

IN THE SUPREME COURT, STATE OF WASHINGTON

JEREMY EDWARD GAINES,

Appellant.

vs.

STATE OF WASHINGTON,

Respondent,

NO. 93199.2

(Court of Appeals No. 46852-2-II)

MOTION FOR DISCRETIONARY
REVIEW

A. IDENTITY OF PETITIONER

JEREMY GAINES, defendant below, asks this court to grant this motion for discretionary review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. DECISION

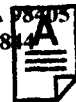
Petitioner seeks review of the portion of the option where the trial court deprived him of his right to choose private counsel, which the court of appeals recast as the trial court abusing its discretion in denying petitioner's motion for continuance. A copy of the decision is in Appendix A.

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MOTION FOR
DISCRETIONARY
REVIEW



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C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit structural error by denying Gaines his fundamental constitutional right to representation by retained counsel of his choice?
2. Is a criminal defendant's constitutional right to substitution of private counsel on the eve of trial after then private counsel commits serious misconduct such that defendant loses all confidence in him?
3. Does a criminal defendant's constitutional right to counsel guaranteed by the Sixth Amendment to the United States Constitution (U.S. Const. amend. VI) and article I, section 22 of the Washington Constitution (Wash. Const. art. I, § 22) supersede non-constitutional rights when defendant moves to substitute private counsel who appears to be violating ethical rules and whom defendant no longer trusts with another private counsel?
4. Should Gaines have been granted his constitutional right to representation by new private counsel of his choice where then private counsel had arranged an improper meeting with the prosecutor, which concerned the Court of Appeals but which the trial court did not specifically address?
5. Should Gaines have been granted his constitutional right to representation by new private counsel of his choice where then private counsel repeatedly had moved to withdraw in May 2014, twice more over the summer of 2014, and again after the improper meeting with the prosecutor?

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- 1 6. Should Gaines have been granted his constitutional right to representation by new
2 private counsel of his choice where the trial court engaged in rank speculation as to
3 when Gaines choice of new private counsel would be able to try the case?
4 7. Should the trial court have given Gaines the opportunity to be heard at his motion for
5 new counsel?
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7 **D. STATEMENT OF THE CASE**
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9 The State of Washington charged Jeremy Gaines in Pierce County Superior Court
10 NO. 13-1-02515-1 with the crimes of solicitation to deliver a controlled substance,
11 conspiracy to deliver a controlled substance, first degree unlawful possession of a
12 controlled substance, and firearm enhancement attached to the first two convictions. He
13 was also charged in Pierce County Superior Court No. 14-1-01254-2 with Unlawful
14 Possession of a Firearm in the First Degree and Unlawful Delivery of a Controlled
15 Substance CP 266-269 These were "three strike" offenses for which Gaines was
16 convicted and now serves life without parole sentences on counts. CP 299

17 After Gaines was charged with crimes relating to possession of controlled
18 substances and firearms, he sequentially retained two private attorneys and attempted to
19 retain a third. CP 300-302, 307-308, 325-326, 329-331, 343 It is the denial of the third
20 private attorney that forms the basis for this motion for discretionary review.

21 Gaines hired attorney Gary Clower in July 2013 for representation in this case.
22 CP342 After two continuances, Gaines discharged Clower and replaced him with
23 another private counsel Geoffrey Cross. Cp 343 Thereafter the case was continued more
24 than six times. CP 303-305, 349, 352-354, 297-298
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1 On May 7, 2014 and May 8, 2014, Mr. Gaines moved to have Cross replaced and
2 Cross moved for a competency evaluation of Gaines. In Gaines' Opinion from May 15,
3 2014, the court heard argument and granted the motion for the competency evaluation
4 and refused to hear the motion for new counsel. CP 317-319 The trial court also stated
5 that the trial date was too close and that "if there are questions about his competence,
6 this certainly isn't the time for him to be making a decision about withdrawing counsel."

7 VRP 5/15/14 30 31

8 Gaines was at Western State Hospital not only for initial evaluation but also for
9 statutory period for restoration of competency. CP 322-323 After he returned to court
10 upon being found competent, Cross made two motions to withdraw, emphasizing that
11 Gaines did not want him to represent him. CP 323-326, 329 Cross noted that Gaines
12 became extremely upset when Cross brought the prosecutor in to meet with him and that
13 after that he would not speak to Gaines. CP 324 Cross represented that all
14 communication with Gaines had broken down. CP 325-326

15 On October 16, 2014, the trial date, Gaines and Cross again moved for continuance
16 and for the substitution of new counsel, Barbara Corey. CP 330,331; VRP 10/16/14 12
17 When Corey stated that she could try the case in February, the trial court disagreed and
18 took its own view of cases in which it had no first hand knowledge. Id.

19 The trial court also noted that although Gaines was not allowed to speak, he was
20 going to throw what "amounts to a temper tantrum" because he did not get his way.
21 VRP 10/16/14 8 There was nothing in the record to suggest that Gaines had ever acted
22 improperly in court. Passim.

1 Thus, although Gaines made a motion for the removal Cross, he was never
2 allowed to speak at his own motion. *Passim* The trial court failed to appreciate the
3 significant misconduct committed by Cross when he took the prosecutor to a meeting
4 with Gaines in an effort to settle the case. Cross swore that the conversation was “rather
5 appropriate.” CP 300-332 In fact, the trial court expressed little to no interest in
6 exploring the purpose of the meeting, why Gaines had been so aggrieved by the
7 meeting, and why the occurrence of the meeting had resulted in a lack of confidence by
8 Gaines in representation by Cross. *Passim*. After that meeting, Gaines did not want to
9 interact with Cross. CP 330-332 Cross informed the court in declaration that he had
10 been criticized by other attorneys for acting unethically in that meeting given that
11 Gaines had another pending third strike case where he was represented by other counsel.
12 *Id.* By Cross’s admission, he felt it was very appropriate to have the prosecutor talk to
13 Gaines about the risks and exposures in that three strikes case as well. CP 300-302 He
14 failed to see any impropriety about negotiating another attorney’s case without notice to
15 that attorney and permission from that attorney to do so. *Passim*.

16 Gaines had two charges pending at that time. Cross represented him in Pierce
17 County Superior Court 13-1-02515-1. Corey represented him in Pierce County Superior
18 Court 14-1-0125405. CP 311 Both cases were “three strikes” cases. For Cross to take
19 the prosecutor into a meeting with a defendant to discuss resolution of both cases was a
20 blatant violation of CrR 4.2, the “no contact” rule, to say the least.

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1 The trial court denied Gaines' motion for substitution or new private counsel on
2 the "eve" of the trial date. Supra The trial court declined to permit Gaines the
3 opportunity even to speak at his own motion and instead engaged in unfounded
4 speculation that Gaines was having a "temper tantrum." Supra The trial court refused to
5 consider the merits of Cross's misconduct. Supra The trial court considered other non-
6 constitutional factors, including the number of continuances, whether the State's
7 witnesses [all police officers] were available, etc. Supra

8 As the result of the court's ruling, Gaines was forced to proceed to trial with
9 retained counsel not of his choice. Moreover, he was forced to proceed with private
10 counsel who, in his view, had committed misconduct that undermined his confidence in
11 that counsel's representation and in whom he no longer trusted. Gaines could not speak
12 to his attorney. Yet the trial proceeded.

13 Gaines was convicted and serves sentences of life without parole. RP 276-287

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1 E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

2 The Supreme Court will accept review of a Court of Appeals decision terminating
3 review only if that decision fits within one of the four criteria set forth in RAP 13.4(b),
4 as follows:

- 5 (1) If the decision of the Court of Appeals is in conflict with a decision of
6 the Supreme Court; or
7 (2) If a significant question of law under the Constitution of the State of
8 Washington or of the United States is involved; or
9 (3) If the petition involves an issue of substantial public interest that should
be determined by the Supreme Court.

10 In this case, review is warranted under criteria (1), (3), and (4).

11 The Court of Appeals decision conflicts with a decision of this Court, RAP
12 13.4(b)(1). A trial court abuses its discretion when it bases its ruling on an erroneous
13 view of the law or applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655,
14 222 P.3d 86 (2009). The trial court applied the wrong legal standard, and therefore
15 abused its discretion, when it considered the Hampton I factors but also misapplied
16 them, for example, the trial court referred to trial counsel's past positive performance,
17 slip opinion page 4 of 12, 6-7 of 12. But then failed to assess or even ascertain the
18 length of the continuance requested, or whether such a continuance would cause undue
19 delay. This improper denial of Gaines' request for a continuance denied him his right to
20 retain his chosen attorney. This erroneous deprivation of the right to counsel of choice
21 constitutes structural error requiring automatic reversal. *Gonzalez-Lopez*, 548 U.S. at
22 149-50 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d
23 182 (1993)).

1 This Motion for Discretionary Review presents an unusual case history in one way, at
2 time of trial and motions, the trial court relied on *Hampton* 182 Wn. App 805 (2014).
3 Between the conclusion of trial and appellate oral arguments, this court issued its
4 opinion on its'case. *Hampton* 184 Wn 2nd 656 (2016).

5 This case presents this court with the significant issue of defining the meaning and
6 scope of the United States Constitution Sixth Amendment right to Counsel. Appendix B
7 That the Court of Appeals ruling confuses the Sixth Amendment right to counsel to
8 choice commands, not that a trial be fair, but that a particular degree of fairness be
9 provided – to wit, that the accused be defended by the counsel he believes to be best.”
10 *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409
11 (2006); U.S. Const. amend. VI. This right to retain counsel of choice is distinct from the
12 Sixth Amendment right to effective assistance of counsel.

13 Deprivation of the right [to retain counsel of choice] is “complete” when the
14 defendant is erroneously prevented from being represented by the lawyer he wants,
15 regardless of the quality of the representation he received. To argue otherwise is to
16 confuse the right to counsel of choice—which is the right to a particular lawyer
17 regardless of comparative effectiveness—with the right to effective counsel—which
18 imposes a baseline requirement of competence on whatever lawyer is chosen or
19 appointed. *Hampton*, dissent of Justice McCloud, 184 Wn.2d at 672-67.

20 The *Hampton* dissent correctly distinguishes between the right to counsel of choice
21 and the right to effective assistance of counsel. The instant case involves Gaines’ right
22 to representation by counsel of choice. The Hampton appellate court decision
23 recognized the criminal defendant’s right to be represented by a retained attorney of his
24 choice and guarantees that an accused be represented by the counsel he believes is best.
25 182 at 810.

1 However, having held that such denial is a structural error, the court of appeals held
2 that the defendants right to counsel could be denied in the presence of countervailing
3 conditions adversely affecting the administration of justice. 182 Wn App at 810.

4 In this case, the trial court decided Gaines' motion to substitute current counsel with
5 retained counsel not only without considering the proper constitutional factor but also
6 by refusing to hear from Gaines, deciding that Gaines would have a temper tantrum if
7 his motion was denied, noting that current retained counsel Cross was an experienced
8 attorney, refusing to explore the reasons for Gaines' distrust of Cross and his refusal to
9 speak to his, and finally the application of the *Hampton* factors.

10 Because the court of appeals ignored the correct law, the trial court erred when
11 endorsed the trial's application of the 11 factor tests to the defendant's right to be
12 represented by retained counsel of his choice. This is the right Gaines sought to
13 exercise.

14 The Court of Appeals thus reduced Gaines's constitutional right to effective
15 assistance of counsel to a second mechanistic application of the several factors to
16 determine whether to grant a continuance to allow substitution of counsel and not the
17 merits of the motion for substitution of counsel. *State v. Gaines* 361 P.3d 734 (2015)].
18 Lexis 2016 Wr App 955 pages 5-8 of 12.

19 The trial court reliance upon this Court confused analysis in *Hampton* which
20 established the compelling need for further guidance to trial courts. This is so because
21 the Gaines' trial court abused its discretion by basing its ruling on an erroneous view of
22 the law or applies the wrong legal standard.

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1 The trial court applied the wrong legal standard, and therefore abused its discretion,
2 when it considered Hampton's appointed lawyer's positive performance and the some of
3 the other eleven factors without considering Gaines fundamental right to be represented
4 by the private counsel of his choice. That is the error in this case that warrants review
5 under RAP 13.4(b)(3) because the conflict between the fundamental constitutional
6 rights under the State and Federal Constitutions to representation by the retained
7 attorney of one's choice cannot be compromised by applicable of the *Hampton* factors.

8 Further, a criminal defendant's ability to exercise his fundamental constitutional
9 right to representation by retained counsel of his choice presents an issue of substantial
10 public interest that should be determined by this Court pursuant to RAP 13.4(b)(4).

11 However, even assuming arguendo that this Court is correct in its analysis, the trial
12 court abused its discretion by denying Gaines motion for substitution of retained
13 counsel. Gaines' motion for substitution of retained counsel was meritorious. Then trial
14 counsel Cross had invited the prosecutor to a surprise meeting with Gaines to discuss
15 resolution not only of their case but also of another "three strikes" case where Cross did
16 not represent Gaines, where Cross had not notified Gaines' attorney in that case that this
17 meeting would occur, and where that attorney had neither consented to nor had the
18 opportunity to attend the meeting. As a result of this meeting, Gaines lost trust and
19 confidence in Cross and refused to speak to him. Nevertheless, the trial court failed to
20 ask Gaines even a single question about the basis for his motion. That failure of the trial
21 court also is an "abuse of discretion." No reasonable person would rule on a motion
22 without permitting the movant to present his/her motion to the court and would, without
23 any apparent basis, simply characterize the movant's actions as a "temper tantrum."
24 Gaines submits it is evidence that someone else was having a temper tantrum.
25

1 Even assuming that there might exist circumstances where a motion for new retained
2 counsel might be analyzed mechanistically under the *Hampton* factors, it is difficult to
3 fathom circumstances where a motion for new retained counsel should be denied.

4 As the court held in *Hampton*, I, Lexis Op-page 7 of 12, although the appellate
5 court expressed slight concern over the trial court's failure to make a better record on
6 the meeting with Gaines, Cross, and the prosecutor, However, the appellate court did
7 not anywhere suggest that such a meeting could override or otherwise affect the
8 mechanistic application of the *Hampton* continuance factors. The 9th Circuit has directed
9 trial courts to inquire into problems between a defendant and appointed counsel and
10 consider whether that counsel can provide effective representation or whether to grant a
11 continuance to allow the defendant to obtain a new, private attorney. *Miller v.*
12 *Blacketter*, 525 F.3d 890, 896-98 (9th Cir. 2008). In this case, the trial court made no
13 inquiry of Gaines regarding his problems with his counsel. Gaines made it clear that he
14 wanted new retained counsel, as is his Sixth Amendment right. While the standard for
15 review when considering a defendant's motion for replacement of his current counsel
16 under *State v. Hampton*, at P.3d 734 (2015) US Supreme Court certiorari denied by
17 *Hampton v. Wash.*, 2016 U.S. LEXIS 2832 (U.S., Apr. 25, 2016) is abuse of discretion,
18 the Court of Appeals acted with apparent certainty that whatever it did could not offend
19 that standard.

20 As the United States Supreme Court has observed, these situations are highly fact
21 dependent and "[t]here are no mechanical tests" that can be used. *Ungar v. Sarafite*, 376
22 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). Instead, the judge must decide
23 based on "the circumstances present." *Id.*

1 Therefore, This Court hold that trial courts can consider all relevant information,
2 including the 11 factors described in the most recent edition of the LaFave *Criminal*
3 *Procedure. Hampton*, 184 Wn.3d at 669.

4 In this case, Gaines had a clearly identifiable meritorious reason for his motion for new
5 counsel.

6 It is almost beyond belief that the trial court refused to hear from him but yet
7 accused him on some unknown basis of being about to “throw another temper tantrum.”

8 According to Cross’ declaration, Gaines took “excessive exception” when Cross took
9 the prosecutor to a meeting with him to discuss Gaines’ exposure in both “three strikes”
10 cases. Of course, Cross did not represent Gaines on both cases nor did he have
11 permission from counsel in that case to discuss that case with the prosecutor. Cross had
12 heard indirectly that there was criticism of his ethical conduct. In fact there was conduct
13 in apparent violation of RPC 4.2, the “no contact” rule, both by Cross and the deputy
14 prosecutor.

15 The Court of Appeals noted its concern that the trial court failed to consult with
16 Gaines on this or develop a more thorough record on this. However, the existing record
17 affirms that Gaines, via Cross, presented a serious issue regarding his representation that
18 had occurred immediate prior to trial.

19 Where Gaines’ legitimate reason for discharging an attorney who had acted
20 unethically and with whom he for good reason no longer communicated should have
21 outweighed the other *Hampton* factors, this court should find that the trial court abused
22 its discretion when it denied Gaines’ motion for substitution of counsel.

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1 To be clear, there is not a single *Hampton* factor that should override a
2 defendant's constitutional right to proceed to trial with an attorney who has not
3 breeched the ethical rules, violated confidences between the defendant and the attorney
4 in the other matter, and exposed the defendant to communication with opposing counsel
5 in the other matter.

6 These are serious issues that caused Gaines to seek other counsel. For the trial court
7 to conclude without questioning him that these substantive issues were of equal or lesser
8 importance than [1] whether his request was made sufficiently before trial to permit the
9 court to adjust its calendar; [2] the length of the continuance requested; [3] whether the
10 continuance would carry the trial date beyond the period specified in the state speedy
11 trial act; [4] whether the court had granted previous continuances at the defendant's
12 request; [5] whether the continuance would seriously inconvenience the witnesses; [6]
13 whether the continuance request was made promptly after the defendant first became
14 aware of the grounds advanced for discharging his counsel; [7] whether the defendant's
15 own negligence placed him or her in a situation where he or she needed a continuance to
16 obtain new counsel; [8] whether the defendant had some legitimate cause for
17 dissatisfaction with counsel, even though it fell short of likely incompetent
18 representation; [9] whether there as a 'rational basis' for believing that the defendant
19 was seeking to change counsel 'primarily for the purpose of delay'; [10] whether current
20 counsel was prepared to go to trial; [11] whether denial of the motion was likely to
21 result in identifiable prejudice to the defendant's case of a material or substantial nature,
22 was an abuse of discretion.

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1 Of these factors: [1] is irrelevant because a defendant has no control over when an
2 issue with counsel may arise – a defendant has a duty to timely raise the issue. In a
3 large county such as Pierce County, calendar control is not an issue in the sense that
4 continuance of a single case disrupts the administration of justice. There are far more
5 cases waiting to go to trial on any given day than there are courtrooms.

6 [2] in this case, moot because no substitution was allowed. Neither the realistic
7 schedules of defense or the prosecutor were discussed; [3] the case already had had
8 numerous continuances and was beyond the speedy trial time limits of CrR 3.6 by
9 waiver of Gaines and the State [4] prior continuances had been at the request of both
10 parties, although there had been two continuances when defense counsel was ill; [5] the
11 witnesses are “professional witnesses”, as in police officers, who conduct searches for
12 contraband – cases are routinely set for their schedules; [6] yes; [7] no; [8] yes; [9] no;
13 [10] could not speak to his client; [11] there was no communication between the
14 defendant and counsel and that was likely to result in identifiable prejudice to the
15 defendant’s case of material or substantial nature.

16 Thus, even assuming mechanistic applicability of the *Hampton* factors to the
17 instant case, the trial court still abused its discretion when it denied his motion for new
18 retained counsel. The record affirms that the trial court was hell bent to send the case
19 out for trial that day, regardless of what issues existed between Gaines and his counsel.
20 There is no attorney who could have tried this case without reading discovery,
21 interviewing witnesses, examining laboratory tests and bench notes, deciding whether to
22 run independent tests, example experts determine what witnesses, if any, could be
23 called.

1 This is a case that competent counsel would require at least two uninterrupted weeks to
2 prepare, notwithstanding expert schedules. To put it bluntly, the trial court simply did
3 not care. If the trial court had been concerned, then it would have inquired of the
4 movant of his reason for the motion.

5 This is an important case. It requires this Court to clarify for trial courts the
6 difference between the criminal defendant's constitutional right to representation by
7 retained counsel of his/her choice versus the criminal defendant's constitutional right to
8 effective assistance of counsel. This Court should provide guidance on this matter to the
9 trial courts to assist them in applying proper standards and making appropriate records
10 when ruling such motions.

11 Finally, and of greatest import, it will insure justice to the citizens of
12 Washington. This, after all, is this Court's highest duty.

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1 F. CONCLUSION

2 This court should grant discretionary review for the reasons stated in Part E.
3 Because Gaines was denied his fundamental constitutional right to be represented by
4 counsel of his choice, his case must be dismissed. This structural error mandates
5 dismissal. Should this court find that another standard for granting Gaines new retained
6 counsel applies and that the *Hampton* factors apply, this Court should reverse this case
7 to permit Mr. Gaines to proceed in the matter with new private counsel of his choice.
8 This is so because his constitutional right to proceed with constitutionally effective
9 counsel certainly outweighs the lesser procedural *Hampton* factors the application of
10 which is not mandatory.
11

12
13 Respectfully submitted this 3rd day of June, 2016.

14
15 /s/BARBARA COREY, WSBA#11778
16 Attorney for Appellant
17 barbara@bcoreylaw.com
18 902 South 10th Street
19 Tacoma, WA 98405

20 CERTIFICATE OF SERVICE:

21 I declare under penalty of perjury under the laws
22 Of the State of Washington that the following is a true
23 and correct: That on this date, I delivered via ABC- Legal
24 Messenger a copy of this Document to: Pierce County
25 Prosecutor's Office, Appeals Unit, 930 Tacoma Ave. So., Room 946,
Tacoma, WA 98402 and via USPS to Jeremy Gaines at 1830 Eagle Crest Way
Clallam Bay, WA 98326.


6/3/16

/s/William Dummitt
Legal Assistant
William@bcoreylaw.com

MOTION FOR
DISCRETIONARY
REVIEW

APPENDIX A

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Focus: **substitut! w/s indigent w/s attorney w/s hampton** (Exit FOCUS™)*2016 Wash. App. LEXIS 955, **THE STATE OF WASHINGTON, *Respondent*, v. JEREMY EDWARD GAINES, *Appellant*.

No. 46852-2-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2016 Wash. App. LEXIS 955

February 25, 2016, Oral Argument

May 3, 2016, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.**SUBSEQUENT HISTORY:** Reported at State v. Gaines, 2016 Wash. App. LEXIS 1108 (Wash. Ct. App., May 3, 2016)**PRIOR HISTORY:** [*1] Appeal from Pierce County Superior Court. Docket No: 13-1-02515-1. Judge signing: Honorable Bryan Chushcoff. Judgment or order under review. Date filed: 10/31/2014.**CORE TERMS:** continuance, controlled substance, deliver, solicitation, conspiracy, firearm, methamphetamine, wire, prosecutor, front, search warrant, unlawful possession, convict, insufficient evidence, private counsel, sufficient evidence, delivery, gun, driver's, competency, pounds, circumstantial, substitution, criminalizes, untenable, prepare, coupled, runner, reply, assigned**COUNSEL:** For Appellant: Barbara L. Corey, Tacoma, WA.

For Respondent: Jason Ruyf ▾, Pierce County Prosecutor's Office, Tacoma, WA.

JUDGES: Authored by Thomas R Bjorgen. Concurring: Bradley A. Maxa, Lisa Sutton.**OPINION BY:** Thomas R Bjorgen**OPINION**

¶1 BJØRGEN, C.J. — Jeremy Edward Gaines appeals his convictions for solicitation to deliver a controlled substance, conspiracy to deliver a controlled substance, first degree unlawful possession of a firearm, and the firearm enhancements attached to the first two convictions.

¶2 Gaines argues that (1) insufficient probable cause supported the warrant to search his vehicle, (2) the trial court abused its discretion in denying his motion for continuance, effectively depriving him of his right to choose private counsel, (3) solicitation to deliver a controlled substance is not criminalized, and (4) the State presented insufficient evidence to allow a jury to return guilty verdicts on his convictions.

¶3 We decline to address the merits of Gaines's search warrant argument, because it was not adequately addressed in his briefing. As to [*2] his other arguments, we hold that the trial court did not abuse its discretion in declining his motion for continuance, that chapter 9A.28 RCW criminalizes solicitation to deliver a controlled substance, and that there is sufficient evidence to uphold all of his convictions.

¶4 Accordingly, we affirm.

FACTS

¶5 On June 3, 2013, police used a confidential informant (CI) to conduct a controlled buy¹ from Jessica Handlen. Police observed the CI and Handlen meet and watched Handlen explain to the CI that she was waiting for her "source." Verbatim Report of Proceedings (VRP) at 28-29. Shortly thereafter, a white Dodge Charger pulled up near Handlen and the CI. The vehicle was registered to Gaines and officers identified the driver in the vehicle as Gaines. Police observed Handlen go up to the driver's side window for a brief moment and then return to the CI. The CI returned to the police and gave them a package received from Handlen, which field tested at the time as 6.4 grams of methamphetamine. However, it was later discovered that this substance was in fact methylsulfonylmethane, a legal substance that is often mixed with methamphetamine.²

FOOTNOTES

¹ According to the record, a "controlled buy" is where police officers arrange [*3] and observe a drug transaction to acquire information about potential illegal drug activity. Verbatim Report of Proceedings (VRP) at 19-20.

² The State expected an expert to testify that the drugs from the June 3 transaction were methamphetamine. However, at trial, a state patrol laboratory forensic scientist testified that it was a purely legal substance, often used to "cut" methamphetamine. VRP at 140, 143, 145-46. Thus, Gaines was subsequently charged with delivery of an imitation controlled substance. The jury later acquitted Gaines of this charge.

¶6 On June 20, police stopped Gaines's Dodge Charger in order to execute a search warrant. As police surrounded the vehicle, three occupants were identified, including Gaines in the driver's seat and Brandon Ryan in the front passenger seat. Police observed Gaines's hands make a downward motion in front of himself and later found a gun placed on the front floorboard on the driver's side in front of Gaines. Police also later found a second gun on the front floorboard of the front passenger's side in front of Ryan.

¶7 Upon arrest, Gaines made several statements to the police. He acknowledged that he dealt narcotics but that "he was a small fish ... [as] a runner³ for [*4] the Mexicans." VRP at 60-61.

He stated that he was “[w]iring the money to Mexico for the dope man” and was “supposed to be picking up two pounds.” *Id.* at 62, 65.

FOOTNOTES

³ According to the record, a “runner” is someone who gets paid to broker deals for a higher level person or entity in a drug operation. VRP (Oct. 21, 2014) at 61. They often transport drugs from one person to another and then give money back to the higher level person or entity in exchange for the drugs.

¶8 The police found wire transfer receipts during their search of Gaines's vehicle. The first receipt was dated May 29, 2013, four days before Gaines was observed contacting Handlen on June 3. The May 29 receipt indicated that Gaines sent \$900 to an Ana Ramos Cuevas in Mexico. The second wire transfer receipt was dated June 20, 2013, the same day Gaines and Ryan were arrested. The June 20 receipt indicated that Ryan had sent \$1,000 to a Jesus Enrique Palomera in Mexico.

¶9 After the State charged Gaines for his involvement in these crimes, he requested that Gary Clower, a privately retained attorney, replace his assigned public defender. The judge granted the request on July 2, 2013. After the prosecutor and Clower jointly requested and received two continuances, Gaines [*5] replaced Clower with a new private attorney, Geoffrey Cross. With Cross as Gaines's counsel, the case was continued six times. Two of the continuances were requested solely by the prosecutor to accommodate his trial schedule,⁴ but most were requested by both parties.⁵

FOOTNOTES

⁴ On Jan 15, 2014, Gaines's case was continued to accommodate the prosecutor's trial schedule. On May 1, the case was continued at the State's request due to the prosecutor being in another trial.

⁵ On Jan 27, 2014 both parties requested a continuance to complete discovery and to accommodate the prosecutor's trial schedule. On March 11, the case was continued because Gaines's co-defendant's attorney was sick. On March 17, the case was continued because of “[defense] attorney & [plaintiff] atty conflicts.” Reply Br. of Appellant, App'x F. On April 7, the case was continued because new charges had been brought against Gaines while he had been out on bail, the attorneys needed more time to prepare for trial, and the primary police witness was unavailable.

¶10 Gaines voluntarily retained Cross for approximately seven months, but on May 7 and 8, 2014, Gaines and Cross respectively moved to have Cross replaced. At the time, Cross had also [*6] filed a motion for a competency evaluation of Gaines. On May 15, the trial court heard arguments and granted the competency evaluation. However, the court denied the motion for substitution of counsel, reasoning that the trial date was too close and that “if there are questions about his competence, this certainly isn't the time for him to be making a decision about withdrawing counsel.” VRP (May 15, 2014) at 30-31. Gaines later spent some time at Western State Hospital until his competency was deemed restored a few months later.

¶11 Shortly after Gaines's competency was restored, Cross moved to withdraw as counsel twice, stating that Gaines maintained he did not want Cross's representation.⁶ Cross's affidavits to these

motions stated that he had a "fairly good relationship" with Gaines until May when Gaines requested him to be discharged. Clerk's Papers (CP) at 330. Cross expressed that when he had the prosecutor meet with Gaines and himself, Gaines took "excessive exception to the fact that [he] even exposed him to the prosecutor." CP at 330. Cross also stated that when he tried to go to the jail to prepare for trial, Gaines refused to allow him access to the jail. To Cross, "[a]ll communication between [him]self and [] Gaines ha[d] broken [*7] down." *Id.* Meanwhile, the trial court granted two more jointly sought continuances,⁷ and trial was ultimately set for October 16, 2014. At this point, Gaines's case had been continued for over a year from the original trial date of August 13, 2013.

FOOTNOTES

⁶ Cross moved to withdraw another time as well, before Gaines's competency was restored.

⁷ On September 17, 2014, the case was continued again because "additional time [was] needed to consider resolution options" and Gaines had just provided a supplemental witness list and evidence. CP at 353. On September 30, the case was again continued because Gaines was "trying to track down material witness," a "[w]itness for [the] State [was] not available" and "[s]tatus of [Gaines's] representation [was] up in the air." CP at 354.

¶12 On the day set for trial, October 16, 2014, the court heard Gaines's and Cross's renewed motion for a continuance and counsel substitution in conjunction with Barbara Corey, who was a private attorney with whom Gaines wanted to replace Cross. The court ultimately denied the motions. When the court asked Corey if she could try the case before the end of the year, she replied, "I think not." VRP (Oct. 16, 2014) at 12. Although Corey stated that she could try the case [*8] in February 2015, the court disagreed based on Corey's caseload, which contained many cases that were all nearing a year old or more and would soon require resolution. The court stated that even "if half of them settled ... [i]t would still take a year to try this one." *Id.* at 9. It further noted that the Gaines case itself was already "very old" and that if it had only been "a 30-day-old, 60-day-old, 90-day-old case, that's something else." *Id.* at 19. The court also had concerns about the right of Ryan, Gaines's co-defendant, to a speedy trial, even though Ryan himself was not worried about a few more months' delay. The trial court also noted that Cross's motions to substitute had been denied at least "twice"⁸ previously, *id.* at 18, and that if Gaines was going to throw what "amounts to kind of a tantrum" because he did not get his way, the court was not compelled to grant his motion for new counsel.⁹ *Id.* at 18.

FOOTNOTES

⁸ It is not clear from the record when the other time Cross's motion to substitute was denied other than the court's oral ruling on May 15, 2014. However, because Cross agreed that his motions to substitute had been denied twice in the past, we accept this as a verity.

⁹ Cross also stated in his affidavit to the motions [*9] to substitute that there was a possible conflict of interest due to Cross having taken a witness statement on Gaines' behalf from a former client of Cross's. Whether this conflict continued to be a problem at the time of the hearing is unclear from the record and is not argued in the parties' briefs.

¶13 After trial with attorney Cross representing Gaines, the jury returned guilty verdicts on charges for first degree unlawful possession of a firearm, unlawful solicitation to deliver a controlled substance, and conspiracy to deliver a controlled substance. The jury also entered

verdicts for firearm enhancements on the latter two convictions.¹⁰

FOOTNOTES

¹⁰ Gaines was also found guilty of unlawful solicitation to possess a controlled substance with intent to deliver. However, this charge was later dismissed on double jeopardy grounds at sentencing and is not at issue in this appeal.

¶14 Gaines appeals.

ANALYSIS

I. SEARCH WARRANT

¶15 In his assignments of error, Gaines claims that the court erred in its determination that probable cause supported the warrant to search his vehicle. The State contends that we should not reach Gaines's challenge to the search warrant, because even though he assigned error to the warrant, [*10] he "abandoned the claim by failing to address it in the body of the opening brief." Br. of Resp't at 25. We agree.

¶16 "Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review." *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *rev'd by* 170 Wn.2d 117, 240 P.3d 143 (2010). Here, Gaines makes argumentative statements in the "Statement of Facts" section of his brief regarding the sufficiency of the search warrant, but fails to elaborate on it in the "Analysis" section or cite authority in accordance with the Rules of Appellate Procedure (RAP). RAP 10.3(a)(6). Additionally, after the State argued in its brief that Gaines had abandoned the claim, he implicitly affirmed the State's assertion by failing to respond or even mention the search warrant issue in his reply brief. Instead, his reply brief focuses entirely on his argument regarding the right to choose private counsel.

¶17 Gaines's disjointed assignments of error further buttress our decision not to address the merits of the search warrant issue. He assigned error to conclusions of law two through four and six through eight on the "Assignment of Error" portion of the brief, but on the "Issues Pertaining to Assignments of Error" portion, conclusions of law two through seven are all [*11] challenged.¹¹ Despite Gaines having an opportunity to amend his opening brief, we cannot reasonably decipher what assignments of error he wants us to review, particularly without adequate accompanying analysis.

FOOTNOTES

¹¹ Conclusion five should not have been assigned error because the trial court accepted the State's concession that there was *not* a sufficient nexus for the warrant to be executed on Gaines's residence.

¶18 Because Gaines failed to follow the RAP, coupled with the difficulty in construing from his brief what he wants us to review, we decline to review this issue.

II. RIGHT TO CHOOSE PRIVATE COUNSEL

¶19 Gaines argues that the trial court abused its discretion when it denied his motion for a continuance, effectively depriving him of his right to retain private counsel. We disagree.

¶20 When a defendant requests a continuance for the purpose of replacing his current attorney with new private counsel, we review the court's decision to deny the continuance for an abuse of discretion. *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015), *petition for cert. filed*, No. 15-8300 (Feb. 24, 2016). "A trial court abuses its discretion when its decision 'is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)) [***12**]. "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Hampton*, 184 Wn.2d at 670 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). "A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices." *Hampton*, 184 Wn.2d at 670-71 (quoting *Rohrich*, 149 Wn.2d at 654).

¶21 The Sixth Amendment to the United States Constitution grants a criminal defendant, if he or she can afford it, the right to a private counsel of his or her choice.¹² *Hampton*, 184 Wn.2d at 662-63. However, this right is not absolute. *Id.* at 663. A defendant's right to counsel of his or her choice is limited, in part, in that a trial court considering a continuance for this purpose must balance that right against the demands of its calendar and the public's interest in the prompt and efficient administration of justice. *Id.* A court has wide latitude in weighing these interests. *Id.* The court is not required to apply any mechanical test and can consider any relevant information necessary to make its decision. *Id.* at 669. However, a court may be guided by the 11 *Hampton* factors in determining whether to grant a continuance to allow substitution of counsel:

- "(1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified [***13**] in the state speedy trial act;
- (4) whether the court had granted previous continuances at the defendant's request;
- (5) whether the continuance would seriously inconvenience the witnesses;
- (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
- (9) whether there was a 'rational basis' for believing that the defendant was seeking to change counsel 'primarily for the purpose of delay';
- (10) whether the current counsel was prepared to go to trial;

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature."

Id. at 669-70 (quoting 3 WAYNE R. LAFAVE, WASHINGTON PRACTICE: CRIMINAL PROCEDURE 11.4(c), at 718-20 (3d ed.2007)).

FOOTNOTES

¹² In contrast, an **indigent** defendant, who is guaranteed appointment of counsel, can only **substitute** an appointed **attorney** if he or she [*14] demonstrates an "irreconcilable conflict." *Hampton*, 184 Wn.2d at 663.

¶22 Here, the court denied the continuance because of (1) Corey's inability to try the case within a couple of months, (2) Corey's caseload, which had many old cases, creating the possibility of prolonging the trial up to another year, (3) its concern with Gaines's co-defendant's right to a speedy trial, (4) the age of the case generally, which had received numerous continuances in the past, and (5) the prior denials of the motion for substitution. These are reasonable bases for exercising discretion to deny the continuance.

¶23 It was also brought before the trial court, however, that Cross and Gaines had had potential communication problems since May 2014. Cross maintained that Gaines refused to be represented by him, citing Gaines's disapproval of Cross's attempt to negotiate plea deals with the prosecutor in this case, as well as Gaines's refusal to come out of his jail cell when Cross tried to prepare for trial. We also note our concern that the trial court did not specifically address Gaines's allegation, which was specifically brought up at the hearing, that Cross had allegedly arranged an improper meeting with the prosecutor. Our concern is [*15] heightened by the trial court's characterization of Gaines's behavior as amounting "to kind of a tantrum." VRP (Oct. 16, 2014) at 18.

¶24 However, in examining the trial court's ruling overall, Gaines's primary issue with Cross was argued to the court, and *Hampton* does not require that the court make specific findings. *Hampton* requires instead that the record indicate that the court made a reasoned decision.¹³ Even though there was evidence of problems between Gaines and Cross, the court reasonably believed that Corey, who was to be Cross's replacement, could not try the case in an acceptable amount of time. Indeed, the court indicated that it would have permitted Corey a shorter continuance to prepare for Gaines's trial. Although there was disagreement whether Corey could have tried the case by February, we cannot say the court abused its discretion after considering Corey's calendar in some detail in making its assessment that she could not.

FOOTNOTES

¹³ Gaines also argues that the court misapplied the law, but as *Hampton*, 184 Wn.2d at 669-72 clarified, the trial court is not required to apply any mechanical test so long as we can reasonably discern that it weighed the defendant's choice of counsel against the other relevant circumstances. [*16]

¶25 Gaines also argues that because he "made no motions for continuance" and only "joined in and/or did not oppose motions made by the deputy prosecutor or codefendant's attorney," the court was unreasonable in not granting his request for a continuance. Br. of Appellant at 32-35; Reply Br. of Appellant at 4-5. However, while the case was occasionally continued solely at the

request and need of the prosecutor, the record also demonstrates that at least some of the continuances were due to Gaines's actions. For example, the April 7, 2014 continuance was granted, in part, because new charges had been brought against him while he was out on bail. In addition, the joint continuance motions are to be taken for what they were: a request by *both* Gaines and the prosecutor for the court to delay trial. Therefore, Gaines's characterization that the continuances were predominantly only requested by the prosecutor is incorrect. In any event, the continuances, along with Gaines's stay in Western State Hospital, resulted in the case becoming sufficiently old so that it was reasonable for the court to base its denial, in part, on the case's age.¹⁴

FOOTNOTES

¹⁴ Gaines also argues that that the State incorrectly presented [*17] evidence that it would suffer prejudice because a delay would cause possible difficulty in presenting witnesses at trial. However, it is not clear that the court based its decision on this argument, and therefore, we do not examine it as a reason for finding the decision reasonable.

¶26 We hold that, taking all the facts into consideration, the trial court did not abuse its discretion in denying Gaines's motion for a continuance.¹⁵

FOOTNOTES

¹⁵ Gaines also discusses possible prejudice to him from Cross's actions at trial. However, this allegation fits more squarely under an ineffective assistance of counsel claim and not as a means to impeach the reasonableness of the court's denial of a continuance before trial.

III. CRIMINALIZATION OF SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE

¶27 Gaines argues that his conviction for solicitation to deliver a controlled substance must be dismissed due to the absence of statutory law criminalizing his conduct. We disagree.

¶28 In *In re Personal Restraint of Hopkins*, 137 Wn.2d 897, 900, 904, 976 P.2d 616 (1999), our Supreme Court held that solicitation to deliver a controlled substance is not an offense under chapter 69.50 RCW, the Uniform Controlled Substances Act, and therefore that conviction was not subject to the Act's sentence-doubling provisions. However, the *Hopkins* [*18] court also recognized that the defendant was still subject to punishment for solicitation to deliver a controlled substance under chapter 9A.28 RCW, which criminalizes anticipatory offenses including solicitation. *Id.* at 899-900; *see also In re Pers. Restraint of Bowman*, 109 Wn. App. 869, 871, 38 P.3d 1017 (2001). Specifically, RCW 9A.28.010 criminalizes a solicitation of any crime outside of title 9A, which would include chapter 69.50 RCW, since it makes delivery of a controlled substance unlawful. Accordingly, we hold that solicitation to deliver a controlled substance is criminalized under chapter 9A.28 RCW.

IV. SUFFICIENCY OF THE EVIDENCE

¶29 Gaines argues that the State presented insufficient evidence to convict him of conspiracy to deliver a controlled substance, solicitation to deliver a controlled substance, and first degree unlawful possession of a firearm. We disagree.

1. Legal Principles

¶30 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a reasonable juror to find the essential elements of the crime beyond a reasonable doubt. *State v. McPherson*, 186 Wn. App. 114, 117, 344 P.3d 1283, review denied, 183 Wn.2d 1012 (2015). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a juror can draw from that evidence. *Id.* at 117-18. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted [***19**] strongly against the defendant. *State v. Miller*, 179 Wn. App. 91, 104, 316 P.3d 1143 (2014). Circumstantial evidence is no less reliable than direct evidence. *Id.* at 105. We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

2. Conspiracy To Deliver a Controlled Substance

¶31 Gaines argues that there was insufficient evidence to convict him of conspiracy to deliver a controlled substance. We disagree.

¶32 A person is guilty of criminal conspiracy "when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). A formal agreement is not necessary for the formation of a conspiracy; rather, "[a]n agreement can be shown by a 'concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.'" *State v. Smith*, 65 Wn. App. 468, 471, 828 P.2d 654 (1992) (quoting *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). While the threshold to show a "substantial step" in a conspiracy context is lower than for attempt,¹⁶ it still requires a manifestation "that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators [***20**] nor a fully completed operation no longer in existence." *State v. Dent*, 123 Wn.2d 467, 475, 477, 869 P.2d 392 (1994) (internal quotation marks omitted) (quoting *Yates v. United States*, 354 U.S. 298, 334, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)). Preparatory conduct which furthers the ability of the conspirators to carry out the agreement can be "a substantial step in pursuance of [the] agreement". *Id.* at 477. Conspiracy to deliver a controlled substance specifically requires the involvement of at least three people, because the delivery itself involves two people and a conspiracy must involve a third person other than those involved in the delivery. *State v. McCarty*, 140 Wn.2d 420, 426, 998 P.2d 296 (2000).

FOOTNOTES

¹⁶ "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

¶33 Here, Gaines admitted that he was a drug runner for individuals located in Mexico and that he was on his way to pick up two pounds. Testimony at trial established that about two pounds of methamphetamine is usually a quantity that comes from a major source such as the Mexican cartel members. Gaines was also observed on June 3 delivering a substance often mixed with methamphetamine to Handlen. Taking this evidence in the light most favorable to the State, one can reasonably infer that Gaines was admitting [***21**] to being on his way to pick up two pounds of methamphetamine.

¶34 Additionally, Gaines was found in a vehicle with Ryan, whose name was listed on the June 20 wire transfer receipt that listed a \$1,000 payment sent to a person located in Mexico, which corroborated Gaines's statements. The May 29 wire transfer receipt, which bore Gaines's name, coupled with police observing Gaines deliver drugs to Handlen on June 3, supplies circumstantial evidence that Gaines, Ryan, and individuals located in Mexico had an agreement to deliver methamphetamine to a low level supplier such as Handlen. Even though Gaines was arrested and was found with no methamphetamine, testimony at trial established that wire transfers are often used to pay money to recipients in Mexico in exchange for methamphetamine smuggled into the United States. Therefore, a jury could have reasonably found that the payment indicated on the June 20 wire receipt constituted a substantial step toward affecting that conspiracy.

¶35 Gaines argues that because the May 29 wire transfer receipt was dated outside the State's charging period for conspiracy, there was no evidence he participated in the wiring of money to Mexico. While we agree that [*22] the May 29 receipt does not establish a conspiracy on its own, that wire transfer, as previously noted, is circumstantial evidence of Gaines's intent and corroborates his statements regarding the June 20 incident.

¶36 Gaines also argues that there is insufficient evidence under the corpus delicti doctrine to show that the purposes underlying the wire transfers were to send money to Mexico in exchange for methamphetamine. Generally, corpus delicti requires independent evidence that would corroborate a defendant's incriminating statement. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006). Police officers' observations of Gaines's prior delivery on June 3, coupled with the May 29 wire receipt bearing Gaines's signature, supply sufficient, independent corroborative evidence of Gaines's incriminating statements.

¶37 Accordingly, we hold the State presented sufficient evidence to convict Gaines of conspiracy to deliver a controlled substance.

3. Solicitation To Deliver a Controlled Substance

¶38 Gaines next argues that there was insufficient evidence to convict him of solicitation to deliver a controlled substance. We disagree.

¶39 Solicitation to deliver a controlled substance requires proof of a person's "intent to promote or facilitate" the crime. *State v. Constance*, 154 Wn. App. 861, 883, 226 P.3d 231 (2010) (quoting [*23] *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007)); RCW 9A.28.030(1); former RCW 69.50.401 (2013). A person is guilty of the offense whether or not the criminal act is completed. *Constance*, 154 Wn. App. at 884. Under RCW 9A.28.030(1) solicitation occurs when "a person offers money or something of value to another person to commit a crime." *Id.*; RCW 9A.28.030.

¶40 Our analysis of this challenge is largely similar to the discussion above of conspiracy to deliver a controlled substance. Gaines's statements to police officers, the wire receipts, and his participation in the June 3 transaction are sufficient evidence that he solicited delivery of methamphetamine on June 20. Specifically, the jury could have reasonably inferred that the June 20 wire receipt was evidence of an offer of money to individuals located in Mexico for methamphetamine. Although Gaines argues that \$900 would not be enough money to buy a "kilo," or 2.2 pounds, of methamphetamine, Brief of Appellant at 41, testimony at trial established that it is common for drug dealers to make incremental "payments" in order to purchase this amount. VRP at 90, 96-97.

¶41 Gaines also argues that Handlen's lack of knowledge at trial that he sold to her specifically on June 3 makes the evidence insufficient. In addition, he argues that because the purpose of the wire receipts can only be proved [*24] by Gaines's statements, the evidence is insufficient

under the corpus delicti doctrine. However, similar to conspiracy to deliver a controlled substance, the May 29 receipt and the police's surveillance of the June 3 incident is sufficient circumstantial evidence to demonstrate Gaines's intent to solicit individuals from Mexico with money and to arrange a purchase of methamphetamine on June 20.¹⁷

FOOTNOTES

¹⁷ Gaines also contends that the evidence is insufficient because the State presented evidence only that he had been associated with methylsulfonylmethane, a legal substance. Inchoate crimes, such as solicitation and conspiracy, by their very nature, do not require completion of the actual, underlying crime. Therefore, there is no requirement that methamphetamine was ever actually found.

¶42 Accordingly, we hold the State presented sufficient evidence to convict him of solicitation to deliver a controlled substance.

4. First Degree Unlawful Possession of a Firearm

¶43 Finally, Gaines argues that there was insufficient evidence to convict him of first degree unlawful possession of a firearm. We disagree.

¶44 First degree unlawful possession of a firearm requires proof that a defendant "owns, has in his or her possession, [***25**] or ... control any firearm after having previously been convicted ... of any serious offense as defined in this chapter."¹⁸ Former RCW 9.41.040(1)(a) (2011). Possession can be actual or constructive. Because Gaines was not directly observed with a firearm, we examine whether he constructively possessed a firearm.

FOOTNOTES

¹⁸ Gaines stipulated to the prior serious offense conviction, which made the possession unlawful.

¶45 To determine constructive possession we analyze "whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question." *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (Stephens, J., dissenting).¹⁹ While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item cannot. *Id.* Factors supporting dominion and control include ownership of the item and ownership of the property where the item is located. *Id.*

FOOTNOTES

¹⁹ This portion of the *Davis* dissent received five votes, so it has precedential value.

¶46 In *Davis*, 182 Wn.2d at 235, the Supreme Court reversed the defendants' firearm convictions when the evidence only established that they had "briefly handled the item" for the true possessor of the gun. In contrast to this case, Gaines was pulled over and found making hand motions [***26**] toward the space in front of the driver's seat where he was sitting. Immediately thereafter, officers found a gun in the location toward which he had been making the hand

motions. The vehicle in which the firearm was located was registered to Gaines. A jury could have reasonably inferred from Gaines's motion toward the space where the gun was found that he placed the gun there. Testimony at trial also established that firearms are often used to protect drug runners when dealing with a larger amount of drugs, which, coupled with the firearm found on the passenger side near Ryan, could have buttressed a jury's belief that Gaines possessed the firearm in front of him to protect his drug operation. Unlike *Davis*, a jury could have reasonably inferred from the totality of this evidence that Gaines had dominion and control over the firearm.

¶47 Gaines argues that the officer's testimony during trial recounting his observations about Gaines's hand motions was inconsistent and contradictory. Even if we were to agree, we "must defer to the trier of fact on issues of conflicting testimony [and] credibility of witnesses" on a sufficiency challenge. *Thomas*, 150 Wn.2d at 874-75.


¶48 Accordingly, we hold the State presented sufficient [*27] evidence to convict Gaines of first degree unlawful possession of a firearm.

CONCLUSION

¶49 We decline to address the merits of the search warrant argument. We hold that the court did not in abuse its discretion in denying the continuance, that chapter 9A.28 RCW criminalizes solicitation to deliver a controlled substance, and that there is sufficient evidence to uphold all of his convictions. For these reasons, we affirm.

¶50 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.

MAXA and SUTTON, JJ., concur.

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APPENDIX B

The United States Constitution's sixth amendment provides, in pertinent part:
"In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his
defence." U.S. Const., amend. VI.

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Attached please find the Motion for Discretionary Review in the above referenced case.
Thank you,

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