleged cocaine sales occurred. 93 Wn. App. 166, 173, 968 P.2d 888 (1998). The trial court found the evidence to be probative with regard to whether or not Jones was selling drugs. *Id*. The trial court reasoned that Jones was "'not a person who is simply unemployed or not working, but a person who is unemployed who has a large amount of cash in his pocket and is accused of a crime for which profit is certainly a motive for a commission of such an act.'" *Id*.

On appeal, we found that the trial court engaged in proper balancing and concluded that the evidence was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice. *Id*. at 176. Had Jones been found "with no money after the alleged offense, or with an insignificant sum, the admission of evidence of Jones's financial situation would have been error." *Id*.

This case is similar to *Jones*. Here, the State did not introduce evidence of Rasmussen's unemployment as evidence that poverty is a motive to deal drugs. Rather, it was introduced to explain the presence of a large sum of cash and to rebut Shelly's contention that the heroin found in the bedroom was for her personal use. The relevance and probative value of finding a large sum of money alongside a significant amount of heroin, baggies, and a scale to prove possession of heroin with intent to deliver is indisputable. Introducing evidence that neither Shelly nor Rasmussen was employed at the time rebutted a potential argument that the large amount of cash came from a lawful source.

Viewing the State's closing argument in context is clarifying. The State argued, "Shelly testified she doesn't have a job. He doesn't have a job. *Where does the cash come from? And that's a lot of cash. $909 for somebody who doesn't have a job?*" RP at 154 (emphasis added). The State clearly sought to tie the cash to Rasmussen selling drugs; it did not improperly argue that Rasmussen would be more likely to commit a crime because of his poverty.

Given the relevance and probative value of this brief testimony and reference to it during closing argument, Rasmussen fails to show that any objection would have been sustained. Accordingly, his claim that counsel rendered ineffective assistance on this ground fails.

C. State's Misstatements of Evidence

Rasmussen also argues that his trial counsel rendered ineffective assistance for not objecting to the State's misstatements of the evidence during closing arguments. Specifically, Rasmussen takes issue with the State's comments that the safe was open and that one bag of heroin weighed 8.45 ounces instead of 8.24 grams. Rasmussen cannot show that he was prejudiced by counsel's failure to object to these comments, and his claim fails.

While the testimony does not establish that the safe was open such that its door was ajar, it is undisputed that the safe was unlocked and accessible by anyone in the house. The State's comments that the safe was "open" was not overly misleading in this context. And while the difference between 8.24 grams and 8.45 ounces is significant, the jury was properly instructed that comments and argument from legal counsel did not amount to evidence. Indeed, Rasmussen did object on the basis of facts not in evidence once during closing argument and the trial court reminded the jury to disregard any facts presented by counsel that are not supported by the testimony. We presume juries follow the instructions provided them by the court. *State v. Keend*,

140 Wn. App. 858, 868, 166 P.3d 1268 (2007). Rasmussen's ineffective assistance of counsel claim fails.

## II. To Convict Instruction

When the identity of the controlled substance increases the maximum sentence that the defendant may face upon conviction, the identity is an essential element. *State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016); *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010) (plurality). Rasmussen was charged under RCW 69.50.401(2)(a), with unlawful delivery of a controlled substance (heroin). Delivery of heroin is a class B felony with a maximum sentence of 10 years. RCW 69.50.401(2)(a). In contrast, delivery of "controlled substances" is a class C felony with a maximum sentence of 5 years. RCW 69.50.401(2)(c); RCW 9A.20.021. Thus, the identity of the substance that the State alleged Rasmussen delivered, heroin, was an essential element of the crime charged because it exposed him to greater punishment. Rasmussen argues that remand for resentencing is necessary because the to convict instruction did not specify the controlled substance, an essential element, and therefore the guilty verdict only supports a conviction of a class C felony. We disagree.

"'We review the adequacy of a challenged to convict jury instruction de novo.'" *State v. Gonzalez*, 2 Wn. App. 2d 96, 105, 408 P.3d 743 (2018) (internal quotation marks omitted) (quoting *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). A "to convict" instruction must contain all the essential elements of the charged crime. *Clark-El*, 196 Wn. App. at 618. A jury instruction is erroneous if it relieves the State of its burden to prove every element of the crime. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

In *Clark-El*, the defendant was tried on a charge of delivery of methamphetamine, a class B felony. *Clark-El*, 196 Wn. App. at 617. The to convict instruction did not identify the controlled substance. *Id*. at 619. The jury found Clark-El guilty of the crime of delivery of a controlled substance. *Id*. at 618-19. The court sentenced him for the offense of delivery of methamphetamine, a class B felony. *Id*. at 618. On appeal, the court of appeals considered whether the faulty to convict instruction required reversal of Clark-El's conviction and sentence. *Id*. at 618.

As to Clark-El's sentence, we held that the jury's verdict did not authorize the sentence imposed because "the only finding stated in the verdict was that Clark-El was guilty of the crime of delivery of 'a controlled substance.'" *Id*. at 624. Because delivery of an unspecified controlled substance is a class C felony, the court held that the sentencing court erred in imposing a sentence for a class B felony. *Id*.

In *State v. Gonzalez*, 2 Wn. App. 2d 96 (2018), the State charged the defendant with unlawful possession of a controlled substance, methamphetamine, under former RCW 69.50.4013 (2015). Although the forensic examination of the controlled substance revealed both methamphetamine and cocaine, the amended information mentioned only possession of methamphetamine and not cocaine. The to convict instruction declared that the State must prove "the defendant possessed a *controlled substance.*" *Gonzalez*, 2 Wn. App. 2d at 104. The to convict instruction omitted the type of controlled substance. On appeal, we held that because the jury's verdict did not specify the controlled substance Gonzalez unlawfully possessed, the only authorized sentence was the lowest possible sentence for unlawful possession of a controlled substance.

Unlike in *Clark-El,* or *Gonzalez,* here, the to convict instruction's prefatory language clearly identified heroin as the controlled substance at issue. In those cases, the specific controlled substance at issue was not identified anywhere in the to convict instruction. *See Clark-El*, 196 Wn. App. at 619 and *Gonzalez*, 2 Wn. App.2d at 104 (to convict instructions stating that "defendant possessed a controlled substance.").

That the jury understood the to convict instruction to require a finding that Rasmussen specifically possessed heroin with the intent to deliver as opposed to a controlled substance, generally, is further evidenced by the verdict form. The verdict form expressly included "possession of heroin." This fact further distinguishes this case from *Clark-El* where the verdict was only for delivery of "a controlled substance." 196 Wn. App. at 618; *see also State v. Rivera-Zamora*, 7 Wn. App. 2d 824, 829, 435 P.3d 844 (2019) (distinguishing case from *Clark-El* and affirming defendant's sentence where verdict form stated unequivocally that it found defendant guilty of unlawful possession of a controlled substance with intent to deliver—methamphetamine, even though the to convict instruction omitted the word "methamphetamine.").

Under these circumstances, and reading the entire to convict instruction in context, we hold that the to convict instruction sufficiently required the jury to find that Rasmussen possessed "the" controlled substance, heroin. And reading the plain language of the verdict, the jury *did* find Rasmussen possessed *heroin* with intent to deliver and not some other controlled substance. Consequently, there is no error in the to convict jury instruction that merits remanding for resentencing.

## III. *BLAKE* CONVICTIONS

Rasmussen also argues that resentencing is required to remove the possession of a controlled substance convictions from his criminal history following *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021).

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, former RCW 69.50.4013(1), violates state and federal due process clauses and is therefore void. 197 Wn.2d at 195. A conviction based on an unconstitutional statute cannot be considered in calculating the offender score. *See State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986).

Here, there is no evidence to suggest that the trial court considered Rasmussen's prior drug possession convictions in calculating his offender score or imposing his sentence. The State provided Rasmussen's criminal history in its Statement of Prosecuting Attorney. That criminal history did not include Rasmussen's prior convictions for possession of a controlled substance. The listed felony conditions included first degree escape, first degree possession of stolen property, possession of heroin with intent to deliver, first degree trafficking in stolen property, and theft of a motor vehicle. Based on those prior convictions and a point based on the fact that Rasmussen committed his current offense while on community custody, the State calculated Rasmussen's offender score to be 6.

At sentencing, the trial court noted that the Statement of Prosecutor was correct, confirmed that Rasmussen stipulated that the criminal history was accurate, and calculated the offender score to be 6. For some reason, the criminal history listed on Rasmussen's judgment and sentence included his prior drug possession convictions. However, nothing in the record suggests that the

trial court considered those convictions in calculating the offender score or imposing its sentence. Although Rasmussen points to the trial court's recognition that his prior criminal history was "long" and "prolific," these statements appear to be a response to Rasmussen's request for a prison based drug offender sentencing alternative, which the trial court denied and Rasmussen does not appeal. See RP (June 4, 2021) at 6. To the extent the prolific nature of Rasmussen's criminal history could have affected the length of the sentence imposed, Rasmussen's prior controlled substance possession convictions were 4 of 37 prior offenses. Even subtracting the 4 controlled substance possession convictions, Rasmussen's criminal history is still "long" and "prolific." See RP (June 4, 2021) at 6; CP at 19-21. Accordingly, resentencing is not required.

## IV. STATUTORY MAXIMUM SENTENCE

Finally, Rasmussen argues that remand to reduce his community custody term is necessary because the total length of his confinement exceeds the 10 year maximum sentence for his conviction. We disagree because the trial court doubled the maximum sentence as authorized by RCW 69.50.408(1).

Possession of heroin with intent to deliver is a class B felony with a statutory maximum sentence of 10 years imprisonment. RCW 69.50.401(2)(a). Rasmussen argues that his total sentence of 132 months was unauthorized based on that statutory maximum.

However, "[a]ny person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized." RCW 69.50.408(1). An offense is considered a second or subsequent offense if the defendant was ever previously convicted under chapter 69.50 RCW "or under any statute of the United States or of any state relating to narcotic drugs, cannabis, depressant, stimulant, or hallucinogenic drugs."

RCW 69.50.408(2). The Washington Supreme Court recently held that RCW 69.50.408 automatically doubles the maximum sentence. *State v. Cyr*, 195 Wn.2d 492, 504, 461 P.3d 360 (2020).

Here, Rasmussen had multiple prior felony convictions under chapter 69.50 RCW. Therefore, under the plain language of RCW 69.50.408(1) the statutory maximum sentence automatically doubled from 10 years to 20 years. Rasmussen asserts that RCW 9.94A.505 and .701(10) require his community custody term to be reduced to bring the sentence within the statutory maximum under RCW 9A.20 generally, and RCW 9A.20.021 in particular. Thus, Rasmussen contends, these statutes do not allow the community custody provision to extend his entire sentence beyond the 10 year statutory maximum.

But Rasmussen's proposed statutory interpretation ignores the plain language of RCW 9A.20.021, which sets the maximum sentence for a class B felony at 10 years "unless a different maximum sentence for a classified felony is specifically established by a statute of this state." RCW 69.50.408(1) establishes a different statutory maximum when it applies to double the otherwise applicable maximum. We read statutes in harmony wherever possible, and this reading harmonizes the sentencing statutes recited above. Thus, we decline to adopt Rasmussen's interpretation.

Rasmussen did not object when the trial court noted the "doubler" at sentencing. The trial court imposed a total sentence of 132 months. Although that sentence exceeded the "normal" 10 year statutory maximum for possession of heroin with intent to deliver, it was well within the doubled statutory maximum of 20 years.

We affirm Rasmussen's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Veljacic, J.

Price, J.

**NIELSEN BROMAN & KOCH, PLLC**

**April 27, 2023 - 2:25 PM**

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