95948-0

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS HAYES,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 49757-3-II
Pierce County No. 15-1-03364-8

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, DEMETRIUS HAYES, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Hayes seeks review of the May 8, 2018 unpublished decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Mere possession of a controlled substance, even in an amount larger that commonly possessed for personal use, is insufficient to support an inference of intent to deliver. Where the State failed to present sufficient corroborating evidence of intent, must Hayes's conviction for possession with intent to deliver be reversed?

2. This Court should review the issues raised in the Statement of Additional Grounds for Review.

D. STATEMENT OF THE CASE

On June 8, 2015, Tacoma police used an informant to conduct a controlled buy in the parking lot of El Hutcho's Bar and Grill. 2RP[1] 73. The informant was searched, fitted with recording devices, and provided

[1] The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—9/22/16; 2RP—9/27/16; 3RP—9/28/16; 4RP—9/29/16; 5RP—10/18/16.

buy money. 2RP 74. The police handlers observed the informant walk toward the parking lot, and when the informant was out of sight of the handlers, another officer picked up surveillance using a camera. 2RP 75-76, 108. The informant conducted a transaction with someone sitting in a black Jaguar and returned to the handlers without the money and with two rocks of crack cocaine. 2RP 76, 109.

The officer watching the scene with a surveillance camera did not take still photographs during the transaction, but he took stills from the surveillance camera at El Hutcho's that afternoon. 2RP 106, 117. He testified that the person seen in the stills standing outside the Jaguar was Demetrius Hayes. 2RP 107. Police followed the black Jaguar from El Hutcho's approximately an hour and a half after the controlled buy. 2RP 81-82. The car was pulled over, and the driver was identified but not searched or arrested. 2RP 83, 98. Two officers observed the stop from 40 to 50 yards away. 2RP 122. They testified at trial that the driver was Hayes. 2RP 83, 123. Neither the informant nor the officer who conducted the stop testified at trial.

Police conducted ongoing surveillance at El Hutcho's until August 25, 2015. 2RP 94. Detective Betts testified that he participated in surveillance of the parking lot at El Hutcho's from the last week of May through the end of August 2015. 2RP 63. During this surveillance he

would see people arrive, meet with different people in the parking lot for two to three minutes, and often there was some sort of hand-to-hand exchange. 2RP 64. Betts described these encounters as suspected narcotics transactions, although he did not testify that any of the people involved were stopped, searched, or found to be in possession of narcotics or large amounts of cash. 2RP 64, 100.

Betts said he saw Hayes at El Hutcho's frequently, but he did not give specific dates. 2RP 63-64, 73, 88. Hayes was seen using the same black Jaguar that had been stopped following the controlled buy. 2RP 89. In the encounters Betts observed, Hayes was typically seated in the driver's seat. Sometimes people would get in the passenger seat, other times people would approach the window. Betts said he saw Hayes access the trunk of the car several times, although he could not tell what items Hayes was putting in or taking out of the trunk. 2RP 93-94.

Detective Krause testified that he participated in the surveillance at El Huthco's for more than a month, and he saw Hayes several times a week, although he did not provide specific dates and times. 2RP 110-11. Krause said he saw a lot of short-stay traffic where a car would pull in, and the driver would hop out and make contact with someone in front of El Hutcho's. There would be a short conversation, a quick hand-to-hand exchange, and the driver would return to the car. 1RP 111. He said at

times he could actually see the person pour little chunks into someone's hand in exchange for something that looked like currency. 2RP 111. He did not specify that he saw Hayes do this. Id.

Officer Malave testified that he participated in the surveillance at El Hutcho's on multiple days over a period of six months, and he saw Hayes there maybe five or six times. 3RP 167-68. Hayes was using the black Jaguar when Malave saw him. 3RP 168. None of the surveillance officers saw Hayes use drugs while he was at El Hutcho's. 2RP 93, 114; 3RP 169.

On August 25, 2015, Hayes was arrested on a warrant following a traffic stop. 2RP 89, 124. He had been followed from El Hutcho's when he was stopped, but there was no evidence that he had been seen conducting transactions at El Hutcho's that day. 2RP 129. Police found no controlled substances, no cash, and no cell phone in Hayes's possession. 2RP 127.

One of the officers involved in the stop drove the black Jaguar to a secured garage, and it was searched the next day after a warrant was obtained. 2RP 89; 3RP 178. One small rock of cocaine was found on the floorboard of the driver's seat. 3RP 179. In a small compartment in the trunk of the car, officers found a plastic sandwich bag with 30.1 grams of crack cocaine, about 40 to 60 rocks. 2RP 92, 111; 3RP 179-80.

Detectives testified that normal usage is a few of rocks, at most seven, at a time. 2RP 92, 112. The only other item in the trunk was a pool cue case containing some cards in Hayes's name. 3RP 180.

Hayes was convicted of unlawful delivery of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and bail jumping. The jury also found that the controlled substances charges were committed within 1000 feet of a school bus stop. CP 71-76. On appeal Hayes argued that the State failed to prove he possessed a controlled substance with intent to deliver. He also raised several issues in his statement of additional grounds for review. The Court of Appeals affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' DECISION THAT THE EVIDENCE GAVE RISE TO AN INFERENCE OF INTENT TO DELIVER CONFLICTS WITH PREVIOUS APPELLATE COURT DECISIONS AND PRESENTS A CONSTITUTIONAL QUESTION. RAP 13.4(b).

Hayes was charged with unlawful possession of cocaine with intent to deliver. CP 2-3. To convict him of this offense, the State had to prove he possessed the cocaine found in the car after his arrest with intent to deliver it. Id.; RCW 69.50.401(1)(2). Constitutional due process required the State to prove these elements beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S.

358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). To find the elements beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). As a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Bare possession of a controlled substance is not sufficient to support a conviction for possession with intent to deliver. "Washington case law forbids the inference of an intent to deliver based on 'bare possession of a controlled substance, absent other facts and circumstances.'" *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. *State v. Zunker*, 112 Wn. App. 130, 135-36, 48 P.3d 344 (2002) (citing *State v. Campos*, 100 Wn.

App. 218, 222, 998 P.2d 893, *review denied*, 142 Wn.2d 1006 (2000)). The intent to deliver must logically follow from the evidence at trial. *Campos*, 100 Wn. App. at 222. "Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." *Brown*, 68 Wn. App. at 485.

Generally this corroborating evidence takes the form of additional factors substantially related to the distribution of drugs, such as large sums of cash, weapons, pagers and cell phones, packaging materials, scales, log or ledgers for recording drug sales, and controlled substance separately packaged for sale. *Campos*, 100 Wn. App. at 223-24 (large sum of cash, pager, cell phone in addition to large quantity of cocaine); *State v. Miller*, 91 Wn. App. 181, 955 P.2d 810 (drugs packaged for individual use, empty packaging materials, sales list, knife supported intent to deliver), *review denied*, 136 Wn.2d 1016 (1998); *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (large amount of cash supported inference that juvenile possessed 24 rocks of cocaine with intent to deliver); *State v. Lane*, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (large sum of cash and a gram scale supported inference of intent to deliver).

Washington cases have long recognized that possession of a larger quantity of drugs than typical for personal use is not sufficient to support

an inference of intent to deliver, absent some other factor. Hagler, 74 Wn. App. at 236; *Brown*, 68 Wn. App. at 485). In *Brown*, officers saw Brown, a juvenile, drinking beer in a high narcotics area. As they approached him, he ran. During the pursuit he dropped a baggie containing approximately 20 rocks of crack cocaine. The arresting officer testified that most users carry only one to four rocks of cocaine, and the amount Brown had was in excess of what was commonly seen for personal use. *Brown*, 68 Wn. App. at 481-82. Brown had no weapon, no large amount of money, no scales, packaging or other paraphernalia indicating sales, and the officers had not observed actions suggesting sales before they approached him. His possession of an amount of cocaine larger than typical for personal use was not the substantial evidence necessary to give rise to an inference of intent to deliver. *Id*. at 484-85. *See also State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994) (evidence insufficient to support intent to deliver where there was no drug paraphernalia, no packaging materials, no scales, no separate packaging).

Here, as in *Brown* and *Hutchins*, the evidence was insufficient to sustain an inference of intent to deliver. The officers' testimony that the amount of cocaine discovered in the trunk of the car was larger than typical for personal use could not alone establish intent to deliver. Other corroborating factors were missing as well. The cocaine was contained in

a single baggie, not packaged separately for sale, and no cash, weapons, packaging materials, scales, cell phones, or log books were found in the car or in Hayes's possession. *See* 2RP 127, 3RP 179-80.

The Court of Appeals concluded that circumstantial evidence produced by the State allowed a reasonable inference that Hayes intended to deliver a controlled substance. Opinion, at 6. While an element of the offense may be proved by circumstantial evidence, the State cannot meet its burden of proof through pure speculation. *State v. J.P.,* 130 Wn. App. 887, 893, 125 P.3d 215 (2005); *State v. Prestegard*, 108 Wn. App. 14, 22, 28 P.3d 817 (2001). On appeal, the reviewing court must be convinced that substantial evidence supports the State's case. *Id*. at 22-23. Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id*. (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). Substantial evidence requires more than "guess, speculation, or conjecture." *Id*. To rise above speculation and conjecture, evidence must support a reasonable inference. *State v. Burkins*, 94 Wn. App. 677, 690, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999).

Contrary to the Court of Appeals' conclusion, the evidence at trial does not support the inference that Hayes possessed cocaine with intent to deliver. There was evidence that an unnamed informant purchased

cocaine from Hayes more than two months prior to his arrest. There was also evidence that Hayes was seen several times in the El Hutcho's parking lot over the course of the surveillance operation. No one testified as to any specific dates or number of times he was seen there, or even as to the most recent time such behavior had been observed, however. 2RP 63-64, 73, 88. And while the officers gave their opinion that the actions they observed were consistent with drug transactions, there was no evidence that either Hayes or anyone else observed during the investigation was ever searched and found to have controlled substances or other indicia of drug transactions. 2RP 64, 100. Hayes was not arrested at the scene of any alleged drug transactions. In fact, there was no testimony that Hayes engaged in any behavior indicative of drug transactions on the day of his arrest.

Constitutional due process required the State to prove every element of the charged offense beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Given the lack of substantial corroborating evidence that Hayes intended to deliver the cocaine found in the car the day after his arrest, his conviction for possession of a controlled substance with intent to deliver must be reversed.

6. THIS COURT SHOULD REVIEW THE ISSUES RAISED IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

Hayes raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Hayes's conviction and sentence.

DATED this 7th day of June, 2018.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Demetrius Hayes,* Court of Appeals Cause No. 49757-3-II, as follows:

Demetrius Hayes/DOC#939189
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
June 7, 2018

Filed
Washington State
Court of Appeals
Division Two

May 8, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEMETRIUS JEROME HAYES Appellant.	No. 49757-3-II UNPUBLISHED OPINION

SUTTON, J. — Demetrius J. Hayes appeals his conviction for unlawful possession of a controlled substance–cocaine–with intent to deliver within 1000 feet of a school bus route stop. He argues that there was insufficient evidence to support the conviction. Hayes makes several claims in his Statement of Additional Grounds (SAG).[1] Hayes claims that (1) the trial court erred in failing to instruct the jury on the definition of "school bus," (2) insufficient evidence supports the jury's special verdict on the sentencing enhancement, (3) because the vehicle was unlawfully impounded, all evidence seized in the vehicle should have been suppressed, and (4) he received ineffective assistance of counsel.

We hold that the State presented sufficient evidence to support the conviction. We also hold that because Hayes's trial counsel did not request a jury instruction defining "school bus," or object to the trial court's failure to give this instruction, the trial court did not err in instructing the jury. Further, we hold that there was sufficient evidence to support the jury's special verdict on

[1] RAP 10.10.

the sentencing enhancement. We also hold that the record is insufficient to determine whether the vehicle was unlawfully impounded or to determine whether Hayes received ineffective assistance of counsel. Thus, we affirm.

FACTS

On August 25, 2015, Hayes was driving a black Jaguar when he was pulled over by City of Tacoma police officers and arrested on an outstanding warrant. No drugs, money, or drug dealing paraphernalia were found on Hayes's person. After impounding the black Jaguar, officers obtained a search warrant and searched the vehicle. In the trunk of the vehicle, in a single bag, officers found 40-60 rocks of cocaine totaling 30.1 grams. In the front seat, the police officers found a single rock of cocaine. Hayes was charged with unlawful possession of a controlled substance with intent to deliver within 1000 feet of a school bus route stop.[2] RCW 69.50.401; 69.50.435(1)(c).

At trial, Detective Henry Betts testified that he and other officers surveilled Hayes from the end of May through August of 2015. He testified that he surveilled the parking lot of El Hutcho's Bar and Grill in Tacoma. He stated that he witnessed many short-stay interactions with hand-to-hand exchanges between individuals and Hayes. Hayes was in his black Jaguar during all of these interactions. Detective Betts explained that on June 8, officers used a confidential informant (CI) to conduct a controlled buy in the parking lot of El Hutcho's. Detective Betts stated that the CI was searched prior to conducting the buy, a camera was attached to the CI, and money to purchase drugs from Hayes was given to the CI. The CI was recorded conducting the transaction

[2] Hayes was also convicted of unlawful delivery of a controlled substance and bail jumping but he does not appeal those convictions.

with Hayes. When the CI returned to Detective Betts, the CI gave the detective two rocks of cocaine. During Detective Betts's testimony, the jury saw the footage from the cameras attached to the CI during the transaction with Hayes.

Detective Betts testified that on August 25, he and other officers served warrants, arrested Hayes, and impounded the black Jaguar. He then applied for a search warrant for the impounded vehicle and while searching the vehicle, officers found 30.1 grams of cocaine in the trunk. Lastly, Detective Betts testified that while transacting out of his car, Hayes would often access his trunk.

Detective Terry Krause next testified to these events. He testified that he had surveilled Hayes in the parking lot of El Hutcho's for over a month and that because of his training and experience in narcotics, certain events stood out. Detective Krause described the CI's controlled buy and that he witnessed Hayes in the Jaguar. Specifically, he described witnessing "lots of typical short-stay traffic where a car would pull in, driver would hop out, go make contact with somebody in front of El Hutcho's, there would be a short conversation, bodies leaning together, quick exchange of hand-to-hand," then the driver would leave. II Verbatim Report of Proceedings (VRP) at 111. He testified that this happened many times with many people. During these transactions, he "could actually see [Hayes] pour little chunks into somebody's hand in exchange for something that was the same size and shape as U.S. currency." II VRP at 111. Detective Krause also testified that a normal amount of cocaine for a user is between two and three rocks, with the most for a typical user being seven rocks. Lastly, Detective Krause testified that during the time the officers surveilled Hayes, he could not recall anyone else but Hayes driving the black Jaguar, and that he never witnessed Hayes using narcotics.

Officer Joe Mettler also testified at the trial. Officer Mettler described the June controlled buy with the CI. He also testified that he was the officer who arrested Hayes on August 25 for an outstanding warrant. Lastly, he stated that no drugs or money were found on Hayes's person at the time of his arrest.

Officer Albert Malave testified at the trial. He testified that while surveilling Hayes, Hayes was the only person to drive the black Jaguar and that Hayes parked in the El Hutcho's parking lot on numerous occasions. Officer Malave also described the CI's transaction with Hayes to the jury. Lastly, he testified that Hayes was never seen using narcotics.

Maude Kelleher is employed by the Tacoma School District in the transportation department. Kelleher testified at trial as to the school district's designations of school bus route stops. She also testified that El Hutcho's parking lot was within 1000 feet of three different school bus route stops as designated by the school district.

The jury found Hayes guilty of unlawful possession of a controlled substance with intent to deliver and also found by special verdict that Hayes was within 1000 feet of a school bus route stop. The trial court sentenced Hayes to a standard range sentence plus an additional 24 months on the sentencing enhancement. Hayes timely filed this appeal.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE–POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER

Hayes challenges the sufficiency of evidence and argues that there are no corroborating facts that indicate he had an intent to deliver a controlled substance. He argues that the State only showed that he possessed 30 grams of cocaine and nothing else. Specifically, he argues that "[t]he

cocaine was contained in a single baggie, not packaged separately for sale, and no cash, weapons, packaging materials, scales, cell phones, or log books were found in the car or in Hayes's possession." Br. of Appellant at 9.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence . . . ." *Salinas*, 119 Wn.2d at 201. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

The law is well settled that mere possession of drugs, without more, does not raise an inference of the defendant's intent to deliver a controlled substance. *State v. Reichert*, 158 Wn. App. 374, 391, 242 P.3d 44 (2010). The State must prove possession of narcotics and at least one additional factor that indicates an intent to deliver in order to convict a defendant of unlawful possession of a controlled substance with intent to deliver. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Specific intent can be inferred as a logical probability from all the facts and circumstances. *State v. Davis*, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). Circumstantial and direct evidence are to be considered equally reliable by the reviewing court in determining the sufficiency of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Additional facts to support an inference of an intent to deliver a controlled substance may include substantial amounts of cash, scales, cell phones, address books, baggies, and materials used to manufacture narcotics. *See State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002).

Here, the State did not produce a large amount of cash or drug sale paraphernalia which is common corroborative evidence in these types of cases. *See e.g. Zunker*, 112 Wn. App. at 136. The admitted evidence consisted of the officers' testimony of the actions they witnessed before Hayes's arrest. While surveilling Hayes, the officers observed Hayes having many interactions that resembled drug transactions. The officers observed Hayes pour chunks into individual's hands in exchange for what appeared to be money, and they observed and recorded Hayes sell cocaine to the CI.

Because specific intent can be inferred as a logical probability from all of these facts and circumstances, the circumstantial evidence produced by the State allowed for a reasonable inference that Hayes had the intent to deliver a controlled substance. Because in a challenge to the sufficiency of the evidence, we view all facts and reasonable inferences in favor of the State, any rational trier of fact could have found that Hayes had the intent to deliver the cocaine in his possession. Because the evidence was sufficient, the State proved the essential elements of the crime beyond a reasonable doubt. Thus, we hold that Hayes's argument fails.

II. SAG

A. DEFINITION OF SCHOOL BUS

In his SAG, Hayes claims that the trial court erred by failing to instruct the jury on the definition of "school bus." Hayes was found guilty by a special verdict of unlawful possession of a controlled substance with intent to deliver within 1000 feet of a school bus route stop.

Hayes's attorney did not request such an instruction or object to the court's failure to give this instruction. Hayes does not provide argument in his SAG as to why we should review this new issue on appeal. Pursuant to RAP 2.5(a), we do not generally review a claim of error raised

for the first time on appeal. Thus, we exercise our discretion under RAP 2.5(a) and do not address this issue further.

B. SUFFICIENCY OF EVIDENCE FOR THE SCHOOL BUS ROUTE STOP SENTENCING ENHANCEMENT

Hayes also claims that because the trial court erred in failing to instruct the jury on the definition of "school bus," there was insufficient evidence to prove the jury's special verdict on the sentencing enhancement under RCW 69.50.435(1)(c). We disagree.

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

Hayes's sufficiency challenge is based on the trial court's failure to instruct the jury on the definition of "school bus." Because the State proved that Hayes unlawfully possessed a controlled substance with the intent to deliver within 1000 feet of a school bus route stop as designated by the school district, the State presented sufficient evidence to support the jury's special verdict on the sentencing enhancement. Thus, we hold that this claim fails.

C. SEIZURE OF THE VEHICLE

Hayes next claims, for the first time on appeal, that when the officers impounded the vehicle, that it was a warrantless seizure in violation of the federal and state constitutions. He claims that, at the time of his arrest, he was driving a vehicle that belonged to a third party.[3] He

[3] Hayes also claims that this vehicle, owned by a third party, was not subject to a warrantless seizure citing to RCW 69.50.505(1)(d)(ii). However, that statute deals with forfeiture and is not applicable to this case.

> (d) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in (a) or (b) of this subsection, except that:

claims that the officers obtained a presumably valid warrant to search the vehicle, but they did not have the initial authority to seize and impound the vehicle, and thus, all evidence seized during the search of the vehicle should have been suppressed.

As a threshold issue, Hayes asks that we review this issue under RAP 2.5(a)(3). It has long been the law in Washington that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). To meet the requirements of RAP 2.5(a)(3) and raise an error for the first time on appeal, an appellant must demonstrate that the error is manifest and that the error is truly of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010). We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *O'Hara*, 167 Wn.2d at 98. After determining the error is of constitutional magnitude, we must determine whether the error was manifest. "'Manifest' under RAP 2.5(a)(3) requires a showing of actual prejudice." *O'Hara*, 167 Wn.2d at 99 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). To demonstrate actual prejudice, there must be a plausible showing by the defendant that the alleged error had practical and identifiable consequences at trial. *Kirkman*, 159 Wn.2d at 935. In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.

. . . .

> (ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent.

RCW 69.50.505(1)(d)(ii)

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal." *McFarland*, 127 Wn.2d at 335.

In Washington, officers may lawfully impound a vehicle for three reasons: "(1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a 'traffic offense for which the legislature has expressly authorized impoundment.'" *State v. Froehlich*, 197 Wn. App. 831, 838, 391 P.3d 559 (2017) (quoting *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013).

The record indicates that the officers arrested Hayes pursuant to a warrant and then one of the officers drove Hayes's vehicle back to police headquarters. After obtaining a search warrant, the officers then searched the vehicle. II VRP at 89-92. The record does not indicate exactly why the officers impounded the vehicle. Without certainty as to why the officers impounded the vehicle, we cannot fairly determine whether the impounding of the vehicle violated Hayes's constitutional rights. Hayes cannot show actual prejudice where the record does not contain the facts necessary to adjudicate the claimed error. *See McFarland*, 127 Wn.2d at 333.

Hayes failed to request a CrR 3.6 suppression hearing and he did not previously argue that the impounding or "seizure" of the vehicle was unlawful, and thus, that all evidence obtained in the search of the vehicle should have been suppressed. Therefore, the State did not have an opportunity to fully develop the record below and to establish that the seizure of the vehicle was lawful. The record does not indicate whether the trial court would have granted a motion to suppress. Thus, Hayes cannot show actual prejudice. *See McFarland*, 127 Wn.2d at 334.

Therefore, because Hayes fails to show a manifest error affecting a constitutional right under RAP 2.5(a), his SAG claim fails.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, Hayes claims that his trial counsel was ineffective for failing to move to suppress the evidence found inside the vehicle because of its allegedly unlawful impoundment. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, Hayes must show that (1) his trial counsel's representation was deficient and (2) his trial counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 687-88; *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The first prong is met by the defendant showing that the performance falls "'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 668). A defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863). The second prong is met if the defendant shows that there is a substantial likelihood that the misconduct affected the verdict. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). A defendant's failure to meet their burden on either prong will be fatal to a claim of ineffective assistance. *Kyllo*, 166 Wn.2d at 862.

"Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." *McFarland*, 127 Wn.2d at 335. Because this is a direct appeal, we must decide this issue based on the record before us. For the reasons discussed above, Hayes cannot show on this record that the trial court would have likely granted a motion to suppress the evidence seized in his vehicle. Thus, he fails to show actual prejudice and we hold that his SAG claim of ineffective assistance of counsel fails.

We affirm.

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.

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

Bjorgen, J.
BJORGEN, J.

GLINSKI LAW FIRM PLLC

June 07, 2018 - 11:51 AM

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Superior Court Case Number:	15-1-03364-8

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