Supreme Court No. 102720-6
Court of Appeals No. 57317-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

ANTHONY GENE HAND,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Anthony Hand, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Hand seeks review of the unpublished opinion of the Court of Appeals in ***State v. Hand,*** 2023 WL 8771704 (Slip op. December 19, 2023). A copy of the decision is attached as Appendix A at pages A-1 through A-10.

C. ISSUES PRESENTED FOR REVIEW

1. A criminal defendant is constitutionally entitled, under the federal Sixth Amendment and Washington State article I, § 22, to the effective assistance counsel. Defense counsel failed to object to testimony and an exhibit purporting that Mr. Hand had several aliases, where there was no issue as to the identity of Mr. Hand and at no time did he maintain that he was not the person named in the Information. Should this Court accept review where the record shows that counsel was ineffective for failing object to testiomy and

exhibit alleging that Mr. Hand was known by several aliases, and where the jury later submitted a question inquiring about the purpose of testimony regarding the aliases?

2. In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that his counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that the defendant was prejudiced, sufficient to undermine the confidence in the outcome of the trial. Should this Court accept review defense counsel's failure to object to testimony and evidence showing that Mr. Hand was known by several aliases, where the jury took note of the testimony regarding use of the aliases and submitted an inquiry to the court, and where the testimony created a reasonable possibility of prejudice sufficient to undermine confidence in the outcome of the trial?

3. A criminal defendant is constitutionally entitled, under the federal Sixth Amendment and Washington State article I, § 22, to the effective assistance counsel. Should this Court grant review

where defense counsel prejudicially ineffective by failing to call Mr. Hand's sister as a witness, where his sister, as his SSI payee, could testify regarding the source of money that was found on Mr. Hand's person at the time of his arrest that was claimed by the State to be proceeds from drug sales?

4. Should this Court accept review where the State failed to prove beyond a reasonable doubt that Mr. Hand intended to deliver methamphetamine and heroin?

D. STATEMENT OF THE CASE

While on patrol at approximately 6 a.m. on April 7, 2021, Pierce County Deputy Bradley Crawford saw a GMC Sierra pickup truck in the parking lot of a convenience store. 4 Report of Proceedings (RP) at 230. Deputy Crawford ran the license plate and was informed that the truck was associated with a person named Jess Mailer, who was wanted by law enforcement. 4 RP at 231. Deputy Crawford parked and approached the truck, and as he did so, a man exited from the driver's side of the truck. 4 RP at 231. Deputy Crawford recognized the man as Anthony

Hand and placed him under arrest. 4 RP at 231. During a search incident to arrest, Deputy Crawford found $128.00 in Mr. Hand's wallet, and three baggies containing approximately 18 grams of heroin and two baggies containing approximately 28 grams of methamphetamine in a pocket of his jacket. 3 RP at 169, 4 RP at 232, 235, 236, 245. After obtaining a warrant to search the vehicle, Deputy Crawford found a sunglasses case in the glove compartment containing pipes and drug "tooters." 4 RP at 236, 237. Deputy Crawford found a backpack in the area of the driver's seat containing a cardboard sign that had "Anthony Hand" written on it, two glass pipes, a box containing two digital scales, and one non-digital scale. 4 RP at 240, 241. While being processed for jail, another deputy found approximately four baggies and a bag containing drugs in an inside pocket of Mr. Hand's jacket. 4 RP at 247.

Mr. Hand testified that he is homeless and that the methamphetamine and heroin found by Deputy Crawford belonged to him and that he had been an addict or 40 years. 4 RP at 273. He said that he lived in the truck and left it to go into the

convenience store when he was arrested. 4 RP at 283. Mr. Hand acknowledged that he had about 28 grams of methamphetamine and 18 grams of heroin in his jacket. 4 RP at 281. Mr. Hand testified that he receives a monthly SSI payment of $743 that his sister brings to him. 4 RP at 274. Mr. Hand stated that he buys drugs once a month after his sister cashes his check and he receives his SSI money, and that he does this because it is cheaper to buy drugs that way and because "that's the only time I had money." 4 RP at 274. Mr. Hand stated that his monthly drugs come in one big bag and that he uses a scale to ration the drugs into grams for his small daily doses. 4 RP at 275-76. He stated that he puts the one gram amount into a smaller bag, and that if he does not weigh it out into daily doses, he will run the risk of overdosing or run out of drugs in the middle of the month. 4 RP at 277. He stated that he smokes methamphetamine in a glass pipe. 4 RP at 278. Mr. Hand stated that drugs found at the jail in his inner jacket pocket was his "daily ration." 4 RP at 281.

Mr. Hand denied that he never sold the drugs or possessed the drugs with the intent to sell. 4 RP at 279. He stated the money

seized by Deputy Crawford as drug proceeds was left over from his SSI check after he bought his monthly amount of drugs. 4 RP at 279.

Mr. Hand was charged in Pierce County Superior Court with possession of methamphetamine with intent to deliver (Count 1), possession of heroin with intent to deliver (Count 2). Clerk's Papers (CP) at 3-4. Mr. Hand was later charged with bail jumping in an amended information filed August 8, 2022. CP at 83-85.

During trial the State introduced the Information filed in the case as an exhibit. 3 RP at 185; CP at 3-4. When asked about the name on the Information, a prosecuting attorney testified that the name of the defendant in the caption of the charging document is "Anthony Hand. It also has some a/k/a's on here, Anthony Gene Bonnafield, Anthony Gene Bonnifield, and Anthony G. Miera." 3 RP at 185-86; CP at 3. Later, during deliberation the jury submitted a question: "[w]hat was the intent to provide evidence of alias names for Defendant." 5 RP at 328; CP at 154. The judge said that it was an unusual question and that "[w]e know why it's

there, but it's so irrelevant to what they're really trying to do." 5 RP at 329. The jury was further instructed by the court to "[r]eview the evidence, review the jury instructions, and continue your deliberations." 5 RP at 328. C

In his direct appeal, Mr. Hand argued that insufficient evidence supports the convictions for possession of methamphetamine with intent to deliver, possession of heroin with intent to deliver, and bail jumping, that the jury should not have informed of his aliases, and ineffective assistance of counsel. In his statement of additional grounds (SAG), Mr. Hand alleged evidentiary error, ineffective assistance of counsel, jury instructional error, and that proceedings were wrongly conducted outside his presence. The lower Court found Mr. Hand fails to demonstrate reversible error, and affirmed his conviction. ***Hand***, 2023 WL 8771704, at *1, 10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court

should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW BECAUSE TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY NOT CHALLENGING INTRODUCTION OF THE UNREDACTED INFORMATION CONTAINING THREE ALIASES.

The State elicited testimony from a former Pierce County deputy prosecutor that Mr. Hand had three "also known as" names. The prosecutor introduced the Information filed as an exhibit and asked the witness to read the name in the caption of the charging document. The witness/prosecutor said that the Information named Anthony Hand and testified that the caption "also has some a/k/a's on here, Anthony Gene Bonnafield, Anthony Gene Bonnifield, and Anthony G. Miera." 3 RP at 185-86; CP at 3-4. At trial, there was no issue as to the identity of Mr. Hand and at no time did the defendant maintain that he was not the person named in the Information.

This issue is controlled by ***State v. Cartwright***, 76 Wn.2d 259,

264, 456 P.2d 340 (1969). Although evidence of an alias is not per se inadmissible, it must be relevant and material to prove issues in a case. ***Cartwright***, 76 Wn.2d at 264. The leading case in Washington addressing the introduction of aliases is ***State v. Smith***, 55 Wn.2d 482, 348 P.2d 417 (1960). In that case, the Supreme Court held that a defendant charged with embezzlement deserved a new trial where the jury learned she had used several unproven aliases. ***Smith***, 55 Wn.2d at 484. By branding Mr. Hand as someone who uses aliases, the prosecution invited jurors to infer that Mr. Hand was an untrustworthy career criminal. The mere fact that the other names contained in the Information were not explicitly referred to as an "alias" does not mean that the jury did not understand the names to be aliases.

It is well-established in Washington law that jurors naturally assume that where a defendant is known by another name, that other name is used for the purpose of committing criminal acts. As stated in ***Smith***, *supra*, it is "common knowledge that the use of aliases is frequently associated in the public mind with the so-called 'criminal' cases." ***Smith***, 55 Wn.2d 484. Even though the prosecutor did not

refer to the three names as "aliases," jurors received the message with unmistakable clarity. This was not lost on jurors, who submitted an inquiry to the court asking "What was the intent to provide evidence of alias names for Defendant." 5 RP at 328; CP at 154.

The test as to whether an alias may be used by the State is whether the alias or other name is relevant and material to prove or disprove any of the issues in the case. ***State v. Elmore***, 139 Wn.2d 250, 284, 985 P.2d 289 (1999). The prosecution's introduction of the Information containing the names created an environment hostile to the defense. Injecting Mr. Hand's unproven aliases into the case was not sanctioned under the alias standard set forth in ***Cartwright*** and served no legitimate purpose: Mr. Hand was not charged with obstruction or otherwise failing to identify himself, and in fact identity was not at issue. Deputy Crawford did not allege that Mr. Hand denied his identity at the time of his arrest and Mr. Hand acknowledged his name during direct examination. 4 RP at 271. The information unfairly allowed Mr. Hand to be cast as a career criminal who used multiple aliases, that he was a person known to law enforcement and to the State to the extent that the State tracked

and recorded his aliases and included them, for no apparent reason, on his charging document.

The aliases, "Anthony Gene Bonnafield, Anthony Gene Bonnifield, and Anthony G. Miera," were irrelevant and prejudicial. The court did not use the test as to whether an alias may be used by the State set forth in ***Elmore***, which is whether the alias or other name is relevant and material to prove or disprove any of the issues in the case. *Id.*, 139 Wn.2d at 284. Mr. Hand raised a viable defense that was undermined by the improper evidence of unproven aliases.

Both the Sixth Amendment and Article 1, § 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Mierz***, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Counsel is ineffective if, despite a strong presumption of capability, 1) his representation was "deficient," and 2) that deficiency prejudiced his client. See ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence

would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). This does not require proof the defendant would likely have been acquitted. ***Strickland***, 466 U.S. at 694. A "reasonable probability" is one sufficient to "undermine confidence in the outcome." ***State v. Crawford***, 159 Wn.2d 86, 104-105, 147 P.3d 1288 (2006).

In this case, trial counsel erred by not challenging introduction of the unredacted Information containing the three aliases or "also known as" names. It was also prejudicial error by trial counsel to fail to challenge the prosecutor's reference to the alleged aliases, "Anthony Gene Bonnafield, Anthony Gene Bonnifield, and Anthony G. Miera" because the aliases were irrelevant and immaterial to prove or disprove any of the issues and were prejudicial to Mr. Hand. In this case, Mr. Hand was subjected to ineffective assistance of counsel by counsel's unprofessional failures to move to exclude or at least object to the prosecution's unproven allegation that Mr. Hand was known by at least three aliases and introduction of the

Information as an exhibit. 3 RP at 185-86. Counsel's representation is "deficient" if it falls below an objective standard of reasonableness, based on the circumstances of the case. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). That deficiency is prejudicial and compels reversal where, within reasonable probabilities, the outcome would have been different, absent counsel's errors.

Due to counsel's failure to recognize the prejudice cause by introduction of the aliases and failure to object, Mr. Hand's jury heard testimony by a prosecutor and received an exhibit showing that Mr. Hand was known by three aliases. 3 RP at 185-86. As stated in ***Smith***, use of aliases is frequently associated in the public mind with criminals. ***Smith***, 55 Wn.2d at 484. Moreover, counsel did not object to the admission of the aliases on the basis that the aliases were not subjected to the test required in ***Elmore*** and ***Cartwright***, *supra*. Reasonably competent counsel would have made a motion to exclude such completely irrelevant, prejudicial, immaterial and prejudicial evidence. Counsel's failure to do so fell far below an objective standard of reasonableness.

When counsel is given discovery, he is on notice that any

evidence mentioned in that discovery, such as in police reports about an arrest, may be attempted to be used by the prosecution at trial. See ***Kimmelman v. Morrison***, 477 U.S. 35, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Here, the aliases were not contained in discovery but in the initial charging document and counsel was therefore on notice that the aliases could be made known to the jury during the course of the State's case, despite the immateriality of the evidence and despite the failure to test admissibility as required by ***Elmore***.

Once the Information was admitted into evidence as an exhibit, it was inevitable that the jury would see it and in fact the prosecution made sure the jury was aware of the aliases by having the witness prosecutor read the three "also known as" names to the jury. 3 RP at 185-86. Defense counsel should have objected in order to keep the contents of the charging document from being revealed to the jury, or by at least requesting that the document be redacted to remove the names. Failing to use legitimate evidentiary objections in this case was not strategic.

Furthermore, there is more than a reasonable probability that counsel's unprofessional failures affected the outcome of the trial.

The prosecutor had no legitimate basis to include unproven aliases in the caption of the pleadings because Mr. Hand at no time denied his identity. Moreover, allowing admission of highly prejudicial irrelevant evidence of aliases impermissibly tainted the jury's ability to fairly and impartially decide the case. The jury undeniably took notice of the aliases and asked the Court "[w]hat was the intent to provide evidence of alias names for Defendant." 5 RP at 328.

The evidence in this case was far from overwhelming. Mr. Hand acknowledged that he possessed 28 grams of methamphetamine and 18 grams of heroin but said that the drugs were for his personal use and that he was not a drug dealer. The evidence did not contradict Mr. Hand's version of events and the jury may very well have been willing to accept that explanation. He said that he bought drugs once a month after receiving his SSI check, and the arrest took place during the first week of the month, when he would presumably have a months' supply. The State presented no evidence of a sale to an informant. Mr. Hand explained that he used the digital scales to ration his daily drug doses into grams. The testimony regarding the use of aliases, however, is precisely the type

of unduly prejudicial evidence that ***Elmore*** and ***Smith*** seek to prevent. As such, counsel was prejudicially deficient by failing to object to introduction of testimony and evidence regarding unproven aliases and the convictions in all three counts should be reversed and the matter remanded for a new trial.

2. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW BECAUSE TRIAL COUNSEL RENDERED PREJUDICIALLY INEFFECTIVE ASSISTANCE DUE TO COUNSEL'S FAILURE TO CALL AN IMPORTANT WITNESS.

A key component of Mr. Hand's defense is that he acknowledged that the drugs were his and that he is a homeless methamphetamine and heroin addict and that he buys his drugs once a month for his personal use using his SSI check. 4 RP at 273, 274. 281-82. His sister is his payee and she receives his SSI check in the amount of $734 once a month and she cashes the check for him and brings him the money and he then uses the money to buy drugs. 4RP at 274. Mr. Hand uses the scales to weigh out one gram of each drug in order to ration his daily drug use to make sure that he does not run out of drugs or money in the middle of the month. 4 RP at 275-79. He uses that method because it is cheaper and because it helps

him avoid running out of drugs before his next check. 4 RP at 274.

In May, 2022, Mr. Hand wrote a letter to the court that he wanted to be read to the jury that included the statement that he had provided his SSI Evaluation and SSI payment records to his attorney and asked that it be entered as an exhibit at trial, and also mentions his SSI payee Karen Laidler. CP at 65-66. Mr. Hand wrote to the court stating that he submitted a witness list to his attorney containing the name Karen Laidler, "who like I said is my Payee and will testify to cashing my checks and giving me all the Money's (currently held in evidence)[.]" CP at 66.

A letter from Karen Laidler to the Judge was filed with the court on July 22, 2022. CP at 74. The letter states in relevant part:

> My name is Karen Jay Laidler, I am Anthony G. Hand's sister and Power of Attorney. I am writing this statement to be filed in the court filings under the above Case # 21-1-00808-7.
>
> At the beginning of each month on the 1st day of the month, Anthony received an SSI payment in the amount of $734.00, sent by mail to our Mothers PO Box. This is also his mailing

address for all of his mail.

. . .

During the time of his arrest 04/07/2021, not only did I give him the SSI payment normally in $20 bills. He also received a stimulus payment on 3 different times posted on a debit card on or around the same times and dates, as his SSI, in which he went to the banks ATM and withdrew the full amount in cash.

CP at 74.

At trial Mr. Hand testified that his sister brings his SSI check for $734 each month and that he rations his money by buying his drugs once a month. 4 RP at 274-75. Defense counsel failed to call Ms. Laidler as a witness, despite being informed through Mr. Hand's letters and pro se motions that she was willing to testify about her status as her brother's SSI payee and despite the presence of Ms. Laidler's letter in the court file.

Here, Ms. Laidler's presence was critical for the defense because she was the source of the $128.00 found in Mr. Hand's wallet and could corroborate that his only source of income was his monthly SSI checks, which he received near the first of each month,

without her testimony her letter to the court was otherwise inadmissible. Mr. Hand repeatedly made clear that he wanted his sister to be called as a witness, and she indicated her willingness to testify by taking the time to write the July 22, 2022 letter to the trial court.

Given counsel's failure to bring Ms. Laidler into court, this failure could not have been tactical, since it left the defense with no ability to challenge the State's assertion that the money found on Mr. Hand's person was from drug sales. Moreover, the failure to call Mr. Laidler essentially left unsupported Mr. Hand's claim that he received money once a month near the beginning of the month, from which the defense would be able to compellingly argue that Mr. Hand's and Ms. Laidler's testimony made sense; he possessed drugs and a relatively small amount of money on April 7, near the beginning of the month and presumably shortly after he received his SSI money from his sister.

Having been provided with Mr. Hand's letters and pro se motions and Ms. Laidler's letter, defense counsel should have been aware of the need to subpoena Ms. Laidler before trial in order to

support his client's case and in order to allow introduction of the July 22, 2022 letter. By failing to call Ms. Laidler to testify, counsel effectively deprived Mr. Hand of his right under the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution, to confront his accusers. The indicia of an intent to deliver drugs was minimal. The amount of money found by police was small and the amount of drugs was not large given Mr. Hand's testimony regarding his method of rationing drugs to last the month. Had defense counsel had secured Ms. Laidler's presence as a known and available witness to testify regarding her role as his SSI payee and the source of Mr. Hand's money, it is reasonable to believe that the jury would have voted to acquit.

3. RESPECTFULLY, THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTIONS FOR POSSESSION OF METHAMPHETAMINE AND HEROIN WITH INTENT TO DELIVER.

To prove Mr. Hand guilty of possession with intent to deliver under RCW 69.50.401(a)(1), the State was required to show three elements: (1) unlawful possession; (2) with intent to deliver; and (3)

a controlled substance, in this case heroin and methamphetamine.

Generally, "[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver." ***State v. O'Connor***, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). A finder of fact may infer intent to deliver from possession of a significant amount of a controlled substance plus at least one additional fact suggesting the intent to deliver. ***O'Connor***, 155 Wn. App. at 290.

"Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." ***State v. Brown***, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). Possession of a controlled substance, without more, is insufficient to establish an inference of intent to deliver. ***State v. Hagler***, 74 Wn.App. 232, 235, 872 P.2d 85 (1994). Washington cases where intent to deliver was inferred all require at least one additional factor, beyond possession, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. ***State v. McPherson***, 111 Wn. App. 747, 759, 46 P.3d 284 (2002). In reviewing the evidence necessary to convict in possession

with intent cases, the ***Brockob*** Court affirmed that " 'at least one additional factor, suggestive of intent, must be present.' " ***State v. Brockob,*** 159 Wn.2d 311, 337, 150 P.3d 59 (2006) (quoting ***State v. Moles***, 130 Wn. App. 461, 466, 123 P.3d 132 (2005)). A common "additional factor" is the defendant's possession of a large amount of cash. ***O'Connor***, 155 Wn.App. at 290, 229 P.3d 880; ***Hagler***, 74 Wn.App. st 236-37 (large amount of cocaine and $342 sufficient to establish intent to deliver). Courts have held that the presence of contraband, together with large sums of money or packaging and processing materials, sufficiently support a finding of intent to deliver.

Here, the presence of a scale is relevant circumstantial evidence suggesting an intent to deliver, although it is usually considered in conjunction with other circumstantial evidence that is similarly suggestive of such intent. For example, in ***O'Connor***, Division Three relied on a large amount of marijuana, the presence of a scale, and "the sophistication of the [defendant's] grow operation" in holding that the evidence was sufficient to sustain a conviction for possession with intent to deliver. ***O'Connor***, 155 Wn.

App. at 291. Similarly, in ***State v. Lane,*** 56 Wn. App. 286, 297/98, 786 P.2d 277 (1989), Division Three affirmed a conviction for possession with intent to deliver based on evidence of a large amount of cocaine, the presence of a scale, and the presence of a large amount of cash.

In this case, however, there is no substantial corroborating evidence to support an intent to deliver. The weight of the evidence demonstrates that the drugs were intended for personal use by Mr. Hand. There was no evidence of a controlled buy with a confidential informant, no address books or accounting books were discovered, and no cutting agents were discovered. Furthermore, there was indicia of personal use found during the search—Deputy Crawford found drug "tooters" and pipes during his search of the sunglasses case found in the truck, which indicates that Mr. Hand intended personal use of the drugs, just as he testified. 4 RP at 236, 237.

The evidence presented showed innocence as strongly as it showed guilt. Mr. Hand told the jury that he was a drug user but not a dealer. 4 RP at 279. He explained that the drugs were for

personal use and that he bought the drugs at the beginning of the month with his of $743.00 SSI check. 4 RP at 274. He had pipes and drug "tooters" to facilitate his ingestion of the methamphetamine and heroin. Even if the amount of 28 grams of methamphetamine and 18 grams of heroin was more than typical for personal use, "[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver." ***O'Connor***, 155 Wn. App. at 290.

Digital scales — such as were found in the backpack — are not solely indicative of an intent to deliver drugs, since purchasers also have scales to make sure the correct quantity of drugs they purchased was delivered. In this case, Mr. Hand testified he used a scale to ration his monthly drugs to a daily ration to make sure that the drugs lasted the month until his next SSI check. 4 RP at 275-76. The possession of the digital scales are consistent with personal use. Without more, particularly without any evidence whatsoever of any drug sales, the methamphetamine and heroin combined with the relatively small amount of money and absence of the usual indicia of

drug dealing are insufficient evidence to prove beyond a reasonable doubt that Mr. Hand intended to deliver the methamphetamine and heroin.

In the absence of sufficient evidence of each of the elements of the crime charged, a guilty verdict may not stand. ***State v. Spruell***, 57 Wn.App. 383, 385, 788 P.2d 21 (1990). The State's evidence showed possession of drugs, but the indicia of intent to deliver was simply the same as any user or purchaser of the drugs as well.

The petitioner respectfully submits that the Division Two incorrectly decided these issues, and that the Court erred by finding that the petitioner received effective assistance of counsel and erred by finding that sufficient evidence supported the convictions for possession with intent to deliver.

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F. CONCLUSION

For the foregoing reasons, Mr. Hand received ineffective assistance of counsel, and the State failed to present sufficient evidence to support the convictions for possession with intent to deliver. This Court should accept review and remand for new trial, or in the alternative, remand for reversal of the convictions.

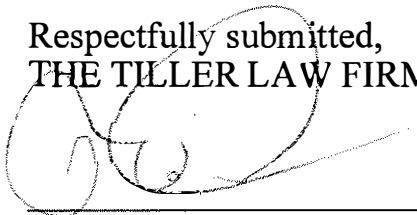
DATED: January 9, 2024.

Certification of Compliance with RAP 18.17:

This petition contains 4964 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: January 9, 2024.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Attorney for Anthony Gene Hand

CERTIFICATE OF SERVICE

The undersigned certifies that on January 9, 2024, that this Petition was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, and to Kristie Barham, Pierce County Prosecuting Attorney and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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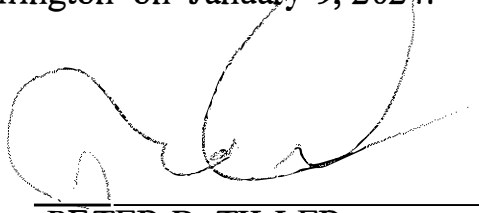
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 9, 2024.



PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

December 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY GENE HAND, Appellant.	No. 57317-2-II UNPUBLISHED OPINION

VELJACIC, J. — Anthony G. Hand appeals his judgment and sentence for possession of methamphetamine with intent to deliver, possession of heroin with intent to deliver, and bail jumping. He alleges that insufficient evidence supports his drug convictions, the jury was wrongly informed of his aliases, and ineffective assistance of counsel. In his statement of additional grounds (SAG) for review, Hand alleges evidentiary error, ineffective assistance of counsel, jury instructional error, and that proceedings were wrongly conducted outside his presence. We affirm.

FACTS

Police arrested Hand for an outstanding felony warrant. In a search incident to arrest, police found several baggies containing methamphetamine and heroin in Hand's jacket. Three of those baggies contained heroin. The baggies weighed 6.8 grams, 0.6 grams, and 10.2 grams. Two baggies contained methamphetamine. One weighed 3.7 grams and the other weighed 24.3 grams. Additional baggies containing heroin and methamphetamine where also found in a pouch on Hand. Hand had a total of 29.8 grams of methamphetamine and 18.5 grams of heroin on him. Hand's wallet contained his identification and $128 in cash in various denominations.

After obtaining a search warrant for the vehicle that Hand exited prior to his arrest, police found a backpack containing numerous other drug-related items. The backpack contained three scales—two of the scales had drug residue on them. The backpack also contained two glass pipes and a piece of cardboard with Hand's name on it. Police also discovered a sunglasses case with tooters[1] and pipes in the vehicle's glove box.

The State charged Hand with two counts of unlawful possession of a controlled substance with intent to deliver. The caption of the information lists Hand's name and then states, "AKA Anthony Gene Bonnafield, Anthony Gene Bonnifield, Anthony G. Miera." Clerk's Papers (CP) at 3.

The trial court released Hand on bail. On December 14, 2021, Hand was ordered to appear on March 22, 2022 for trial. The court issued a bench warrant when he failed to appear for trial on that date. The State amended the information to include a bail jumping charge.

At trial, the arresting officer, Pierce County Sheriff's Detective Bradley Crawford, testified for the State. He testified that scales are commonly used to weigh illegal drugs for sale and distribution. He further testified that based on his experience, the large quantity of drugs, how they were packaged, the multiple scales, and the amount of money with multiple denominations are indicative of the distribution of drugs.

The State also called Pierce County Sheriff's Detective Jesse Hotz, who is part of a narcotics task force. Hotz testified that the items found on Hand's person and in the vehicle were associated with drug delivery rather than personal consumption. Hotz also testified that street dealers of illegal narcotics commonly purchase a large quantity of drugs and then weigh them out

[1] "Tooter" is a slang term used to describe a short straw segment, or some other similarly shaped object, used to inhale certain drugs.

in smaller amounts. He gave an example that a dealer may purchase a "zip" of methamphetamine, which is 28 grams. 3 Rep. of Proc. (RP) at 209. The dealer may then use scales to break down the "zip" into "teeners" or "8 balls," which are sold to individual users. 3 RP at 209. Heroin is commonly broken down into an ounce, half ounce, or quarter ounce amounts. Hotz further testified that both methamphetamine and heroin are packaged in plastic baggies for individual sales.

Hand testified on his own behalf. He admitted the methamphetamine and heroin were his, but they were for his personal use. Hand claimed that, because he was homeless, his sister, Karen Laidler, would receive his social security check each month and bring it to him. He would then use that money to buy large quantities of drugs to divide up into smaller packages for personal use. Hand testified that he divided up the drugs into smaller packages to make sure he did not overuse during the month.

During a sidebar, the trial court noted that Laidler had written a letter to the court about Hand's social security benefits, which was included in the court's record. The court inquired whether she was going to be called as a witness. Defense counsel responded that he had not heard back from Laidler, but her testimony only had "marginal value" and that if he did not hear back he would proceed without her. 4 RP at 258. Defense counsel ultimately did not call Laidler as a witness.

To support the bail jumping charge, the State offered, and the trial court admitted, the information as an exhibit. A prosecutor described the document before it was admitted and stated that the information included additional names that Hand was also known by. Defense counsel did not object.

The jury found Hand guilty as charged. At sentencing, the State recommended 60 months, which was the high end of the standard range on Hand's bail jumping conviction and the low end

for his possession with intent to deliver convictions. Based on Hand's numerous prior convictions, his offender score was a 9+. The trial court sentenced him to 60 months on all three convictions to be served concurrently. The court also noted that Hand's sentence was concurrent with two other criminal matters. Defense counsel did not argue at sentencing that Hand's convictions for possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver constituted the same criminal conduct.

Hand appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Hand first contends that sufficient evidence does not exist to support his possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver convictions. He argues that the State failed to show he had intent to deliver the drugs. We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. Credibility determinations are made by the trier of fact and are not subject to review. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.*

In order to prove unlawful possession of a controlled substance with intent to deliver, the State had to prove (1) unlawful possession (2) of a controlled substance (3) with the intent to deliver. *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010); RCW 69.50.401(1). Generally, "[m]ere possession of a controlled substance, including quantities greater than needed

for personal use, is not sufficient to support an inference of intent to deliver." *O'Connor*, 155 Wn. App. at 290. But a finder of fact can infer intent to deliver from possession of a significant amount of a controlled substance plus at least one additional factor, "such as a large amount of cash or sale paraphernalia." *Id.*

Here, Hand was found with a significant amount of methamphetamine and heroin. The drugs were packaged into small baggies. Two officers testified the amounts found were consistent with distribution of drugs instead of personal use. Officers also found scales with drug residue, cash with multiple denominations, and drug paraphernalia. These items may also be associated with distribution.

While Hand testified that the drugs were for his own personal use, credibility determinations are for the trier of fact and are not subject to review. *Miller*, 179 Wn. App. at 105. Accordingly, we hold that sufficient evidence exists to convict Hand of possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver.

II. EVIDENTIARY ERROR

Hand next contends that the trial court erred in allowing the information to be submitted to the jury with his three aliases listed on the caption. This issue is not preserved for review.

A failure to object that evidence is inadmissible waives any claimed error on appeal. *State v. Burns*, 193 Wn.2d 190, 211, 438 P.3d 1183 (2019). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

Here, Hand did not object to the admission of the information below, so there is no error preserved for appeal. Accordingly, his argument regarding the information is waived.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Hand next alleges he was denied effective assistance of counsel. He argues that counsel was deficient for not objecting to the admission of the information discussed above, not calling Laidler as a witness, and not arguing at sentencing that his possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver convictions encompass the same criminal conduct. We disagree.

Ineffective assistance of counsel claims arise from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 247-48. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Id.* at 248.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* at 247. Defense counsel's conduct is not deficient if it was based on legitimate trial strategy or tactics. *Id.* at 248. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any legitimate strategic or tactical reason explaining defense counsel's conduct. *Id.* A decision not to call a witness "'is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics'" and will not support a claim of ineffective assistance of counsel. *State v. Bogdanov*, ___ Wn.2d ___, 532 P.3d 1035, 1053 (2023) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 545, 397 P.3d 90 (2017)); *see also Vazquez*, 198 Wn.2d at 248.

1. No Objection to Information

Hand first contends counsel rendered deficient performance for failing to object to the jury seeing the "also known as" names in the caption of the information and that this error was prejudicial. Br. of App. at 26. We disagree.

Relying on *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), *State v. Cartwright*, 76 Wn.2d 259, 456 P.2d 340 (1969), and *State v. Smith*, 55 Wn.2d 482, 348 P.2d 417 (1960), Hand argues that defense counsel should have objected to the other names evidence and that such evidence affected the jury's verdict. But even assuming counsel's performance was deficient for not objecting, Hand cannot establish prejudice. Here, there was overwhelming evidence of Hand's guilt supporting both the drug charges and the bail jumping charge. The "also known as" names listed in the caption would not likely change the outcome. As discussed above, reversal is only required if the appellant can show the result would likely have been different without the inadmissible evidence. *Vazquez*, 198 Wn.2d at 248-49. Hand fails to make this showing.

2. Not Calling Laidler as a Witness

Hand next contends that counsel rendered deficient performance by not calling his sister as a witness. We disagree.

During trial, Hand testified that Laidler received his social security checks for him each month and then gave the checks to him. When asked if Laidler would be called as a witness, counsel told the court he had not heard back from her and that her testimony only had "marginal value." 4 RP at 258. Indeed, there was no dispute that Hand purchased the drugs with his social security money. While Laidler's testimony may have gone to why Hand had cash in his wallet, defense counsel's decision to not call a witness to highlight for the jury that Hand was using his

social security benefits in this way was legitimate trial strategy and does not amount to deficient performance.

3. Not Arguing Drug Convictions Encompass Same Criminal Conduct

Hand next contends that defense counsel rendered deficient performance by not raising same criminal conduct at sentencing. We disagree.

Counsel renders deficient performance for not arguing that two offenses constitute the same criminal conduct when (1) there is a reasonable probability the trial court would have found same criminal conduct, and (2) this finding would likely affect the sentence imposed. *State v. Phuong*, 174 Wn. App. 494, 547-48, 299 P.3d 37 (2013). Even assuming there is a reasonable probability that the trial court would have found same criminal conduct, Hand must also demonstrate that this finding would have likely affected his sentence. This, though, is a burden he cannot meet.

If two convictions encompass the same criminal conduct they are scored together as one point for offender score purposes. RCW 9.94A.589(1)(a); *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). Here, Hand has an offender score of 9+. Even if defense counsel successfully argued that the two possession with intent to deliver convictions encompassed the same criminal conduct, there would be no change in Hand's offender score. Thus, there would be no change in his sentencing range. Moreover, Hand cannot show that a same criminal conduct finding would likely affect the sentence imposed especially where the court sentenced Hand to the low end of the range on the possession with intent charges, and the sentence was concurrent with sentences on the bail jumping conviction and Hand's other cases. Therefore, Hand fails to demonstrate that his trial lawyer's decision not to argue that his possession with intent convictions encompassed the same criminal conduct amounted to ineffective assistance of counsel.

IV. SAG ISSUES

Lastly, in his SAG, Hand argues that the State referenced the wrong cause number in opening argument, he received ineffective assistance of counsel because defense counsel failed to call a forensic psychologist, the trial court erred by not instructing the jury regarding the "Defensive Theory," and the court wrongly conducted proceedings outside Hand's presence. SAG at 2.

First, our record does not show that the prosecutor referenced the wrong cause number during opening argument. While Hand is not required to reference the record in a SAG, he must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Hand has failed to do so regarding this contention.

Second, discussions between Hand and defense counsel regarding whether to call a forensic psychologist is not in our record. Because the record is insufficient to review Hand's claim, we do not further address it. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition [PRP].").

Similarly, Hand's claims that trial court erred by not instructing the jury regarding the "Defensive Theory" and the court wrongly conducted proceedings outside Hand's presence are not demonstrated by our record. If Hand has additional evidence or facts to support these arguments, the proper means for review is to file a PRP. *Id.*

CONCLUSION

Because Hand fails to demonstrate reversible error, we affirm his judgment 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.

Veljacic, J.

We concur:

Lee, J.

Che, J.

THE TILLER LAW FIRM

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