NO. 46852-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY EDWARD GAINES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 13-1-02515-1

BRIEF OF RESPONDENT

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2. Is defendant incapable of overcoming the presumptive validity of the vehicle-search warrant used to confiscate unlawfully possessed firearms and receipts from money transfers to methamphetamine suppliers in Mexico as there was probable cause to believe he used the vehicle in that illicit enterprise?

3. Does defendant erroneously contend the inapplicability of RCW 69.50's sentencing provisions to the crime of solicitation to deliver a controlled substance places the offense outside Washington's criminal code when it is criminalized by Title 9A?

4. Are defendant's convictions for conspiracy and solicitation to deliver methamphetamine as well as unlawful possession of firearm adequately supported by evidence that proved he was a felon caught with a loaded pistol in a car he used to traffic methamphetamine?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged by Fourth Amended Information with unlawful distribution of an imitation controlled substance (Ct.I), unlawful possession of a firearm in the first degree (Ct.II), firearm enhanced unlawful solicitation to deliver methamphetamine (Ct.III), firearm enhanced unlawful solicitation to possess methamphetamine with intent to deliver (Ct.IV), and firearm enhanced conspiracy to deliver a controlled substance (Ct.V). CP 266-69. The Original Information was filed June 21, 2013. CP 294-95.

Trial was scheduled for August 13, 2013. CP 338[1]. Attorney Christopher Torrone (WSB No. 35541) filed a Notice of Appearance. CP 339. A $75,000 bond was posted on defendant's behalf. CP 340. The Honorable Meagan Foley permitted defendant to substitute Mr. Torrone for Attorney Gary Clower (WSB No. 13720) July 9, 2013. CP 343. A joint motion to continue the trial until October 15, 2013, for additional time to prepare was granted. CP 297. A second joint motion to continue the trial until January 15, 2014, was granted to facilitate additional discovery. CP 298. Bail was increased to $150,000 after defendant's Persistent Offender Notice was filed. CP 299, 344. A $150,000 bond was posted on defendant's behalf. CP 346.

[1] Citation to Clerk's Papers above CP 337 reflect the State's estimate of how supplemental designations will be numbered.

A second substitution of counsel, whereby privately retained counsel Geoffrey Cross (WSBA No. 3089) took over for Mr. Clower, was accomplished November 4, 2013. CP 300. The January 15, 2014, trial date was continued twelve days to accommodate the prosecutor's appearance in a different trial. CP 303. On January 17, 2014, defendant sought an indefinite continuance to interview material witness Jessica Handlen. CP 349. Trial was continued to March 11, 2014, on joint motion to complete discovery and accommodate the prosecutor's trial schedule. CP 304. A six day continuance was granted March 11, 2014, because the co-defendant's attorney was ill. CP 305. Trial was continued to May 1, 2014, for the parties to assess offenses defendant allegedly committed while pending trial as well as to accommodate final trial preparation and the primary detective's out-of-state leave. CP 306. Defendant's bail was increased to $300,000 when charges were filed in a separate case. CP 350; RP(5/15/14) 28-30; (10/16/14) 2. He remained in custody thereafter. RP (10/16/14) 4.

The Honorable Edmund Murphy denied defendant's CrR 3.6 motion to suppress firearms and evidence of illicit money transfers discovered in his car during the execution of a valid warrant. CP 94-97; RP(5/15/14) 15-21. The drugs and property seized from defendant's house were suppressed upon the State's concession the supporting affidavit failed to establish the requisite nexus between his crimes and house. RP(3/17/14) 8; (10/16/14) 14

Defendant's trial was continued to June 3, 2014, because the prosecutor was in a different trial. CP 352. Defendant's attempt to substitute counsel a third time was denied. CP 321. He was determined to be competent September 10, 2014. CP 322. Trial was continued to October 1, 2014, for one or both parties to consider resolution options and because defendant submitted a supplemental witness list and disclosed additional evidence "just" before the hearing. CP 353. A final continuance to October 16, 2014, was granted to afford defendant time to track down a material witness and settle issues related to his representation as well as to accommodate the State's witnesses. CP 354.

Attorney Barbara Corey (who represents defendant on appeal) appeared before the Honorable Brian Chushcoff on the day of trial. RP(10/16/14 JBC[2]) 2. She said defendant retained her the day before, yet urged the court to permit defendant's third substitution of counsel despite her unavailability until February, 2015. *Id.* at 2, 6-8. The court did not block the substitution, permitting defendant to proceed to trial with any attorney willing to represent him, but would not grant another continuance to accommodate Ms. Corey's appearance due to: (1) the age of the case, (2) defendant's earlier substitution of counsel, the court's belief defendant was manufacturing conflict with his counsel, (3) the court's interest in the

[2] Citation to the 10/16/14 hearing before the Honorable Brian Chushcoff will be designated by "JBC" to differentiate it from the hearing held later that day by the Honorable Thomas Felnagle, who will be identified by "JTF".

joint trial proceeding in accordance with the co-defendant's speedy trial right, (4) and its concern Corey's heavy case load would make her unavailable for up to a year. *Id.* at 5-10, 18-19.

Defendant proceeded to trial before the Honorable Thomas Felnagle with privately retained counsel Geoffrey Cross. RP(10/16/14 JTF). Eleven witnesses were called, fifteen exhibits were admitted, and a stipulation to the serious offense predicate for the UPOF charge was entered. CP 355-57; 2RP 234-35. The jury convicted defendant as charged. CP 258-65. Sentence was imposed on Counts II, III, and V; Count IV was dismissed without prejudice on double jeopardy grounds. CP 278, 280. Defendant received a life sentence due to the persistent offender status achieved when his convictions for Counts III and/or V combined with two previous "most serious offenses." An offender score of 9+ as to the other current offenses resulted from the combination of those offenses with decades of criminal history, including but not limited to: first degree burglary, residential burglary, one count of firearm enhanced second degree assault, one count of deadly weapon enhanced second degree assault and two counts of unlawful possession of a firearm in the first degree. CP 277-78. Defendant's Notice of Appeal was timely filed. CP 272.

2. Facts

On June 3, 2013, the Tacoma Police Department used a confidential informant to complete an investigative purchase ("controlled buy") of what was negotiated to be methamphetamine. 1RP 24. The unit makes investigative purchases through informants known to drug suppliers because it avoids exposing undercover officers to the dangers of drug transactions. 1RP 16, 20. Jessica Handlen was the operation's initial target. 1RP 24. The informant was searched to ensure any drugs the informant returned to police came from Handlen. 1RP 18-19, 25-26, 41-42.

The transaction took place on South Altheimer in Tacoma. 1RP 26-27, 33; 2RP 211-12. Handlen repeatedly sold methamphetamine from that location, and supplied up to one hundred people per week. 2RP 206, 209, 211-12. Officers watched the transaction from nearby vantage points. 1RP 27. The informant contacted Handlen in broad daylight. 1RP 27. Handlen identified defendant as her methamphetamine source. 1RP 28; 2RP 206. Defendant arrived in a 2013 Dodge Charger registered[3] in his name. 1RP 28-30. Handlen made contact with defendant through the driver's side window as officers looked on. 1RP 31. Handlen brought a bag of suspected methamphetamine back to the informant. 1RP 32. The informant purchased the bag with prerecorded bills. 1RP 32, 85-86.

The informant surrendered the bag to police. 1RP 32-33. The bag weighed 6.4 grams (approximately one-quarter ounce), and field-tested

positive for methamphetamine. 1RP 35. Such an amount, with a street value of several hundred dollars, is consistent with small scale street level dealing. 1RP 36-38[4]. Handlen only dealt in that amount at the time. 1RP 36. A subsequent laboratory analysis revealed the bag contained methylsulfonylmethane—a "cutting agent" or "bunk substance" used by dealers to increase the apparent quantity of methamphetamine packaged for sale. 1RP 143; 146-47, 152-53; CP 356 (Ex.1). The forensic scientist who tested the bag's contents was a 28 year veteran of the Washington State Patrol Crime Lab who had analyzed methamphetamine hundreds of times. 1RP 139-41, 145. She opined a visual inspection of the bag would lead one to believe it contained methamphetamine. 1RP 145-46. Handlen was not aware she sold the informant a cutting agent instead of methamphetamine despite her extensive experience with the drug. 2RP 211-12, 214, 217.

Police refocused the investigation on identifying defendant's supplier with the ultimate goal of reaching a person who smuggled methamphetamine into the country. 1RP 33, 38-39. An investigative operation was executed June 20, 2013, which consisted of taking defendant into custody and executing a search warrant on his vehicle. 1RP

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[3] License plate No. AKZ 7273.

[4]Expert testimony on the methamphetamine industry was provided by Officer Shultz. At the time of trial, Shultz had six years of experience investigating the drug trade. He was assigned to Tacoma Police Department's Narcotics Unit, which included an eighteen month detail to the Drug Enforcement Administration (DEA) task force, and several DEA drug enforcement courses. 1RP 13-14, 79-82.

39, 42, 59, 65-67.[5] Undercover units spotted defendant's car in a Safeway parking lot. 1RP 39, 42. An arrest team executed a felony stop shortly after he drove away from the lot. 1RP 43-44. Co-defendant Brandon Ryan was the front seat passenger and Richard Thompson was seated in back. 1RP 45-46. 132, 137, 153-54.

Defendant initially ignored repeated commands to open his door. 1RP 137-38. Officer Shultz was alerted to a loaded .45 caliber pistol at defendant's feet by the downward motions defendant made with his hands as police approached. 1RP 47-48, 50-51; CP 356 (Ex. 5). A loaded .40 caliber pistol was located on the front seat passenger floorboard near Ryan's feet. 1RP 49, 52-55, 127-28; CP 356 (Ex.6). Both weapons were operable. 2RP 179-80. The need to protect oneself from the dangers of drug trafficking increases as one ascends within the industry's hierarchy. 1RP 84-85. Traffickers involved in moving large quantities are attractive targets for robbers posing as customers, rivals looking to eliminate competitors, and suppliers responding to inadequate returns on advanced (or "fronted") product. 1RP 84-85, 96-97. At trial, defendant and Ryan stipulated to the prior "serious offense" convictions that made it unlawful for them to possess firearms. 2RP 234-35.

Defendant made several statements to Shultz. 1RP 57-58, 149-51. The conversation began with Shultz reading the search warrant to

[5] The search warrant executed on the house is not mentioned above because it was not adduced as evidence in the trial.

defendant. 1RP 59. Shultz told defendant he was the target of a trafficking investigation who had already been observed in a controlled buy. 1RP 59-60. Defendant acknowledged he was dealing drugs, but claimed he was a "small fish" working as a runner for "the Mexicans." 1RP 61. "A runner" transports drugs and money between suppliers and purchasers. 1RP 61. To corroborate this account, defendant revealed he just wired "money to Mexico for the dope man" and was on his way to pick up "two pounds." 1RP 62, 65. The referenced quantity was significant as 2.2 pounds of methamphetamine is essentially a kilogram (or "kilo")—an extraordinarily large street-dealer quantity typical of a major source, particularly "Mexican cartel members." 1RP 62-63. Defendant opined the officers were "screwing up" by deciding to arrest him instead using him to investigate the Mexican supplier. 1RP 62-64.

A search of defendant's car revealed two receipts for money transfers to Mexico. 1RP 66; CP 356; Ex.2. There was a Western Union transfer of $1,000.00 to Jesus Enrique Palomera in Jalisco, Mexico, approximately three minutes before defendant and Ryan were arrested leaving the Safeway parking lot where the Western Union was located. 1RP 72, 75, 77. Ryan was the documented sender. 1RP 76. Although $1,000.00 is not enough money to buy a kilo of methamphetamine, the amount was typical of a down payment for a large quantity or a partial payment of an outstanding balance for such a quantity. 1RP 90, 96-97.

The second receipt recorded the May 29, 2013, transfer of $900.00 by defendant to Ana Ramos Cuevas, also in Jalisco, Mexico. 1RP 77-78. That transaction occurred four days before the June 3, 2013, controlled buy in which defendant delivered suspected methamphetamine to Handlen for sale to the informant. 1RP 77-78. Money transfers directly to Mexico for methamphetamine smuggled into the United States became more common after legislative restrictions on the accessibility of precursor chemicals made it relatively difficult to manufacture methamphetamine in the United States. 1RP 82-83.

Defendant had $657.00 on his person at the time of arrest, consisting of: four $100 bills, eleven $20 bills, two $10 bills and 17 $1 bills. 1RP 121-22. According to state databases, defendant did not have any reported wage or unemployment payments from January, 2012, to the end of December, 2013. 1RP 24, 121-22, 2RP183-84. There was no evidence he had any legitimate source of income. *E.g.* 2RP 185-86.

C. ARGUMENT.

1. THE LOWER COURT PROPERLY MANAGED ITS DOCKET BY DENYING DEFENDANT'S UNREASONABLE DAY-OF-TRIAL MOTION FOR A CONTINUANCE TO MAKE A THIRD SUBSTITUTION OF COUNSEL FOR AN UNAVAILABLE ATTORNEY IN A CO-DEFENDANT CASE THAT HAD BEEN PENDING TRIAL FOR OVER A YEAR.

"[T]he right to counsel is a shield, not a sword." ***Neal v. Grammer***, 975 F.2d 463, 467 (8th Cir. 1992). A defendant is not entitled to manipulate the right to disrupt the trial, and it is well settled a defendant does not have an absolute right to counsel of his own choosing. "[S]ubstitution of counsel is a matter committed to the sound discretion of the trial court." *Id.*; *see also* ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 152, 126 S.Ct. 2257 (2006). Reviewing courts note "with increasing concern ... it seems to be standard procedure for the accused to quarrel with ... counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense." ***In re Personal Restraint of Stenson***, 142 Wn.2d 710, 734, 16 P.3d 1, 15 (2001)(citing ***State v. Piche***, 71 Wn.2d 583, 589, 430 P.2d 522 (1967)). This appears to be done to leverage claimed infringements of the right to counsel on appeal. *Id.*

The United States Supreme Court has repeatedly "recognized a trial court's wide latitude in balancing the right to counsel of choice ... against the demands of its calendar." ***Gonzalez-Lopez***, 548 U.S. at 152

(citing ***Wheat v. United States***, 486 U.S. 153, 163-64, 108 S.Ct. 1692 (1998); ***Morris v. Slappy***, 461 U.S. 1, 11-12, 103 S.Ct. 1610 (1983)). And it recognizes "[t]rial judges require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling ... witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons...." ***Morris***, 461 U.S. at 11-12 (citing ***Ungar v. Sarafite***, 376 U.S. 575, 589, 84 S.Ct. 841 (1964)). "[O]nly an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to assistance of counsel." *Id.*

a. The unreasonable request for a day-of-trial continuance to accomplish a third substitution of counsel was properly denied.

An accused is not constitutionally entitled to unavailable counsel. ***Morris***, 461 U.S. at 4; ***United States v. Hughey***, 147 F.3d 423, 431 (5th Cir. 1998). A late request to retain counsel of one's choice should generally be denied, especially if granting it may delay trial. ***State v. Early***, 70 Wn. App. 452, 457, 853 P.2d 964 (1993)(citing ***State v. Chase***, 59 Wn. App. 501, 505-06, 799 P.2d 272 (1990)); ***State v. Hampton***, 182 Wn. App. 805, 826, 332 P.3d 1020 (2014). "To be sure, the right of counsel of choice explicated in ***Gonzalez-Lopez***, does not preclude courts from limiting a defendant's right to retained counsel of his choice when it would unduly delay the proceedings." ***Hampton***, 182 Wn. App. at 826.

"[A] trial court's discretion is at its zenith when the defendant endeavors to replace counsel shortly before trial." ***United States v. Robinson***, 662 F.3d 1028, 1032 (8th Cir. 2011). ***Early***, 70 Wn. App. at 458 (citing ***State v. Young***, 11 Wn. App. 398, 523 P.2d 946 (1974)(morning-of-trial continuance request to substitute counsel retained day before appropriately denied); ***State v. Wilkinson***, 12 Wn. App. 522, 530 P.2d 340 (1975).

As the case gets closer to trial, granting a continuance becomes more disruptive to the court's calendar and to others involved in the case. ***United States v. Sinclair***, 770 F.3d 1148, 1153-56 (7th Cir. 2014). "A motion for continuance to ... replace counsel will routinely be denied where the accused's lack of representation is attributable to his own lack of diligence in procuring or replacing counsel...." ***Early***, 70 Wn. App. at 458. Such motions will also regularly be denied where prior continuances to accommodate substitute counsel have been granted and the trial is otherwise ready to proceed. *Id.*; ***State v. Staten***, 60 Wn. App. 163, 172-73, 802 P.2d 1384 (1991);***United States v. Flanders***, 491 F.3d 1197, 1215-17 (10th Cir. 2007).

Defendant substituted attorney Torrone for attorney Clower on July 9, 2013. CP 343. He then substituted attorney Clower for attorney Cross. CP 300; RP (10/16/14 JBC) 6-7. Defendant then retained attorney Corey as a substitute for Cross one day before trial. RP (10/16/14 JBC) 2. Ms. Corey urged Judge Chushcoff to authorize the third substitution when

the parties appeared for trial. *Id.* at 2, 4-6. Judge Chushcoff conditionally granted the request:

> "[M]y view at this point is the Gaines case could go out to trial, and if you want to be the lawyer out, that's fine with me. Problem is you're in trial someplace else."

Id. at 3-4; *see also Id.* at 8, 18. Corey confirmed her unavailability, claiming it was "not a factor ... the court can consider." RP (10/16/14 JBC) 4, 7. According to her, the co-defendant's speedy trial right was also irrelevant to the decision. *Id.* at 7.[6] Corey conceded her unavailability would persist until February. *Id.* at 8. The court was concerned she would actually remain unavailable for upwards of a year, even if half of ten older cases assigned to her settled. *Id.* at 8-9, 10, 15. The youngest of those cases was 297 days old; four much older cases with incarcerated defendants had been respectively pending trial for "393 days", 461 days", "623 days" and "779 days." *Id.* at 14. Several attorneys in those cases had no expectation of settlement. *Id.* at 15. Corey responded by raising the abstract possibility of settlements while only vaguely describing the actual posture of her cases. *Id.* at 9, 14, 16-17. The court's review of her cases left it unable to conceive of how she could represent "with any

[6] Co-defendant Ryan initially expressed a desire to proceed to trial before the end of the year; however, after the court mentioned the problem of defendants delaying cases in perpetuity through successive substitutions and the State expressed concern delay would compromise its ability to produce civilian witnesses, Ryan stated he was comfortable with the continuance required to accommodate Corey's appearance. RP (10/16/14 JBC) 13, 16.

confidence" an ability try defendant's case "in a reasonable period of time...." *Id.* at 16.

Corey opined defendant could further postpone the trial by moving for substitution when she became available, arguing "under ***Gonzalez*** his right to ... retain an attorney of his choice trumps everything." *Id.* at 9. A discussion as to whether there were any limits on a defendant's ability to indefinitely avoid trial through successive substitutions followed:

> **COURT**: So this goes on forever; is that what I'm hearing you say?
> **COREY**: Your Honor, I want to cite Brady v. Henry.
> **COURT**: Can you answer my question, then you can cite anything you want.
> **COREY**: I think he has a right to counsel of his choice, to retain that attorney.
> **COURT**: So it can go on literally in perpetuity.
> **COREY**: Well, I would hope not.
> **COURT**: I would hope not, too, but what you're telling me is that's what could happen. If you have enough money to hire lawyers, or find lawyers willing to come in, they could all come in on the day of trial, in perpetuity, and we could do nothing about it. That's what I'm hearing you - - that's the legal principle at stake here.

Id. at 9-10. Corey repeated her interpretation of ***Gonzalez-Lopez***'s holding while making it clear she could not accommodate co-defendant Ryan's request to be tried before the end of the year. *Id.* at 10, 12. The State was concerned the delay requested to accommodate Corey would prejudice defendants in her older cases, impinge upon the co-defendant's speedy trial

right, and compromise the State's ability to produce drug-involved civilian witnesses at defendant's trial. *Id.* at 15.

The court also addressed defendant's choice not to cooperate with Cross:

> My point is this: If Mr. Gaines chooses -- understanding the court's rulings ... not to cooperate ... that is ... his choice, and this amounts to a kind of tantrum when he won't talk to you [Cross]. But that's his call. He hired you. We've kept you on the case.

Id. at 18-19. The court then reiterated its willingness to permit Corey's participation so long as it did not delay the case:

> Now, I don't really care whether Ms. Corey's on the case or not, but I do care that the trial date not continue any longer. So, I'd be perfectly willing to let Ms. Corey on this case, she's also in trial right now in another case .... So that's not my trying to keep [defendant] from having a lawyer of his own choosing. If Ms. Corey was able to try the case today, I'd say, great. You're on the case. We'll send you out to trial. That would be fine with me.
>
> The problem ... is that he comes up with a lawyer of his choice on the eve of trial on a very old case. If this was a 30-day-old, 60-day-old, 90-day-old case, that's something else. A one-year-old case with somebody else who is also in jail, I have to have some concerns about this. And when the lawyer getting into the case also has lots of other older cases, I have to worry about that, too, that is - - how realistic is this that [defendant] is going to be tried anytime soon?

Id. at 18-19.

The Honorable Thomas Felnagle called the case for trial. RP (10/16/14 JTF) 1. Judge Chushcoff's decision to permit Corey to represent

defendant was confirmed as was Judge Chushcoff's unwillingness to let Cross withdraw. *Id.* at 3-4. Defendant's history of unsuccessful motions to terminate Cross was discussed; however, no error has been assigned to those rulings nor has a record of the associated proceedings been provided. Judge Felnagle declined to second guess Judge Chushcoff's rulings, opining he probably would have ruled the same way. *Id.* at 7-8.

Defendant failed to prove the trial court abused its discretion in refusing to grant a day-of-trial continuance to accommodate an unavailable attorney retained the day before trial. There is no requisite showing of an arbitrary insistence upon expeditiousness in the face of a justifiable request for delay. The record reveals the court was confronted with, and carefully considered, nearly all the factors consistently upheld as reasonable grounds to deny a continuance requested to substitute counsel. Defendant had been allowed to substitute counsel on two prior occasions. His trial had been several times delayed through nine prior continuances, many of which afforded the defense time to prepare.

On September 30, 2014, defendant was given sixteen additional days to resolve outstanding issues with his previously chosen counsel, but did not retain Corey, his proposed substitute, until the day before trial. Of all the lawyers he might have hired, he chose one guaranteed to remain unavailable for at least four months, and apparently up to one year, due to her competing responsibilities in older cases. He then sought at least another four month delay on the day of trial in a one year old case

otherwise ready to proceed. The requested delay was foreseeably likely to trigger subsequent delays as the necessary participants fell out of the alignment achieved on the scheduled trial date. There were no guarantees that witnesses, co-defendant's counsel, the prosecutor or the court would be able to similarly proceed in February when Corey *thought* she would be available. Predicable future scheduling conflicts would likely result in the other participants missing Corey's apparently narrow, potentially illusory, window of availability.

Added to those already adequate grounds to support the challenged ruling, were valid concerns the requested continuance would impinge upon the speedy trial rights of the incarcerated co-defendant who expressed a desire to be tried at least two months before Corey might be available, *until* the State indicated the continuance might compromise its case. RP (10/16/14 JBC) 13, 16. The court had a legitimate interest in ensuring the co-defendant was timely tried as well as in preventing both defendants from misusing delay as a means of obtaining illegitimate advantages in the case. Of no less concern were the speedy trial rights of the incarcerated defendants pending trial in Corey's considerably older cases. Defendant's motion to continue was very reasonably denied.

Appellant's brief denigrates the trial court's concerns about Corey's case load through an extraneous epilogue of how several of the older cases vying for her time resolved. App.Br. at 12, n.8. Such hindsight cannot demonstrate an abuse of discretion, which must be evaluated from the

record actually before the trial judge. ***In re Personal Restraint of Duncan***, 167 Wn.2d 398, 408, 219 P.3d 666 (2009). The information *reported* nevertheless shows Corey was not relieved of all those competing responsibilities until roughly three months after her supposed availability for defendant's trial. That said, the epilogue's irrelevance is only surpassed by the impropriety of its inclusion in a direct appeal where this Court "will not consider matters outside the trial record." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)(citing ***State v. Crane***, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); ***State v. Blight***, 89 Wn.2d 38, 45–46, 569 P.2d 1129 (1977); *accord* ***State v. Stockton***, 97 Wn.2d 528, 530, 647 P.2d 21 (1982); RAP 9.11.

Defendant then somewhat ambidextrously accuses attorney Cross of acting inappropriately by meeting with the prosecutor to pursue some potential advantage for the defendant while Cross remained his attorney of record by judicial decree. As defendant's proposed substitute counsel (and now appellate counsel) acknowledged below, Cross was not permitted to withdraw from the case—as Corey was not permitted to enter—without the court's permission. RP (10/16/14) 2; CrR 3.1(e). Cross consequently continued to owe defendant competent, diligent, and constitutionally effective representation. *E.g.* RPC 1.1, 1.3; ***Missouri v. Frye***, __ U.S. ___ 132 S.Ct. 1399 (2012). Defendant was free to seek Corey's opinion before accepting any offers communicated by Cross, but he could not direct

Cross to violate his obligations as an officer of the court, the court order precluding his withdrawal, or the responsibilities attending his constitutional role as defendant's counsel of record.

It was Corey—not Cross—whose ability to act on defendant's behalf in the case was in question. One can easily imagine defendant would now be attacking his convictions through a claim of ineffective assistance of counsel had Cross disengaged from the representation as defendant claims was required. In any event, Cross's meeting with the prosecutor did nothing to undermine the trial court's well-reasoned decision not to further delay a one year old case to facilitate a third substitution of counsel for an unavailable attorney.

"[T]he right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice." ***Robinson***, 662 F.3d at 1032-33 (day of trial request for substitution of counsel properly denied in year old case). As with the counsel of choice reasonably refused in ***Miller***, it was at least unclear how much time accommodating the schedule of defendant's most recently chosen counsel would demand. ***Miller v. Blacketter***, 525 F.3d 890, 895 (9th Cir. 2008)(citing ***Gonzalez-Lopez***, 126 S.Ct. at 2565-66). Even if one assumes the unwarranted four month continuance requested was reasonable, the court was not bound by that manifestly optimistic estimate of Corey's availability, when, like the attorney in ***Miller***, the record established "other [scheduling] commitments ... [which] may have

made such a timeline unrealistic." ***Miller***, 525 F.3d at 896. Contrary to Corey's contention, defendant was not constitutionally entitled to hold the court, co-defendant, and prosecution hostage for an indefinite period of time pending his final choice of counsel and the completion of whatever matters vied for that preferred attorney's attention. *See* ***United States v. Mohsen,*** 587 F.3d 1028, 1034 (9th Cir. 2009)(no abuse in denying three month continuance requested by chosen counsel where representation was rejected because of the adverse ruling).

b. The decision to deny the continuance was harmless if error due to the absence of any demonstrated prejudice.

The denial of a continuance requested by a criminal defendant will only be disturbed upon a showing the trial's outcome would likely have been different had the continuance been granted. ***State v. Simonson***, 82 Wn. App. 226, 228, 917 P.2d 599 (1996); ***State v. Oughton***, 26 Wn. App. 74, 79, 612 P.2d 812 (1980) (citing ***State v. Eller***, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); ***State v. Barker***, 35 Wn.App. 388, 397, 677 P.2d 108 (1983)). Prejudicial error must be shown even where an erroneously denied continuance violates due process. ***In re Personal Restraint of V.R.R.***, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). Whereas, erroneous deprivation of the right to choice of counsel is structural error not subject to a harmless-error analysis. ***Gonzalez-Lopez***, 548 U.S. at 149-52.

The trial court did not deprive defendant of his right to proceed to trial with counsel of his choice. Defendant proceeded with an attorney he retained after an earlier substitution of counsel. His day-of-trial request to substitute that counsel of his choosing for yet another attorney was granted. Nothing in the challenged ruling prevented defendant's most recently chosen counsel from requesting a postponement of the matter that required her appearance elsewhere or from making arrangements for some of her older cases to be transferred to available counsel. RP (10/16/14 JBC) 12; ***Hughey***, 147 F.3d at 433 (court properly denied continuance and ruled counsel of choice either needed to commit to the case or withdraw).

Defendant cites ***Gonzalez-Lopez*** in support of his theory the trial court committed structural error by denying the continuance, yet ***Gonzalez-Lopez*** "was not a case about a court's power to ... make scheduling ... decisions that effectively exclude a defendant's first choice of counsel." *Id.* at 548 U.S. at 152. That case addressed a deprivation of a defendant's prepared and available counsel of choice. *Id.* at 143-44. Since the trial court permitted Corey to represent defendant at trial, the real issue before this Court is whether the denial of the requested continuance, if error, deprived Corey a reasonable opportunity to prepare. It was clear from the colloquy, the trial court was inclined to give Corey roughly two months:

> **COURT**: "Can you accommodate a trial date before the end of the year, Ms. Corey?"
> **COREY**: "I think not."

RP (10/16/14 JBC) 12. There is no proven reason to believe two months would be inadequate to prepare for the trial. Although the temptation for defendant to cast the court's ruling as a denial of his choice of counsel is easy to appreciate, the ruling cannot conform to the mold because it did not bar substitution.

Errors grounded in a trial court's failure to reasonably accommodate defense counsel's trial preparation are not structural, for they bear upon the effectiveness of the representation received. They will not support reversal of a jury's determination of guilt when harmless. *See* ***Gonzalez-Lopez***, 548 U.S at 147; ***State v. Sain***, 34 Wn. App. 553, 558-59, 663 P.2d 493 (1983)(citing ***State v. Burri***, 87 Wn.2d 175, 180, 550 P.2d 507 (1976)).

There is no proof of outcome affecting prejudice in this case as is required for the reversal requested. *See* ***Eller***, 84 Wn.2d at 96. The record reveals defense counsel did his constitutional duty. Counsel successfully challenged the search warrant executed at defendant's house, and apparently negotiated the case on defendant's behalf. RP (10/16/14 JBC) 12. Counsel argued an assortment of pretrial motions. *E.g.*, RP (10/16/14 JTF) 9, 10, 17. Thereafter, he cross-examined witnesses, proposed instructions, moved for dismissal at the end of the State's case, presented closing argument, argued for post-verdict dismissal, and sought favorable treatment for defendant at sentencing. *E.g.*, 1RP 85, 112, 123, 129, 138, 153; 2RP 163, 180, 185, 213; 3RP 270, 275, 303, 333, 337, 342.

Defendant's guilt was nevertheless firmly established by the evidence. Any conceivable error in the court's unwillingness to further postpone defendant's already unduly delayed trial to extend an apparently wasteful accommodation to an unavailable attorney was harmless.

2. DEFENDANT CANNOT OVERCOME THE PRESUMPTIVE VALIDITY OF THE VEHICLE SEARCH WARRANT USED TO CONFISCATE UNLAWFULLY POSSESSED FIREARMS AND RECORDS OF MONEY TRANSFERS TO METH SUPPLIERS IN MEXICO BECAUSE THERE WAS PROBABLE CAUSE TO BELIEVE THE VEHICLE WAS USED TO TRAFFIC DRUGS.

A criminal defendant bears the burden of establishing the unreasonableness of an executed search warrant by a preponderance of the evidence. ***State v. Hopkins***, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); ***United States v. Dozier***, 844 F.2d 701, 705 (9th Cir. 1988)(citing ***Franks v. Delaware***, 438 U.S. 154, 98 S.Ct. 2674 (1978)). The underlying affidavit is reviewed according to common sense with all doubts resolved in favor of its validity. ***State v. Tarter***, 111 Wn. App. 336, 341, 44 P.3d 899 (2002); ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); ***State v. Young***, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)).

a. The merits of this assignment of error should be summarily rejected due to defendant's failure to support it with any meaningful analysis.

Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)(citing ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)(declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

Defendant assigned error to the warrant, then apparently abandoned the claim by failing to address it in the body of the opening brief. The warrant's presumed validity cannot be overcome by silence.

b. The presumptively valid search warrant was amply supported by the underlying affidavit.

Appellate review of a presumptively valid search warrant is limited to a common sense evaluation of the four corners of the affidavit supporting probable cause to determine whether it establishes the requisite nexus between a criminal act, the item to be seized, and the place to be searched. ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). "[A]s a constitutional matter [it] need not even name the person from whom the

things will be seized ....." (emphasis added). ***Zurcher v. Stanford Daily***, 436 U.S. 547, 555-56, n.6, 98 S.Ct. 1970 (1978); ***State v. G.M.V.***, 135 Wn. App. 366, 372-73, 144 P.3d 366 (2006)(citing ***State v. Thein***, 138 Wn2d 133, 147, 977 P.2d 582 (1999)).

Items authorized to be searched are adequately identified in a warrant when there is a fair probability they contain evidence of the offense under investigation. ***United States v. Taketa***, 923 F.2d 665, 674 (9th Cir. 1991)(quoting ***Zurcher***, supra); ***United States v. Ocampo***, 937 F.2d 485, 490 (9th Cir. 1991); ***United States v. Banks***, 556 F.3d 967, 973 (9th Cir. 2009); ***United States v. Richards***, 659 F.3d 527, 539-40 (6th Cir. 2012); ***State v. Ollivier***, 161 Wn. App. 307, 318-19, 254 P.3d 883 (2011). All doubts are resolved in favor of the warrant's validity. ***State v. Tarter***, 111 Wn. App. 336, 341, 44 P.3d 899 (2002)(*citing* ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); ***State v. Young***, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)).

Defendant's assignment of error vaguely attacks the vehicle search warrant that led to the discovery of his gun and the receipts for the money he wired to methamphetamine suppliers in Mexico. The supporting affidavit provided in relevant part:

> Unlawful Delivery of a Controlled Substance (methamphetamine) 69.50.401, was committed by act, procurement, or omission of another, and that the following evidence, to-wit:

> [R]ecords ... and other papers relating to the transport, ordering, purchase and distribution of controlled substances, in particular ... methamphetamine. ... money orders .... Firearms and ammunition.... Personal communications in electronic or written form ... indicative of ... said offense....

CP 86-89 (Attachment "A"). The affidavit alleged such evidence would be concealed in or about:

> The vehicle WA License AKZ7273 a white 2013 Dodge Charger registered to and driven by Jeremy E. Gaines ....

Id. The requisite probable cause and nexus requirements were met through the averments, including that:

> [Officers] observed as the CI walked ... towards the location. Surveillance units observed a WF exit 1207 S Altheimer and contact the CI. This subject was positively identified ... as ... Handlen ....The CI waited outside ... with S)HANDLEN until her "source" arrived ... S)HANDLEN contacted their [sic] source. Surveillance units observed as S)HANDLEN contacted a 2013 While Dodge Charger registered to Jeremy Edward Gaines DOB 07/29/19878. A routine records check corroborated ... the driver matched the ... registered owner ... S)GAINES) ...., S)HANDLEN returned ... and completed the transaction. ....
> Shortly after ... the CI ... proceeded directly to our ... meeting location to turn over the narcotics.... they field tested positive as methamphetamine[7]....
>
> On 06-12-2013 I contacted the CI and requested ... they attempt to arrange another narcotics transaction with

[7] It is of no moment a more sophisticated laboratory analysis subsequently revealed the apparent methamphetamine was actually an imitation "cutting agent" since probable cause is not undermined by reasonable mistakes. ***In re Personal Restraint of Lim***, 139 Wn.2d 581, 597, 989 P.2d 512 (1999)(citing ***State v. Seagull***, 95 Wn.2d 898, 908, 632 P.2d 44 (1981)(quoting ***Franks v. Delaware***, 438 U.S. 154, 171, 98 S.Ct. 2674 (1978)).

> S)HANDLEN. Per conversation it was apparent that S)HANDLEN had re-upped from S)GAINES the night before and was "holding" some narcotics, specifically methamphetamine for distribution. The CI arranged to purchase a quantity of narcotics from S)HANDLEN that afternoon.... S)HANDLEN met with the CI ... and conducted the transaction. ... [T]he CI promptly turned over the narcotics to me. ... they field tested positive as methamphetamine.... It is your affiant's training and experience that drug dealers often use vehicles, and/or persons within the vehicles ... to conceal and carry the Controlled Substances to/at places for sale or for Storage. ...

Id. The challenged warrant reiterated the crime under investigation, place to be searched and items to be seized. CP 83-84. Probable cause to support it was found by the issuing judge as well as the Honorable Edmund Murphy when he denied defendant's motion to suppress. *Id.* at 15-22; CP 94-97. Their decisions should be affirmed since additional review will again demonstrate the presumptively valid warrant to be amply supported by the affidavit's uncontroverted recitation of facts.

3. WASHINGTON'S CRIMINALIZATION OF SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE IS UNAFFECTED BY THE INAPPLICABILITY RCW 69.50's SENTENCING PROVISIONS TO THAT OFFENSE.

The error of defendant's contention to the contrary is plain in the language of the applicable statutes. Statutory interpretation is reviewed *de novo*. ***State v. Jacobs***, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The statute's plain meaning is given effect as the expression of legislative

intent. *Id.* (quoting ***Dep't of Ecology v. Campbell & Gwinn***, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). Plain meaning is assessed according to the language's ordinary usage, the statute's context, and the statutory scheme's related provisions. ***Jacob***s, 154 Wn.2d at 600. Interpretations leading to constitutional deficiencies or absurd results should be avoided. ***State v. Eaton***, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); ***State v. J.P.***, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)(quoting ***State v. Delgado***, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

The crime of unlawful delivery of a controlled substance is criminalized by RCW 69.50.401. "[U]nder its unambiguous language, RCW 9A.28.010[8] ... classifies anticipatory offenses based on crimes defined under other titles as offenses under Title 9." ***In re Personal Restraint Petition of Thomas Hopkins***, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). And RCW 9A.28.030 criminalizes solicitation of any conduct which would constitute a crime if attempted or committed. "Thus, despite the fact the underlying crime in this case ... is defined under RCW 69.50, solicitation to commit that crime is *expressly classified as an offense under RCW Title 9A*." *Id.* (emphasis in original); ***In re Personal Restraint of Bowman***, 109 Wn. App. 869, 872-73, 38 P.3d 1017 (2001).

[8] RCW 9A.28.010—Prosecutions based on felonies defined outside Title 9A RCW. "In any prosecution under this title for attempt, solicitation, or conspiracy to commit a felony defined by a statute of this state which is not in this title, unless otherwise provided .... 1975 1st ex.S. c 260 § 9A.28.010 (emphasis added).

Defendant misinterprets ***Hopkins***'s holding that solicitation to deliver a controlled substance "is not an offense under RCW 69.50" to mean it is not a crime under any other Title of Washington's criminal code. App.Br. at 39 (citing ***Hopkins***, 137 Wn.2d at 900-01). But the issue addressed in the cited passage was the offense's omission from sentencing provisions that were only expressly applied to attempts and conspiracies in RCW 69.50.407. ***Hopkins***, 137 Wn.2d at 900. The omission of solicitation from RCW 69.50's sentencing provisions was interpreted to be intentional. No part of the decision read solicitation to deliver a controlled substance out of the criminal code.

Aside from the crime's self-evident existence in the convergence of RCW 69.50.401's criminalization of the completed offense and RCW 9A.28.010's criminalization of one's act of enticing another to commit it, the offense's existence is explicitly recognized by related statutes. For example, "RCW 9.94A.728(1)(b)(ii)(C) states in relevant part:

> An offender is qualified to earn up to fifty percent of aggregate earned release time under this subsection ... if he or she (C) Has no prior conviction for: (VI) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by ... delivery or possession with intent to deliver methamphetamine...."

In re Wheeler, 140 Wn. App. 670, 674, 166 P.3d 871 (2007)(emphasis added). The crime's existence is equally visible in RCW 9.94A.662(1)(d):

> An offender is eligible for the special drug offender sentencing alternative if: For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a

> criminal solicitation to commit such a violation under chapter 9A.28 RCW, ... (emphasis added).

See also ***State v. Howell***, 102 Wn. App. 288, 292, 6 P.3d 1201 (2000) ("[d]efendant's conviction for the solicitation of delivery of cocaine should be treated as a delivery of cocaine offense, which is a drug offense under RCW 69.50")(citing RCW 9.94A.360(6), (12)). The meritless claim there is no Washington law criminalizing the act of soliciting another to deliver a controlled substance should be rejected.

4. THE EVIDENCE AMPLY SUPPORTED DEFENDANT'S CONVICTIONS BY PROVING HE POSSESSED A LOADED .45 CALIBER PISTOL IN THE CAR HE USED TO TRAFFIC METH BETWEEN A SUPPLIER IN MEXICO AND A STREET DEALER IN TACOMA.

Sufficiency of the evidence is reviewed to determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt when the evidence is viewed in the light most favorable to the State. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). A challenge to the sufficiency of the evidence admits the truth of the State's evidence with any reasonable inferences capable of being drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); ***State v. Barrington***,

52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).

a. The evidence proved defendant conspired to deliver methamphetamine when he agreed to buy meth from a supplier in Mexico and sell it through a street dealer in Tacoma.

Defendant's conviction for conspiracy to deliver a controlled substance required proof that "sometime during the period starting on June 3, 2013, and ending on June 20, 2013":

(1) Defendant agreed with two or more persons to engage in or cause the performance of conduct constituting the crime of delivery of methamphetamine;
(2) Defendant made the agreement with the intent that such conduct be performed;
(3) Any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
(4) That any of these acts occurred in the State of Washington.

RCW 9A.28.040; WPIC 110.02; CP 250 (Inst. 33); *see* ***State v. Valencia***, 148 Wn. App. 302, 316, 198 P.3d 1065 (2009).

A formal agreement among co-conspirators is not essential. ***State v. Smith***, 65 Wn. App. 468, 471-72, 828 P.2d 654 (1992)(citing ***State v. Casarez-Gastelum,*** 48 Wn. App. 112, 116, 738 P.2d 303(1987)); ***State v. Barnes***, 85 Wn. App. 638, 664, 932 P.2d 669 (1997). Drug conspiracies

often take one of two forms, "chain-and-link" or "hub-and-spoke." *E.g.*, ***United States v. Caldwell,*** 589 F.3d 1323, 1329 (10th Cir. 2009). In a "chain-and-link," or a vertical conspiracy, there are a series of consecutive buyer-seller relationships. *Id.* A classic vertical conspiracy involves Supplier "A" selling contraband to Supplier "B", who then sells it to Supplier "C". *Id.* "Hub-and-spoke" conspiracies are analogous to wheels, with core figures supplying several distributors. *Id.*; ***United States v. Asibor***, 109 F.3d 1023, 1031 (5th Cir. 1997). The law has long responded to what would otherwise be offense-defeating divisions in the agreements along the chain or among the spokes by making it unnecessary to show co-conspirators came together or were acquainted with one another. ***State v. Stewart***, 32 Wash. 103, 109, 72 P. 1026 (1903). "An 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." ***Smith***, 65 Wn. App. at 471-72. Proof of a defendant's "slight connection" with the conspiracy is sufficient to support conviction. *Id.*; ***State v. Isreal***, 113 Wn. App. 243, 284, 54 P.3d 1218 (2002).

The "substantial step" or overact act requirement is different in the conspiracy context. ***State v. Dent***, 123 Wn.2d 467, 475-77, 869 P.2d 392 (1994). Its purpose is "to manifest that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Id.* As an inchoate crime, conspiracy allows law-enforcement officials to intervene at a stage

far earlier than attempt does. Conspiracy consequently "requires a lesser [overt] act than does the attempt statute...." *Id.* Mere "[p]repartory conduct which furthers the ability of the conspirators to carry out the agreement can be a substantial step in pursuance of the agreement." *Id.* In sum, once "the agreement has been established ... virtually any act will satisfy the overt act requirement." ***State v. Bobic***, 140 Wn.2d 250, 265, 996 P.2d 610 (2000)(quoting 2 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 6.5, at 95 (2d ed.1986)).

The crime of conspiracy is seldom susceptible of direct evidence. ***State v. Culver***, 36 Wn. App. 524, 528, 675 P.2d 622 (1984)(citing ***Sears v. International Brotherhood of Teamsters***, 8 Wn.2d 477, 452, 112 P.2d 850 (1941). Equally reliable circumstantial evidence is often the only proof of the crime. *Id.*; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "[C]redibility determinations ... cannot be reviewed [o]n appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The decision of the trier of fact should be upheld when the State has produced evidence of a crime's essential elements. *See* ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted); *see also* ***State v. Suleiman***, 158 Wn.2d 280, 291, n. 3, 143 P.3d 795 (2006).

The direct and circumstantial evidence proved defendant entered an agreement to deliver methamphetamine with two or more people by

connecting himself to a garden variety vertical—chain and link—conspiracy. He served as a middleman between at least one methamphetamine supplier in Mexico and at least one street level methamphetamine dealer in Tacoma. Someone receiving money under the name Jesus Enrique Palomera represented defendant's up-chain supplier on June 20, 2013. 1RP 61-65, 72, 75, 77. Palomera was the listed recipient of the $1,000.00 defendant or accomplice sent to Jalisco, Mexico. Defendant identified the recipient as the "dope man" defendant just paid for two pounds of product he was on his way to collect when arrested. 1RP 61-63, 72, 75, 77. Two pounds, roughly a kilo, is typical of a major source, particularly Mexican cartel members, again consistent with defendant's claim to be a drug runner for "the Mexicans." 1RP 61-63.

There was ample evidence surrounding defendant's description of the transaction to support an inference the referenced two pounds of "dope[9]" was methamphetamine. Handlen was defendant's down-chain distributor of methamphetamine. She sometimes supplied 100 methamphetamine users a week as she believed she supplied the police informant on June 3, 2013, with the bag defendant delivered. 1RP 28-31; 2RP 206, 209, 211-12. Defendant's ability to supply Handlen with methamphetamine required he either produce it or acquire it from another. Circumstantial evidence showed it was coming from Mexico, consistent

[9] "Dope" 4a: a preparation of opium or other narcotic or habit-forming drug ...." Webster's Third New International Dictionary 674 (2002).

with Shultz's explanation of how the regulation of precursor chemicals in the United States pushed methamphetamine production to Mexico. 1RP 82-83. The $1,000.00 wired to Jalisco, Mexico, on June 20, 2013, must be considered in context with the $900.00 defendant wired to Jalisco, Mexico, three days before the planned methamphetamine delivery to the police informant. 1RP 77-78. Multiple near $1,000.00 payments to Jalisco, Mexico, one of which defendant explicitly identified as a payment for drugs, is consistent with partial payments for a kilo of methamphetamine. 1RP 90, 96-97.

The jury was also entitled to infer Ryan was part of the conspiracy since he was listed on the wire receipt as the person who sent $1,000.00 to the Mexican "dope man," Ryan was present with defendant at the Safeway where the money was wired to Mexico for the product, and Ryan rode with defendant to receive the product armed with a loaded firearm. It would not have been unreasonable for the jury to infer defendant was driving to the pick-up location with two loaded firearms and two other men due to the increased security concerns attending the large quantity of methamphetamine to be delivered. *E.g.* 1RP 16, 20.

For many of the same reasons, there is ample evidence defendant entered the agreement with the intent methamphetamine would be delivered. It was in the context of officers revealing their surveillance of the methamphetamine transaction arranged to take place on June 3, 2013, that defendant admitted to being a drug runner for "the Mexicans." 1RP

61. It was also in this context defendant admitted to wiring "money to Mexico for the dope man" on his way to pick up "two pounds." 1RP 62, 65. Handlen was demonstrated to be a street level methamphetamine dealer supplied by defendant who sometimes sold methamphetamine to a hundred customers a week in the same manner as Handlen believed she sold defendant's methamphetamine to the police informant on June 3, 2013. 1RP 24, 31-32, 352; RP 206, 209, 211-12, 214, 217.

Those acts similarly showed a substantial step in support of the agreement to deliver methamphetamine while supporting the jurisdictional element. Both Handlen's attempt to sell defendant's methamphetamine to the police informant as well as defendant's attempt to obtain additional methamphetamine through a $1,000.00 payment to a Mexican supplier occurred within the State of Washington during the charging period. 1RP 26-27, 33, 39, 42; 2RP 206, 209, 211-12. For the purpose of proving the inchoate crime of conspiracy, it is immaterial whether defendant knowingly delivered imitation methamphetamine to Handlen on June 3, 2015, or inadvertently did so as a consequence of being deceived by his supplier. The totality of the evidence coalesced to show a supply side and demand side agreement to deliver methamphetamine regardless of whether the co-conspirators acted in good faith with one another in their performance of the agreement. It is also immaterial that police interrupted defendant on his way to collect the two pounds he purchased from Mexico

since his efforts nevertheless evinced a substantial step in an active conspiracy.

Defendant's evidentiary challenge advances irrelevant disagreement with the verdict supporting inferences fairly drawn from the evidence. It also incorrectly challenges the probative value of each item of evidence in isolation when it must be considered as an integrated whole. His conviction should be affirmed.

b. The evidence proved defendant committed solicitation to deliver meth when he had $1,000.00 wired to Mexico for two pounds of methamphetamine.

Defendant's conviction for unlawful solicitation to deliver methamphetamine required proof that on or about June 20, 2013:

(1) Defendant or an accomplice gave or offered to give money to another to engage in specific conduct;
(2) That such giving or offering was done with the intent to promote or facilitate the commission of the crime of delivery of methamphetamine;
(3) That the specific conduct of the other person would constitute the crime of deliver of methamphetamine or would establish complicity of the other person in the commission or attempted commission of the crime of delivery of methamphetamine, if such a crime had been attempted or committed; and
(4) That any of these acts occurred in the State of Washington.

CP 43(Inst. 26); RCW 69.50.401; 9A.28.010, .030(1). "The evil the solicitation statue criminalizes is the enticement to commit a criminal act...." ***State v. Jensen***, 164 Wn.2d 943, 950, 195 P.3d 512 (2008). It

punishes "the act of engaging another to commit a crime." *Id.* In doing so, the statute "target[s] preparatory conduct without regard to whether the contemplated crime actually occurs." *Id.* "In the crime of solicitation, criminal liability may attach to words alone. Solicitation involves no more than asking someone to commit a crime in exchange for something of value...." *Id.* at 952. "By offering something of value to another person to commit a crime, a solicitor supplies a motive that otherwise would not exist, thereby increasing the risk the greater harm will occur. The harm of solicitation is fully realized when the solicitor offers something of value to another with the intent to promote or facilitate a target crime or crimes. *Id.* at 953. "Unlike conspiracy and attempt, it requires no overt act other than the offer itself." *Id.* at 952.

The enticement element of this offense was proved by the $1,000.00 defendant, or an accomplice, wired to Mexico on June 20, 2013, to encourage the delivery of two pounds of "dope" reasonably inferred to be methamphetamine from the circumstances surrounding his down-chain distribution of that kind of "dope" to a street level dealer in Tacoma. *E.g.*, 2RP 206, 209, 211-12. Defendant was independently established to be Handlen's methamphetamine supplier. When confronted by a police-observed instance of what was expected to be defendant's fulfillment of that role, he admitted to being supplied by "the Mexicans." The seized receipt of the $1,000.00 wire transfer to a supplier in Mexico undermines defendant's claim the solicitation was proved by defendant's statement

alone.[10] Defendant's corroborating statements made it clear enough within the context in which they were made that the money sent from Washington was intended to entice the recipient to provide, or authorize the delivery of, a dealer-quantity of methamphetamine to him in Washington. The solicited transaction would constitute unlawful delivery of methamphetamine if completed, so that element of the offense was supported by the evidence and inferences reasonably drawn therefrom.

c. The conviction for unlawful possession of a firearm should be affirmed because defendant was a convicted felon caught with a loaded .45 caliber pistol.

Defendant's conviction for unlawful possession of a firearm in the first degree required proof that on or about June 20, 2013:

(1) Defendant knowingly had a firearm in his possession or control;
(2) Defendant had previously been convicted of a serious offense; and
(3) That the possession or control of the firearm occurred in the State of Washington.

CP 37(Inst.21); RCW 9.41.042(1)(a). Possession requires more than mere proximity or passing control. ***State v. Davis***, 182 Wn.2d 222, 226-27, 340

[10] The confession of a person charged with the commission of a crime is not sufficient to establish a crime, but if there is independent proof thereof, such confession may then be considered in connection therewith and the crime established by a combination of the independent proof and the confession. *See* ***State v. Aten***, 130 Wn.2d 640, 656, 927 P.2d 210 (1996); ***City of Bremerton v. Corbett***, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986); ***State v. Dow***, 168 Wn.2d 243,249-50,227 P.3d 1278 (2010).

P.3d 820 (2014). It may nevertheless be actual or constructive. CP 36 (Inst.20); ***Davis***, 182 Wn.2d at 226-27.

Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the item. *Id.*; ***State v. Chouinard***, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Adequate control can be shown through a number of factors, to include the ability to take actual possession, the capacity to exclude others, or authority over the premises. ***State v. Holt***, 119 Wn. App. 712, 721, 82 P.3d 688 (2004) (*abrogated on other grounds in* ***State v. Echenrode***, 159 Wn.2d 488, 496-97, 150 P.3d 1116 (2007)). Reviewing courts consistently find constructive possession where a defendant was the driver of a vehicle in which a firearm at issue was found. *E.g.*, ***State v. Harris,*** 154 Wn. App. 87, 101, 244 P.3d 830 (2010)); ***State v. Turner***, 103 Wn. App. 515, 521, 13 P.3d 234 (2000)).

Defendant was in constructive possession of the loaded .45 caliber pistol observed near his feet on the floor board of his vehicle during a felony stop initiated while he was driving to pick up a dealer quantity of methamphetamine. He had the ability to take actual possession of the firearm at any moment by picking it up if it was not already in his actual possession just prior to the stop. Based on the firearm's location relative to defendant's position as the vehicle's driver, he was equally capable of excluding anyone else in the vehicle from taking possession of it. And defendant was in constructive possession of all the vehicle's contents by

virtue of his status as the registered owner who was operating it when the firearm was found.

Several facts similarly supported a reasonable inference defendant knew of the firearm's presence. Just before the felony stop defendant was on his way to engage in the perilous business of picking up a large quantity of methamphetamine. It was reasonable for the jury to conclude defendant armed himself to protect his interests against robbers, competitors, suppliers, and even law enforcement. Further support for the inference defendant was intentionally armed for the occasion can be found in the fact his front-seat passenger was similarly equipped. The downward hand gestures defendant made while refusing to open his door could have been interpreted by the jury as his attempt to conceal the firearm while officers approached. Defendant was in Washington when he was found in possession of the firearm and he stipulated to the prior "serious offense" conviction, which made the possession unlawful.

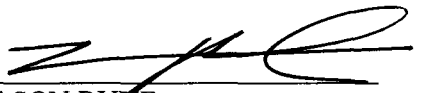
D. CONCLUSION.

The trial court properly denied defendant's unreasonable day-of-trial motion for a continuance to make a third substitution of counsel for an unavailable attorney. Defendant's apparently abandoned challenge to

the presumptively valid search warrant should be summarily rejected, and defendant's well supported convictions should be affirmed.

RESPECTFULLY SUBMITTED: September 25, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUFF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.25.15 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

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