92003-6

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

AYALNEH M. ANEBO,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 45826-8-II
Appeal from the Superior Court for Thurston County
The Honorable Christine Schaller, Judge
Cause No. 13-1-00443-1

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is AYALNEH M. ANEBO, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the unpublished opinion in the Court of Appeals, Division II, cause number 45826-8-II, filed June 3, 2015. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the unpublished opinion is attached hereto in the Appendix at A1-A9.

C. ISSUES PRESENTED FOR REVIEW

01. Whether admission of State's Exhibit 16, a map displaying a building labeled "Olympic View Elementary School," violated Anebo's right of confrontation?

02. Whether Anebo was prejudiced as a result of his counsel's failure to properly object to admission of a map displaying a building labeled as a school?

03. Whether the trial court erred in admitting State's Exhibit 16, a map displaying a building l labeled "Olympic View Elementary School," under the business record exception to the hearsay rule?

04. Whether the trial court erred by seating a juror who said he thought he had read something about the case in the paper and that it could possibly affect his ability to be fair?

05. Whether Anebo's trial counsel was ineffective for failing to object to the seating of the juror?

D. STATEMENT OF THE CASE

As provided in Anebo's Brief of Appellant, Reply Brief, and statement of additional grounds (SAG), which set out facts and law relevant to this petition and are hereby incorporated by reference, he was convicted of unlawful delivery of a controlled substance and unlawful possession of a controlled substance, with the jury further returning special verdicts that the offenses were committed within 1,000 feet of the perimeter of a school ground. On appeal, he argued that the trial court erred by admitting a map that contained inadmissible hearsay, that admission of the map was in violation of the confrontation clause, that his counsel was ineffective in failing to properly object to the admission of the map, that the court erred in seating a juror, and that his counsel was ineffective in failing to object to the seating of the juror.

In its opinion, Division II did not address whether the trial court erred by admitting the map at issue or whether such error violated Anebo's confrontation right, holding that any error in admitting the map was harmless beyond a reasonable doubt. [Slip Op. at 5, 7]. Division II also held the record did not support the claim that the trial court had erred in seating a juror or that defense counsel was ineffective for failing to move

for dismissal of the juror. [Slip Op. at 8-9]. Division II is incorrect in all instances.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

01. THE ADMISSION OF STATE'S EXHIBIT 16, A MAP DISPLAYING A BUILDING LABELED "OLYMPIC VIEW ELEMENTARY SCHOOL," VIOLATED ANEBO'S RIGHT OF CONFRONTATION.

To support a school zone enhancement under RCW 69.50.435(1)(d), there must be sufficient evidence that a drug offense occurred within 1,000 feet of the perimeter of a school ground, and the State must prove each element of the sentencing enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The Thurston County GeoData Center (GDC) provides mapping and data services for Thurston County, using mapping software to create maps depicting geographic regions within the county. [RP 210-14]. Kelly Alfaro-Haugen, an analyst for GDC, testified that maps are generated by software using aerial photography to see houses or streets or to map roads. [RP 216-17]. GDC maintains over 300 data layers, one of which was mapped by the "911 office for Thurston County" and shows the names and locations for all public schools in the county. [RP 223]. There was no testimony as to the provider of the information designating the school names or locations used in the creation of the data layer. The building in

State's Exhibit 16 was labeled "Olympic View Elementary School." Alfaro-Haugen explained:

> I was able to find Olympic View Elementary School in relationship to (Uon's) house, because I was given an address of the school. And I used the various layers to identify that it was a school and then located and placed the name of the school on top of it.

[RP 226]. Exhibit 16, which was used to depict a 1,000-foot radius encompassing the two offenses for sentencing enhancement purposes [RP 236-37], was admitted at trail over hearsay objection under the business record exception. [RP 233].

Here, to prove the sentencing enhancements, a business record was offered to establish the fact that the two offenses had occurred within 1,000 feet of a school ground, namely "Olympic View Elementary School." To establish this, however, the State was required to provide "a map produced or reproduced by any municipality, school district, (or) county ... for the purpose of depicting the location and boundaries of the area ... within one thousand feet of any property used for a school...." RCW 69.50.435(5). This map "shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas" if the "municipality, school district (or) county ... has adopted a resolution or ordinance approving the map." Id. And while there was no evidence of a complying resolution or ordinance

adopted by Thurston County, RCW 69.50.435(5) does not preclude "the use or admissibility of any map or diagram other than one which has been approved by the governing body of a municipality, school district (or) county ... if the map or diagram is otherwise admissible under court rule." Id. (emphasis added).

In declining to address the issue, Division II instead connected Exhibit 15, which depicts one undesignated nonresidential building located within 1,000 feet of where the offenses occurred, to the testimony of Officer Haggerty that the building was the Olympic View Elementary School to conclude beyond a reasonable doubt that the jury would have reached the same special verdict finding absent the admission of State's Exhibit 16. [Slip Op. 7-8]. This reasoning, which sidesteps the requirements of RCW 69.50.435(5), is also questionable given that the basis of Haggerty's knowledge appears to stem from a Google search, the accuracy of which he conceded was not always correct. [RP 134]. Accordingly, Division II is incorrect in holding that the admission of State's Exhibit 16 was harmless because the jury would have reached the same special verdict finding without it.

To the point: the map was not otherwise admissible, and its introduction into evidence violated Anebo's right of confrontation, for it contained testimonial statements. The Sixth Amendment provides that a

person accused of a crime has the right "to be confronted with witnesses against him." Similarly, Article I, Section 22 of the Washington State Constitution asserts that "[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10). In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)), our Supreme Court concluded that article I, section 22 is more protective than the Sixth Amendment with regard to a defendant's right of confrontation.

Such a violation is reviewed de novo. Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). The right to confront adverse witnesses is an issue of constitutional magnitude, which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); State v. Price, 158 Wn.2d 630, 639 n.3, 146 P.3d 1183 (2006); State v. Lee, 159 Wn. App. 795, 813-14, 247 P.3d 470 (2011).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On

appeal, the State has the burden of establishing that statements are nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

In Crawford, the court did not offer a "comprehensive definition" of what constitutes testimonial statements, though it did say "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial, Crawford, 541 U.S. at 52.

Moreover, Alfaro-Haugen provided no original analysis and brought no expertise to bear on the map displaying a building labeled "Olympic View Elementary School." Like the chief medical examiner addressing the toxicology and autopsy reports in State v. Lui, 179 Wn.2d 457, 494, 315 P.3d 493 (2014), Alfaro-Haugen testified to information about which she had no personal knowledge: "I was able to find Olympic View Elementary School in relationship to (Uon's) house, because I was given an address of the school." [RP 226]. Boiled down, Alfaro-Haugen merely recited conclusions prepared by nontestifying witnesses. The point is this: Alfaro-Haugen brought no expertise to bear on the information on the map, which, by itself, inculpated Anebo, for the map, State's Exhibit 16, constituted statements of fact used to prove the sentence enhancement. All of which was derived from information provided from an unknown

source designating the name and location at issue. Admission of the information violated Anebo's right of confrontation.

In this case, Alfaro-Haugen generated and presented a digital map using a data layer mapped by the "911 office for Thurston County" based on information provided by an unknown source designating the school name and location at issue. There can be no question but that this map was prepared for use in Anebo's criminal trial to determine whether RCW 69.50.435(1) had been satisfied, and as such, he had a right to confront the source of the information, who was never shown to be unavailable. Since there was also no showing that Anebo had a prior opportunity to cross-examine the declarant witness, the map generated from this source, State's Exhibit 16, was inadmissible, with the result that there was insufficient evidence to support the jury's special verdicts, which must be vacated.

02. ANEBO WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE ADMISSION OF A MAP DISPLAYING A BUILDING LABELED AS A SCHOOL.[1]

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington

[1] While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented should this court disagree with this assessment.

State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82

Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Should this court find that trial counsel waived the error claimed and argued in the preceding section by failing to object to the admission of the map displaying a building labeled as a school, State's Exhibit 16, as a violation of the confrontation clause, then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel failed to so object for the reasons argued in the preceding section. And there is a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice is self-evident, for without the map, State's Exhibit 16, sufficient evidence did not exist to support the jury's special verdicts.

Counsel's performance was deficient, which was highly prejudicial to Anebo for the reason argued in the preceding section, with the result that Division II's reasoning is misplaced in holding that the jury would have reached the same special verdict absent the admission of State's

Exhibit 16. [Slip Op. at 8]. Anebo was deprived of his constitutional right to effective assistance of counsel, and is entitled to vacation of his sentencing enhancements.

03. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT 16, A MAP DISPLAYING A BUILDING LABELED "OLYMPIC VIEW ELEMENTARY SCHOOL," UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.

As previously noted, the trial court overruled Anebo's hearsay objection to admission of State's Exhibit 16 under the business record exception to the hearsay rule. [RP 233].

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A statement can be either "an oral or written assertion." ER 801(a). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply in this case. ER 802.

Records of a regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). The business record exception is codified in RCW 5.45.020:

> A record of an act, condition or event, shall in s far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and mode of preparation, and if it was made in the regular course of

> business, at or near the time of the act, condition or event, and if, in the opinion of the court, the source of information, method and time of preparation were such as to justify its admission.

It is not necessary that the person who actually made the record provide the foundation for admissibility. State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005). Even where, as here, the witness who relied on information contained in a document did not actually prepare it, he or she may still provide foundation testimony if that person knows its mode of preparation and routinely relies on another's preparation of that document. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

Alfaro-Haugen was not qualified to identify the building in State's Exhibit 16 as a school and to testify about the mode of preparation of the map in this regard. There was no testimony that she knew the mode of preparation as it related to the information designating the school used in the creation of the data layer she used to generate State's Exhibit 16, which included the building labeled "Olympic View Elementary School." [State's Exhibit 16].

As before, the prejudice is self-evident, for without the map, State's Exhibit 16, sufficient evidence did not exist to support the jury's

special verdicts. Again, Division II is wrong in holding that any error in admitting State's Exhibit 16 was harmless. [Slip Op. at 7].

04. THE TRIAL COURT ERRED IN SEATING A JUROR WHO SAID HE THOUGHT HE HAD READ SOMETHING ABOUT THE CASE AND THAT IT COULD POSSIBLY AFFECT HIS ABILITY TO BE FAIR.

The right to an impartial jury in a criminal case is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution. United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001). These rights are co-extensive. Id.

During jury voir dire, the following colloquy occurred between the trial court and prospective juror 29:

> THE COURT: Prior to coming here today, have any of you heard of this case before?
>
> PROSPECTIVE JUROR 29: I think I read something in the paper recently about it - -
>
> THE COURT: All right.
>
> PROSPECTIVE JUROR 29: - - because I recognize the name.
>
> THE COURT: Do you remember any of the details about what you might have read? I'm not asking you to tell me the details, but in your mind, do you remember any details about the case?

PROSPECTIVE JUROR 29: Not that amount.

THE COURT: Okay. Would the fact that you've read something in the newspaper maybe related to this case - - would that affect your ability to sit as a potential juror and be fair and impartial to both sides?

PROSPECTIVE JUROR 29: I would hope so.

THE COURT: No. Would it affect your ability to be fair?

PROSPECTIVE JUROR 29: Possibly.

[RP 01/14/14 3-4].

Later, in putting the side bar that occurred during voir dire on the record, the trial court indicated:

> There was also a very brief discussion regarding Juror Number 29 who had indicated that he thought he had read about this case recently in the newspaper. The lawyers and I both indicated that we did not believe that this case had been in the newspaper recently, and also, there was not a basis, because the juror ultimately said that that would not affect his consideration in this case.
>
> Is there anything you would like to add to that side bar, Ms. (Prosecutor)?
>
> (PROSECUTOR): No, Your Honor.
>
> ....
>
> (DEFENSE COUNSEL): I have nothing.

[RP 33-34].

In denying Anebo's claim that the trial court had erred in seating prospective juror 29, the Court of Appeals limited it analysis to the above-quote of the trial court putting the side bar on the record, which

inaccurately described what had happened, for prospective juror 29 never said that what he thought he had read "would not affect his consideration in this case," as attributed to him by the trial court. As fully set forth above, prospective juror 29 said that "[p]ossibly" it would affect his ability to be fair.

This record demonstrates that the trial court erred in seating a juror who was not sure he could be fair, and that Anebo's trial counsel was ineffective[2] for failing to object to the seating of the juror.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and remand for retrial and/or vacate Anebo's sentencing enhancements.

DATED this 29th day of July 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

[2] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier is hereby incorporated by reference.

CERTIFICATE

I certify that I served a copy of the above Petition on this date as follows:

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DATED this 29th day of July 2015.

Thomas E. Doyle

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AYALNEH M. ANEBO, Appellant.	No. 45826-8-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — A jury returned verdicts finding Ayalneh Marcus Anebo guilty of unlawful delivery of a controlled substance (Oxycodone) and unlawful possession of a controlled substance (Oxycodone) with intent to deliver. The jury also returned special verdicts finding that Anebo committed both offenses within 1,000 feet of the perimeter of a school ground. Anebo appeals his sentencing enhancements, asserting that (1) the trial court erred by admitting as evidence a map containing inadmissible hearsay, (2) the admission of the map violated his constitutional right of confrontation, and (3) his counsel was ineffective for failing to make a

proper objection to the admission of the map. Anebo contends that absent admission of the map at issue, the State failed to present sufficient evidence in support of his school zone sentencing enhancements. In his statement of additional grounds for review (SAG), Anebo appeals his convictions, asserting that (1) the trial court erred by seating a juror who had prior knowledge of the case and (2) his counsel was ineffective for failing to object to the juror being seated on the jury.[1] We affirm.

FACTS

On March 20, 2013, a confidential informant working with Centralia Police Officer Adam Haggerty performed a "controlled buy" of 100 Oxycodone pills.[2] Report of Proceedings (RP) at 89. The informant arranged to purchase the 100 pills from Veasna Uon for $3,000 and met Uon at Uon's home in Olympia, Washington for the transaction. Approximately 30 minutes later, Anebo arrived in a silver Volvo and parked in Uon's driveway. The informant handed $3,000 in prerecorded buy money to Uon and waited with Haggerty in Haggerty's vehicle. Uon then handed the cash to Anebo, who counted the money and then retrieved a bag of pills from the

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[1] In his SAG, Anebo also appears to reference *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), but he does not explain the nature or occurrence of any claimed errors under *Brady*, contrary to the requirements of RAP 10.10(c). Instead, Anebo's SAG merely states:

> The *Brady* obligations apply to a prosecutor[']s conduct even when the defense has not requested the discovery of exculpatory evidence. A prosecutor[']s duty to disclose exculpatory evidence under *Brady* extends his or her personal knowledge of such evidence.

SAG at 2. Because Anebo does not allege that the State withheld any evidence in violation of *Brady*, we do not further address the issue.

[2] Haggerty described a "controlled buy" as:

> [A] purchase of narcotics or contraband from a suspect, known or unknown, and it is directed by law enforcement entirely from the word go. And the informant is sterilized, so I can testify on the stand that they did not have any narcotics on them prior to going into the vehicle, and they park near the house to buy narcotics.

RP at 89.

trunk of his Volvo. After Uon gave the bag of pills to the informant, law enforcement officers moved in to arrest the suspects. Anebo fled in his Volvo and crashed into an undercover police vehicle that was blocking his escape.

Based on this incident, the State charged Anebo by second amended information with unlawful delivery of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and second degree assault.[3] The State also alleged that Anebo committed the offenses of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver within 1,000 feet of the perimeter of school grounds.

Before trial, there was a brief sidebar discussion between counsel and the trial court regarding a potential juror who had thought he read about Anebo's case in the newspaper. The trial court later created a record of the sidebar discussion, stating:

> [Trial Court]: Juror Number 29 . . . had indicated that he thought he had read about this case recently in the newspaper. The lawyers and I both indicated that we did not believe that this case had been in the newspaper recently, and also, there was not a basis [to dismiss the juror for cause], because the juror ultimately said that that would not affect his consideration in this case.
>
> Is there anything you would like to add to that side bar, [State]?
>
> [State]: No, Your Honor.
>
> [Trial Court]: [Defense counsel]?
>
> [Defense counsel]: I have nothing.

RP at 33-34.

At trial, Officer Haggerty testified consistently with the facts as stated above. Additionally, Haggerty testified that on the day of the incident he saw children playing on the other side of a chain link fence that separated Uon's residence from the neighboring property.

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[3] The trial court declared a mistrial with respect to the second degree assault charge after the jury indicated that it could not reach a verdict on that charge.

He further testified that the building on the neighboring property was the Olympic View Elementary School.

Kelly Alfaro-Haugen testified that she works as a geographic information systems analyst for the Thurston County GeoData Center. Alfaro-Haugen stated that the Thurston County GeoData Center provides mapping and data services for Thurston County, using mapping software to create maps that depict locations within the county. With respect to this case, Alfaro-Haugen testified that she created two maps depicting a 1,000-foot radius around the center point of Uon's residence, the location of Anebo's alleged crimes. Alfaro-Haugen stated that she identifies the location of all Thurston County public schools by using data from the Thurston County 911 office, and that she verifies this information with parcel data from the county assessor's office. Alfaro-Haugen said that she was able to locate the Olympic View Elementary School using this process, and that she had identified its location on one of the maps, Exhibit 16, by labeling the building with the name of the school.

Anebo objected to the admission Exhibit 16, arguing that the text, "Olympic View Elementary School," printed over the building behind Uon's residence, was based on inadmissible hearsay. RP at 228; Ex. 16. The trial court overruled the objection under the business record exception to the hearsay rule, stating:

> I find that Exhibit 16 was prepared in the witness'[s] regular course of business. I further find, as it relates to business records, that the underlying information used to create that exhibit is reliable information. The witness testified that that information came from the Assessor's Office of Thurston County and from the Thurston County 911 Center. And I find that that information is reliable information. It is information that this witness has testified to that she relies upon, basically, on a daily basis, in the preparation of maps that she does on a daily basis. And therefore, it does fit within the business records exception because of the reliability of the underlying information. And I am going to overrule the objection and admit the exhibit.

RP at 234. The jury returned verdicts finding Anebo guilty of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver. The jury also returned special verdicts finding that Anebo committed his crimes within 1,000 feet of the perimeter of school grounds. Anebo appeals.

ANALYSIS

I. ADMISSION OF EXHIBIT 16

Anebo first contends that the trial court erred by admitting a map containing inadmissible hearsay in the form of text superimposed over a building on the map stating, "Olympic View Elementary School." Anebo further contends that the admission of the map violated his right to confront adverse witnesses, because he could not cross-examine the person who generated the data Alfaro-Haugen used to determine the location of the Olympic View Elementary School. We need not decide whether the trial court erred by admitting the map at issue or whether such error violated Anebo's confrontation right because, even assuming that the text "Olympic View Elementary School" constituted inadmissible hearsay, any error in admitting the map was harmless beyond a reasonable doubt in light of Haggarty's testimony regarding the location of the school.

Under ER 802, hearsay evidence is inadmissible unless an exception applies. A nonconstitutional error in admitting hearsay evidence is harmless, unless there was a reasonable probability that the error materially affected the outcome of the trial. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 369, 225 P.3d 396 (2010). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution provide an accused

person with the right to confront the witnesses against him or her.[4] Therefore, in general a witness may not testify against a defendant unless that witness appears at trial or the defendant had a prior opportunity to cross-examine the witness. *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012).

Admission of hearsay evidence in violation of a defendant's right to confront adverse witnesses is subject to the constitutional harmless error test. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007). Under this test, we may affirm Anebo's sentencing enhancements only if we are convinced beyond a reasonable doubt that the jury would have found that Anebo committed his crimes within 1,000 feet of the perimeter of a school absent admission of the map at issue. *State v. Tyler*, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007). To determine if the jury would have reached the same special verdict finding, we look to whether the untainted evidence regarding the school's location was so overwhelming that it would have necessarily led to the jury's finding that Anebo committed his offenses within 1,000 feet of the school. *Tyler*, 138 Wn. App. at 129-30.

Here, the trial court admitted two maps, both of which depict a 1,000 foot perimeter surrounding Uon's residence, the location where Anebo committed his crimes. Anebo did not challenge at trial or on appeal the admission of Exhibit 15, the map that did not label the location of the Olympic View Elementary School. On that map, it is clear that only one nonresidential building abuts Uon's residence, and that the nonresidential building is completely located within the 1,000 foot perimeter surrounding Uon's residence. Haggerty's untainted testimony that the building abutting Uon's residence was the Olympic View Elementary School established that

[4] The federal and state constitutions provide the same protections with respect to a defendant's right to confront witnesses against him or her. *State v. Lui*, 179 Wn.2d 457, 468, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014).

this nonresidential building was the Olympic View Elementary School. Therefore, we are convinced beyond a reasonable doubt that the jury would have reached the same special verdict finding Anebo committed his crimes within 1,000 feet of the perimeter of a school even absent admission of Exhibit 16, the map at issue. Because we are convinced beyond a reasonable doubt that Haggerty's untainted testimony rendered any constitutional error in admitting the map harmless, we hold that any nonconstitutional error in admitting the map was unlikely to have materially affected the outcome of Anebo's trial and was, thus, harmless. Accordingly, we hold that any error in admitting Exhibit 16 was harmless.

II. SUFFICIENCY OF THE EVIDENCE

Next, Anebo contends that absent admission of Exhibit 16, the State failed to present sufficient evidence in support of the jury's special verdict finding that he committed his crimes within 1,000 feet of a school. However, we have already determined in our harmless error analysis above that Exhibit 15 together with Haggarty's testimony clearly established the location of Anebo's crimes in relation to a school zone. Accordingly, sufficient evidence supports the jury's special verdict.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Anebo asserts that his trial counsel provided ineffective assistance by failing to properly object to the admission of Exhibit 16. We disagree.

We review ineffective assistance of counsel claims de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, Anebo must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006).

Here, defense counsel objected several times to the admission of Exhibit 16 and preserved Anebo's contentions with the admission of the exhibit for appeal. Accordingly, Anebo fails to demonstrate that his counsel performed deficiently. Additionally, even if Anebo could demonstrate deficient performance, he cannot show any resulting prejudice because, as discussed above, we are convinced beyond a reasonable doubt that the jury would have reached the same special verdict absent admission of Exhibit 16. We thus affirm Anebo's sentencing enhancements.

IV. SAG

In his SAG, Anebo appeals his convictions, asserting that (1) the trial court erred by seating a juror who had prior knowledge of the case and (2) his counsel was ineffective for failing to object to the juror being seated on the jury. Because there is no evidence in the record that a sitting juror had actual knowledge of Anebo's case prior to trial, we disagree on both points.

Although the record indicates that a potential juror told the trial court that he thought he had read about the case in a newspaper article, the trial court concluded, and counsel agreed, that there was no newspaper article regarding Anebo's case, stating:

> Juror Number 29 . . . had indicated that he thought he had read about this case recently in the newspaper. The lawyers and I both indicated that we did not believe that this case had been in the newspaper recently, and also, there was not a basis [to dismiss the juror for cause], because the juror ultimately said that that would not affect his consideration in this case.

RP at 33-34. On this record, Anebo cannot demonstrate that the trial court erred by seating a juror with prior knowledge of his case or that his defense counsel was ineffective for failing to

move for the juror's dismissal for cause. We thus affirm Anebo's convictions.

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.

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

J.

LEE, J.

Sutton, J.

SUTTON, J.

DOYLE LAW OFFICE

July 29, 2015 - 3:42 PM

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