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Court of Appeals
Division I
State of Washington

No. 74019-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE GREENE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES..... 2

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT 9

 1. The evidence was insufficient for the jury to find that Mr. Greene was an accomplice to possession with intent to deliver a controlled substance. 9

 a. The State bears the burden of proving guilt beyond a reasonable doubt..... 9

 b. To prove accomplice liability, the State must prove that the defendant actually participated in the crime. 10

 c. In accordance with the Rules of Appellate Procedure, the Court should analyze whether the evidence from the first trial was sufficient to prove guilt. 11

 d. The evidence was insufficient to prove that Mr. Greene was an accomplice to Ms. Fortson’s act of possessing cocaine with intent to deliver it..... 12

 2. Cross-examination of Officer Edison on his assertion that it was impossible that he had seen anything but a drug deal did not “open the door” to testimony that Officer Edison knew the purported buyer to be a drug user. 15

 a. The “opening the door” rule..... 15

 b. Cross-examination of the officer did not “open the door” to testimony that the first buyer was a known drug user. 16

c.	The trial court erred in ruling that defense counsel had “opened the door” and in admitting this evidence that was unfairly prejudicial and of little relevance.	21
d.	The error requires reversal.	23
3.	Counsel’s failure to ask that the court sentence Mr. Greene under the parenting sentencing alternative deprived Mr. Greene of his right to effective assistance of counsel.....	24
a.	Defendants have a right effective assistance of counsel at sentencing.	24
b.	Counsel failed to propose the parenting sentencing alternative.	25
c.	The deprivation requires remand for a new sentencing hearing.....	27
4.	This Court should direct that no costs will be awarded to the State for this appeal.....	29
F.	CONCLUSION.....	30

TABLE OF AUTHORITIES

United States Supreme Court Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 9

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560
(1979)..... 9

Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) 25

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
(1984)..... 25

Washington Supreme Court Cases

Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 750 P.2d 1257
(1988)..... 12

In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979)..... 10

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 30

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 10

State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002)..... 10

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)..... 15

State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969)..... 15, 21

State v. Gladstone, 78 Wn.2d 306, 474 P.2d 274 (1970)..... 11, 13

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 9

State v. Kyлло, 166 Wn.2d 856, 215 P.3d 177 (2009)..... 25

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000) 30

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 9

Washington Court of Appeals Cases

<u>City of Seattle v. Pearson</u> , 192 Wn. App. 802, 369 P.3d 194 (2016).....	16, 22, 23
<u>State v. Adamy</u> , 151 Wn. App. 583, 213 P.3d 627 (2009).....	29
<u>State v. Amezola</u> , 49 Wn. App. 78, 741 P.2d 1024 (1987).....	11
<u>State v. Fisher</u> , 74 Wn. App. 804, 874 P.2d 1381 (1994).....	13
<u>State v. McPherson</u> , 111 Wn. App. 747, 46 P.3d 284 (2002).....	13
<u>State v. Mohamed</u> , 187 Wn. App. 630, 350 P.3d 671 (2015).....	25
<u>State v. Morris</u> , 77 Wn. App. 948, 896 P.2d 81 (1995).....	13
<u>State v. Ortiz</u> , 34 Wn. App. 694, 664 P.2d 1267 (1983).....	16, 23
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	30
<u>State v. Thomas</u> , 68 Wn. App. 268, 843 P.2d 540 (1992).....	12
<u>State v. Zunker</u> , 112 Wn. App. 130, 48 P.3d 344 (2002).....	12

Other Cases

<u>State v. Cota</u> , 191 Ariz. 380, 956 P.2d 507 (1998).....	13
<u>Wheeler v. State</u> , 691 P.2d 599 (Wyo. 1984).....	13

Constitutional Provisions

Const. art. I, § 22.....	24, 25
Const. art. I, § 3.....	9
U.S. Const. amend. VI.....	24
U.S. const. amend. XIV.....	9

Statutes

RCW 10.73.160(1).....	29
-----------------------	----

RCW 9.94A.030(30).....	28
RCW 9.94A.030(55).....	28
RCW 9.94A.655.....	25
RCW 9.94A.655(1).....	27
RCW 9.94A.655(4).....	25
RCW 9.94A.655(5)(a)	29
RCW 9A.08.020(3)(a)(i).....	10
RCW 9A.08.020(3)(a)(ii).....	10

Rules

ER 403	16
RAP 14.2.....	29
RAP 15.2(f).....	30
RAP 2.4(b)	12

A. INTRODUCTION

After an officer saw three purported drug transactions conducted by a woman, police arrested the woman along with Jermaine Greene, a man who had stood nearby while the transactions occurred. The officer claimed to have seen Mr. Greene pass tiny, loose rocks of cocaine to the woman. He also claimed to have seen the woman place her remaining loose cocaine rocks into her bra before her arrest. Police, however did not find any loose rocks, only a small plastic baggie with cocaine. No drugs were found on Mr. Greene. After two trials, a jury convicted Mr. Greene of possession with intent to deliver the cocaine found on the woman under an accomplice liability theory. Because the evidence was insufficient to prove that Mr. Greene was an accomplice, this Court should reverse. Alternatively, the conviction should be reversed for evidentiary error. If not reversed, the case should be remanded for a new sentencing hearing for consideration of a parenting sentencing alternative.

B. ASSIGNMENTS OF ERROR

1. In violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and article one, section three of the Washington Constitution, the conviction is not supported by sufficient evidence.

2. After the close of evidence at the first trial, the court erred in denying Mr. Greene's motion to dismiss for insufficient evidence.

3. After the close of evidence at the second trial, the court erred in denying Mr. Greene's motion to dismiss for insufficient evidence.

4. The trial court erred in ruling that Mr. Greene "opened the door" on cross-examination to evidence that the testifying officer knew the person who had approached Mr. Greene was a known drug user.

5. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, Mr. Greene's was deprived of his right to effective assistance of counsel at sentencing.

C. ISSUES

1. To be guilty as an accomplice, there must be evidence of complicity in *the* crime. Mr. Greene was present while a woman exchanged rocks of cocaine for money. He made gestures toward the woman prior to the transactions and purportedly passed several loose rocks of cocaine to the woman before and after the last transaction. Before walking away, the woman placed her remaining loose rocks into her bra area, not into a baggie. As they walked away, the officer kept the two in sight and did not see any more exchanges between them or others before their arrest. No drugs were found on Mr. Greene. Two rocks of

cocaine were found on the woman in a small sealed plastic baggie in her bra. No evidence substantiated that this cocaine came from Mr. Greene or that he was facilitating a future delivery. Was the evidence insufficient to convict Mr. Greene as an accomplice to possession with intent to deliver this cocaine?

2. A defendant may “open the door” to inadmissible testimony if a new topic is raised on cross-examination and it would be unfair to not permit further inquiry into the topic. Before trial, the court precluded the testifying officer from testifying that he knew certain individuals as drug users. The officer testified on direct that, as a man he knew approached Mr. Greene and the woman, Mr. Greene made a gesture pointing the man to the woman. Although the officer heard no words, on cross-examination the officer stubbornly maintained that the only possibility was that this gesture related to a drug transaction. The trial court ruled this cross-examination opened the door to evidence that the officer knew the man to be a regular drug user. Did the trial court err when the topic regarding what the gesture meant was not new and the risk of unfair prejudice from admitting this evidence was great?

3. The right to effective assistance of counsel extends to sentencing. While Mr. Greene had children and there was no indication that he was ineligible for a parenting sentencing alternative to prison, his

counsel did not propose this alternative. The court indicated that it would impose treatment-based alternatives if Mr. Greene was eligible and asked for it. The court was not happy about sending Mr. Greene to prison and hoped he could be reunited with his children when released. Was Mr. Greene deprived of his right to effective assistance of counsel, requiring remand for consideration of the parenting sentencing alternative?

D. STATEMENT OF THE CASE

The State charged Jermaine Greene with one count of possession with intent to deliver a controlled substance, cocaine. CP 1. The State alleged that he committed the act with Alvalina Fortson. CP 1.

The case came for trial in March 2015. 1RP 2.¹ Before trial, Mr. Greene moved in limine to exclude any testimony that individuals were known drug users. CP 10-11. The court granted his request. 1RP 27-28.

At trial, Officer Simon Edison testified that he was in downtown Seattle working a night shift on October 27, 2014. 1RP 70. He was in plain clothes. 1RP 71. At around 10:30 to 10:40 p.m., he was at the 1500 block of Third Avenue and Pine Street. 1RP 71. There were businesses in this area along with bus stops on the block. 1RP 71-72. The busy area was well lit. 1RP 73.

¹ Transcripts from the first trial are cited as “1RP.” Transcripts from the second trial are cited as “2RP.”

About 20 feet from him, he saw a man he knew, James Lamping. 1RP 75, 86. Mr. Lamping approached another man and a woman, later identified as Mr. Greene and Ms. Fortson. 1RP 75. Mr. Greene made some kind of gesture towards Ms. Fortson and Mr. Lamping approached her. 1RP 76, 109. The officer could not recall what gesture was made specifically, testifying it could have been a head nod or a point. 1RP 76, 110. He could not hear any words. 1RP 95. Mr. Lamping and Ms. Fortson then conducted a quick transaction. 1RP 77. Officer Edison believed that Ms. Fortson dropped a single rock of crack cocaine, smaller than a pea, into Mr. Lamping's hand in exchange for an unknown amount of money. 1RP 76-77, 80. Mr. Lamping then walked southbound. 1RP 77.

Next, Officer Edison testified that Mr. Greene reached into his right breast pocket, retrieved something, and dropped two or three rocks of similar size from his hand into Ms. Fortson's hands. 1RP 82, 97. Another person that Officer Edison knew, Eric Jordan, then approached Ms. Fortson with money in his hand. 1RP 82-83. Officer Edison did not recall any interaction between Mr. Greene and Mr. Jordan. 1RP 83. Ms. Fortson took Mr. Jordan's money and passed on a rock to Mr. Jordan. 1RP 83. Mr. Jordan then walked off in a direction that Officer Edison could not remember. 1RP 83. The transaction was quick. 1RP 86.

Shortly thereafter, a woman that Officer Edison did not know approached Ms. Fortson. 1RP 84. The woman exchanged an unknown amount of money in exchange for one rock from Ms. Fortson. 1RP 84, 98.

Afterward, Officer Edison perceived that Mr. Greene retrieved two or three loose rocks from his right breast pocket and dropped them into Ms. Fortson's hand. 1RP 85, 98-99. Ms. Fortson, using her thumb, forefinger, and middle finger, placed the rocks into her bra and removed her hand. 1RP 99. Officer Edison saw no more hand movements in her bra area. 1RP 99. Ms. Fortson did not place the rocks in anything before putting them in her bra. 1RP 119. Ms. Fortson and Mr. Greene then walked eastbound. 1RP 88, 99.

At about this time, Officer Edison called in a team to arrest Ms. Fortson and Mr. Greene, arriving a couple minutes later. 1RP 87-88. Officer Edison kept the two in sight the entire time and saw no more exchanges. 1RP 88, 114. From when he first saw them to the end of his observation, Officer Edison saw no conversation between Mr. Greene and Ms. Fortson. 1RP 100-01.

Officers arrested Mr. Greene and Ms. Fortson at a bus shelter nearby. 1RP 125, 137, 154. They searched both of them at the scene. Police found nothing of evidentiary value on either Mr. Greene or Ms. Fortson. 1RP 126, 138. A more thorough search was conducted at the

precinct. 1RP 126-27, 149. Both Mr. Greene and Ms. Fortson were under constant surveillance between the searches. 1RP 131, 163-64. At the precinct, officers found \$120 in a pocket on the left sleeve of Mr. Greene, and no drugs. 1RP 128. Earlier, during the initial search, officers had found \$13 in his pants or jacket pocket. 1RP 156. Officer Jennifer Hunt found \$22 and a small plastic Ziploc baggie tucked inside Ms. Fortson's bra. 1RP 140. The baggie had two small rocks of cocaine. 1RP 140, 150-51. No loose cocaine was found on Ms. Fortson. 1RP 149-50.

Based on the foregoing evidence, Mr. Greene moved to dismiss the charge, contending that no evidence substantiated Officer Edison's claim that he gave cocaine to Ms. Fortson and that the evidence did not prove complicity. 1RP 167-68. He noted the discrepancy regarding the lack of loose rocks on Ms. Fortson's person. 1RP 168. The court denied Mr. Greene's motion. 1RP 172-74.

The jury was unable to reach a verdict, resulting in a mistrial. 1RP 227, 233.

In late May 2015, the case came for a second trial before a different judge. 2RP 2. As before, the court granted Mr. Greene's pretrial motion to exclude testimony naming people as known drug users. 2RP 9.

Much of the testimony and evidence was similar. However, this time Officer Edison testified that he did not see where Ms. Fortson placed

the cocaine rocks that Mr. Greene purportedly gave to her. 2RP 71. Also unlike the first trial, Officer Edison now claimed that he saw Ms. Fortson stuff the money she received into her chest area on her right side as she walked away. 2RP 71, 96. He later acknowledged that this testimony was contrary to what he had written in his report. 2RP 98.

Additionally, while Officer Edison had readily admitted on cross-examination at the first trial that he did not know what had caused Mr. Greene to gesture to Ms. Fortson when Mr. Lamping approached, 1RP 115, he now claimed on cross-examination that any gestures made by Mr. Greene must have related to a drug transaction. 2RP 81. Although he had not heard anything that was said, Officer Edison remained stagnant, asserting that it was impossible that he had seen anything but a drug deal and that Mr. Greene's gesture was a part of it. 2RP 81-82. Based on this cross-examination, the court ruled that Mr. Greene had "opened the door" to testimony that Mr. Lamping was a known drug user. 2RP 84.

Mr. Greene moved again to dismiss for insufficient evidence. 2RP 179. The court rejected the motion. 2RP 183-84.

The jury returned a guilty verdict. 2RP 233. At sentencing, Mr. Greene continued to deny guilt. 2RP 248-49. He told the court that he had three kids and that prison would take him away from them. 2RP 248-49. The mother of the children told the court that the children needed their

father. 2RP 251. Mr. Greene was sentenced to 60 months of prison, the low end of the standard range. 2RP 249.

E. ARGUMENT

1. The evidence was insufficient for the jury to find that Mr. Greene was an accomplice to possession with intent to deliver a controlled substance.

a. The State bears the burden of proving guilt beyond a reasonable doubt.

The State bears the burden proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing whether the State has met this burden, the appellate court analyzes “whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). While inferences are drawn in the State’s favor, these inferences must be reasonable and cannot be based on speculation or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

b. To prove accomplice liability, the State must prove that the defendant actually participated in the crime.

A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, the person solicits, commands, encourages, or requests another person to commit the crime. RCW 9A.08.020(3)(a)(i). Additionally, a person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, the person aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a)(ii). The person must have knowledge of *the crime* for which the person was eventually charged, not merely *a crime*. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Further, mere knowledge or physical presence at the scene of a crime is insufficient. In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). The State must prove that the defendant actually participated in the crime. State v. Everybodytalksabout, 145 Wn.2d 456, 471, 39 P.3d 294 (2002).

In Wilson, our Supreme Court reversed a reckless endangerment conviction that was based on the defendant's mere presence at the scene of the crime. Wilson, 91 Wn.2d at 492. There, a group of youths pulled a rope taut across a road as the defendant stood by. Id. at 489-90. Found guilty as an accomplice, our Supreme Court reversed, holding that

“something more than presence alone plus knowledge of ongoing activity must be shown” to find a person guilty. Id. at 490, 492.

Accordingly, physical presence is insufficient to establish accomplice liability for possession of a controlled substance with intent to deliver. State v. Amezola, 49 Wn. App. 78, 89-90, 741 P.2d 1024 (1987). Merely providing information on where and from whom to purchase drugs is also insufficient to establish complicity. State v. Gladstone, 78 Wn.2d 306, 312, 474 P.2d 274 (1970).

c. In accordance with the Rules of Appellate Procedure, the Court should analyze whether the evidence from the first trial was sufficient to prove guilt.

After the State rested in the first trial, Mr. Greene moved to dismiss for insufficient evidence. 1RP 167. The court denied his motion. 1RP 172-74. There was then a mistrial. 1RP 227, 233. Mr. Greene was convicted on retrial.

Under the Rules of Appellate Procedure, the trial court ruling denying the motion to dismiss from the first trial is reviewable in this appeal:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

RAP 2.4(b). These requirements are satisfied. The second trial would not have happened if the court had granted Mr. Greene's motion to dismiss for insufficient evidence. Hence, the decision prejudicially affected the final decision which was designated in the notice of appeal. See Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 134-35, 750 P.2d 1257 (1988), clarified on denial of reconsideration, 756 P.2d 142 (1988) (trial court's ruling on mistrial in first trial reviewable because second trial would not have occurred absent court's decision to grant a mistrial).

Consistent with RAP 2.4(b), Mr. Greene asks that this Court review whether the evidence from the first trial was sufficient to convict him as an accomplice. Alternatively, this Court should review the record from the second trial.

d. The evidence was insufficient to prove that Mr. Greene was an accomplice to Ms. Fortson's act of possessing cocaine with intent to deliver it.

Under current Washington caselaw, the evidence was sufficient for the jury to conclude that *Ms. Fortson* possessed cocaine and that she intended to deliver it because she had just completed three deliveries of drugs. See State v. Zunker, 112 Wn. App. 130, 137-38, 48 P.3d 344 (2002); State v. Thomas, 68 Wn. App. 268, 273-74, 843 P.2d 540 (1992). The question, however, is whether the evidence was also sufficient to conclude that Mr. Greene intended to facilitate Ms. Fortson's possession

with intent to deliver. State v. McPherson, 111 Wn. App. 747, 760, 46 P.3d 284 (2002); State v. Fisher, 74 Wn. App. 804, 816, 874 P.2d 1381 (1994), reversed on other grounds State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). The answer is no.

Viewed in the light most favorable to the State, the evidence proved that Mr. Greene made some kind of gesture toward Ms. Fortson when Mr. Lamping approached. Even if this could be viewed as informing Mr. Lamping that he could buy drugs from Ms. Fortson, this would not establish complicity in any delivery. Gladstone, 78 Wn.2d at 312.

As for the claim Mr. Greene passed cocaine to Ms. Fortson, that is also insufficient by itself to prove complicity in a later possession with intent to deliver. When a person delivers drugs, they are not an accomplice to the other person's possession of the drugs. Wheeler v. State, 691 P.2d 599, 602 (Wyo. 1984) ("the buyer is not aiding the 'selling act' of the seller and the seller is not aiding the 'buying act' of the buyer."); State v. Cota, 191 Ariz. 380, 383, 956 P.2d 507 (1998); State v. Morris, 77 Wn. App. 948, 954-55, 896 P.2d 81 (1995) (buyer of drugs is not an accomplice to seller's act of delivery). Logically, if the seller is not an accomplice to the buyer's possession, the seller does not become an accomplice later on when the buyer forms intent to deliver the same drugs.

Thus, if A (Mr. Greene) delivers drugs to B (Ms. Fortson), and B later forms intent to deliver these drugs to C (an unknown person), A is not necessarily complicit in B's possession with intent to deliver.

Here, besides Mr. Greene's mere presence, there was no other evidence tying Mr. Greene to Ms. Fortson's possession with intent to deliver. There was no evidence that Ms. Fortson passed money from the purported sales onto Mr. Greene. Officer Edison did not testify that he saw money pass between Ms. Fortson and Mr. Greene. There was no evidence that he was helping Ms. Fortson procure a potential buyer.

Moreover, the State failed to prove that Mr. Greene actually supplied the cocaine recovered from Ms. Fortson (which formed the basis of the charge). Officer Edison testified that Mr. Greene gave Ms. Fortson loose rocks of cocaine. 1RP 85, 98-99. His testimony was also that Ms. Fortson placed these loose rocks in her bra, not in a plastic baggie. 1RP 99, 119. He maintained close view of Ms. Fortson and Mr. Greene, and noted nothing to indicate Ms. Fortson placed the rocks in a baggie. 1RP 88, 114. While the State is entitled to inferences, it is only entitled to reasonable inferences. Even viewed in the State's favor, the only *reasonable* inference is that Ms. Fortson already had the baggie of cocaine in her bra. The undisputed evidence cannot be squared with Officer Edison's account. The reasonable inference is that Officer Edison was

wrong about Mr. Greene passing loose rocks to her after the third transaction. As for the Officer Edison's testimony on seeing Ms. Fortson place loose rocks in her bra, what Officer Edison likely saw was Ms. Fortson placing the money in her bra because that is where police found money on her.

The Court should hold that the evidence was insufficient to prove Mr. Greene was an accomplice to Ms. Fortson's possession with intent to deliver. The trial court should have granted Mr. Greene's motion to dismiss and no second trial should have occurred. The conviction should be reversed and dismissed with prejudice.

2. Cross-examination of Officer Edison on his assertion that it was impossible that he had seen anything but a drug deal did not "open the door" to testimony that Officer Edison knew the purported buyer to be a drug user.

a. The "opening the door" rule.

When examining a witness, a party may "open the door" to a subject of inquiry on cross or redirect. Thus, "[w]here the defendant 'opened the door' to a particular subject, the State may pursue the subject to clarify a false impression." State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The purpose of this rule is "to prevent a party from mischaracterizing evidence by only revealing advantageous details of a

particular subject.” City of Seattle v. Pearson, 192 Wn. App. 802, 819, 369 P.3d 194 (2016). Accordingly, in Gefeller, the defendant opened the door to evidence about a lie detector test because the subject was first introduced by the defendant on cross-examination. Gefeller, 76 Wn.2d at 454. But even where the evidence does rebut new evidence, the evidence should still not be admitted if its probative value is substantially outweighed by any unfair prejudice. State v. Ortiz, 34 Wn. App. 694, 696-97, 664 P.2d 1267 (1983). The trial court’s ruling is reviewed for an abuse of discretion. Fisher, 165 Wn.2d at 750.

b. Cross-examination of the officer did not “open the door” to testimony that the first buyer was a known drug user.

Officer Edison knew the first two men who had purportedly conducted a drug transaction with Ms. Fortson as drug users. Mr. Greene moved to preclude this testimony under ER 403² because its probative value was substantially outweighed by a danger of unfair prejudice. CP 10-11. There was a substantial danger that the jury would presume that Mr. Greene was engaged in some kind of criminal activity simply because he associated with drug users. 1RP 26. In both trials, the court granted

² “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

the motion. 1RP 27-28; 2RP 9. The State did not oppose the request and did not argue that such testimony was necessary to provide “context” for Officer Edison’s actions or conclusions. 1RP 25-28; 2RP 9.

At the first trial, Officer Edison testified on cross-examination that he heard no conversations between Mr. Greene, Ms. Fortson, and the three people who approached them. 1RP 115-16. He admitted that it was possible that Mr. Greene’s gesture toward Ms. Fortson could have been in response to directions, or a request for a cigarette or gum. 1RP 116. He admitted he did not know what words might have been said that had prompted Mr. Greene to gesture towards Ms. Fortson. 1RP 115-16.

A similar examination occurred at the second trial. This time, however, Officer Edison claimed it was “not possible” that Mr. Greene had gestured to Ms. Fortson for any reason other than to facilitate a drug transaction:

Q. Okay. Now you said that you saw [Mr. Lamping] interact with Mr. Greene, and that Mr. Greene made a gesture, correct?

A. Correct.

Q. Did you hear Mr. Greene say anything to Mr. Lamping?

A. No.

Q. Did you hear Mr. Lamping say anything to Mr. Greene?

A. No.

Q. So you heard no conversation or anything exchanged between the two of them?

A. Correct.

Q. And you can't recall what the specific gesture was that Mr. Greene supposedly made?

A. Correct.

Q. But then Mr. Lamping proceeded to engage Ms. Fortson, correct?

A. Well, as I've written in my statement, one of the follow-up gestures by Mr. Greene was actually pointing to Ms. Fortson, whereupon Mr. Lamping faced Ms. Fortson directly.

Q. Okay. So you say you saw Mr. Greene point to Ms. Fortson, but at this point you have no idea what the conversation was about, if there was even conversation?

A. Beyond what I surmised, correct.

Q. So it's entirely possible that Mr. Greene was simply saying, yeah, that's her or something completely unrelated to a drug transaction?

A. Well, it's not possible because I witnessed a drug transaction.

2RP 80-81 (emphasis added).

Defense counsel then proceeded to follow up on Officer Edison's surprising testimony and to get him to admit (as he had

testified at the first trial) that he did not know for certain what the gesture had been about:

Q. Okay. So you're saying that just by virtue of the fact that a drug transaction occurred that that gesture was related to the transaction?

A. That would be - - yeah - - that would be what my expectation was.

Q. Okay. That was your opinion of what happened.

A. Well, sir, I did witness a drug transaction.

Q. Okay. But you cannot say with certainty that the gesture was related?

A. I can say with pretty, yeah, I can say with certainty that that's what the gesture was about.

Q. Even though you had no context for the gesture.

A. No, I had plenty of context for the gesture.

Q. Leading up to that point?

A. Yes, actually.

Q. But you just stated that you heard no words exchanged.

A. Correct.

Q. You had never met Mr. Greene previously.

A. Correct.

Q. You had no idea who he was.

[The prosecutor]: Your Honor, we may need to be heard at sidebar about the line of questioning.

2RP 81-82.

Out of the jury's presence and over Mr. Greene's objection, the court agreed with the State that the cross-examination had "opened the door" to testimony that the officer knew Mr. Lamping to be a drug user:

MS. MANCA: Your Honor has previously ruled that under ER 403 the Officer is not allowed to testify that Mr. Lamping and Mr. Jordan were known drug users, and that is the context that Officer Edison is referring to when he's talking about context from prior interaction - -

THE COURT: Of course. Of course.

MS. MANCA: - - and so I do believe that Mr. Greenspan's line of questioning has opened the door to Officer Edison to explain, because now he's being specifically asked a question and he can't give a complete and honest answer.

THE COURT: Mr. Greenspan?

MR. GREENSPAN: Your Honor, I would disagree with opening the door. I understand what the State's position is, and I'm approaching this with as much delicacy as I can manage, but the Officer's testimony was that he was certain that my client made a gesture that was specifically related to a drug transaction despite having heard nothing and having no information regarding who my client was specifically as of that moment.

If the Officer's testimony is that he based that assumption entirely on the fact that Mr. Lamping was a known drug user, I think at this stage there's no question that a drug transaction took place between Mr. Lamping and Ms. Fortson, and if that information needs to come in at this point, perhaps it will, I don't know; I don't know that it's going to make a difference. But the point - - the purpose of the questioning is to question the Officer's recollection and

the certainty which he is displaying based on a complete lack of information.

THE COURT: Right. I do believe the door's been opened based on the questions that have been asked thus far, and I don't know that I need to explain it more, but I think the Officer has been basically asked, or he's been put to the test of his level of certainty based on what he knew and this is a part of, I'm sure, what he will testify to when asked. So I do believe the door has been opened, and I will permit on redirect questioning or cross about Mr. Lamping being a known drug dealer.

2RP 83-84.

Officer Edison then testified that he knew Mr. Lamping to have a "drug problem" and that he was a "drug addict" "primarily addicted to crack cocaine." 2RP 90-91, 101-02.

c. The trial court erred in ruling that defense counsel had "opened the door" and in admitting this evidence that was unfairly prejudicial and of little relevance.

The trial court erred in its ruling that defense counsel had opened the door to testimony about Officer Edison knowing Mr. Lamping to be a regular drug user. Unlike in Gefeller, where defense counsel raised a new topic concerning a lie detector test, counsel's inquiry on cross-examination did not raise a new topic. Cf. Gefeller, 76 Wn.2d at 454. On direct examination, Officer Edison had testified that Mr. Greene had gestured to Ms. Fortson in interacting with Mr. Lamping. 2RP 59. The plain implication from this testimony was that the gesture was made to direct

Mr. Lamping to Ms. Fortson for a drug sale. Defense counsel's inquiry into the possibility that this gesture related to something else did not open the door to the evidence precluded under the pretrial ER 403 ruling.

If the State believed that Officer Edison's knowledge on how he knew Mr. Lamping was essential to provide "context" for why he believed Mr. Greene's gesture was related to a drug sale, the State should have made this argument in response to Mr. Greene's motion in limine to preclude this testimony. The State did not oppose the motion and did not object when the court ruled that this evidence was unfairly prejudicial.

Neither was this evidence necessary to clarify any "false impression" on "context." Counsel had already established that Officer Edison had not heard any verbal exchange. Thus, when Officer Edison boldly asserted that it was *impossible* that Mr. Greene's gesture was related to anything but a drug transaction, counsel followed up with questions directed to show that it was *possible*. The question about lack of context was about lack of verbal context, as counsel's other questions indicated. 2RP 80-82. Evidence that Mr. Lamping was a drug user did not explain, clarify, or rebut Mr. Greene's evidence that Officer Edison lacked information on what context the gesture was made. Cf. Pearson, 192 Wn. App. at 819 (evidence on current per se blood THC limit did not

explain, clarify, or rebut defendant’s evidence that no per se limit was in effect at time of charged offense for driving under the influence).³

Regardless, the evidence still should have been excluded under ER 403. Ortiz, 34 Wn. App. at 696-97. This evidence allowed the jury to infer that Mr. Greene was associating with a regular drug user whom police knew very well. The State already was permitted to elicit evidence that Officer Edison knew Mr. Lamping. This was sufficient to provide “context” for Officer Edison’s testimony about what Mr. Greene’s gesture meant.

Because the door was not opened and the evidence was highly prejudicial, this Court should hold that the trial court abused its discretion in admitting the evidence that Mr. Lamping was a known drug user.

d. The error requires reversal.

An erroneous evidentiary ruling will justify reversal if it was material to the outcome of the trial. Pearson, 192 Wn. App. at 819. Here, the evidence was very prejudicial. It associated Mr. Greene with a regular drug user, whom Officer Edison had frequent interaction with. Moreover, the issue as to what Mr. Greene’s gestures meant went to whether he was working with Ms. Fortson, i.e., whether he was complicit in her illicit

³ THC stands for tetrahydrocannabinol. This is the active component of marijuana.

activities. The evidence as to Mr. Greene’s complicity was weak and largely circumstantial. Thus, it is likely the error was material.

There is also a reasonable probability that the error affected the outcome because the jury was unable to reach a verdict in the first trial where this evidence was not admitted. Besides the admission of this evidence, the two trials were largely the same. Because the court’s “opening the door” ruling was a key difference between the two trials, it is reasonable to conclude that the error was material. Absent the evidence, the jury, or at least some jurors, would have likely entertained a reasonable doubt as to Mr. Greene’s complicity.

This Court should hold that the error was prejudicial, reverse, and remand for a new trial.

3. Counsel’s failure to ask that the court sentence Mr. Greene under the parenting sentencing alternative deprived Mr. Greene of his right to effective assistance of counsel.

a. Defendants have a right effective assistance of counsel at sentencing.

Criminal defendants have the right to effective assistance of counsel under our state and federal constitutions. U.S. Const. amend. VI; Const. art. I, § 22.⁴ This right extends to all critical stages, including

⁴ “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

sentencing. Lafler v. Cooper, 132 S. Ct. 1376, 1380-81, 182 L. Ed. 2d 398 (2012).

To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Id. Prejudice is shown when there is a reasonable probability that absent counsel's deficient performance, the result of the proceeding would have been different. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

One sentencing alternative permitted in Washington is for parents who have legal custody of minor children. RCW 9.94A.655. If the parent is eligible and the court determines this alternative is appropriate, the court waives imposition of the sentence and imposes a sentence consisting of twelve months of community custody. RCW 9.94A.655(4); see State v. Mohamed, 187 Wn. App. 630, 636-37, 350 P.3d 671 (2015).

b. Counsel failed to propose the parenting sentencing alternative.

At sentencing, the parties discussed the possibility with the court of a drug offender alternative sentencing (DOSA). 2RP 244-48. The

“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.” Const. art. I, § 22.

court was inclined to continue sentencing and obtain a DOSA evaluation.

2RP 246. This was consistent with the sentencing court's "basic philosophy" "that if there's an opportunity for treatment and someone is asking for it, I'm going to give them that opportunity if they're eligible."

2RP 246. Mr. Greene, however, who had gone through the DOSA process before, indicated he was not interested in going through this process again.

2RP 246, 248. Accordingly, because the court was not presented with another option, the court sentenced Mr. Greene to 60 months of incarceration, the low-end of the standard range under Mr. Greene's offender score. 2RP 249.

Before sentencing Mr. Greene, Mr. Greene informed the court that he had three children and that being sent to prison would take him away from them. 2RP 248-49. The court also heard from the mother of the children, Toni Washington. 2RP 251. She told the court that the children needed their father. 2RP 251. She asked for the court to impose a sentence so that Mr. Greene could be "reunited with his kids." 2RP 251. The court told Ms. Washington the minimum sentence was 60 months and that was what Mr. Greene would have to serve. 2RP 252.

The court agreed with the sentiments expressed by Mr. Greene and Ms. Washington, telling Mr. Greene that "it doesn't make me happy to

send you to the Department of Corrections, but I do wish you well.

Hopefully, you will get out and reunite with your kids.” 2RP 254.

c. The deprivation requires remand for a new sentencing hearing.

The parenting sentencing alternative statute has five eligibility requirements:

(1) An offender is eligible for the parenting sentencing alternative if:

(a) The high end of the standard sentence range for the current offense is greater than one year;

(b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;

(c) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and

(e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

RCW 9.94A.655(1).

The first requirement was met because the high end of the standard range for the current offense was 120 months, which is more than one year. CP 66.

Concerning Mr. Greene’s felony convictions, the record indicates that Mr. Greene had convictions for violation of the uniform controlled

substances act, eluding a police vehicle, taking a motor vehicle without permission, third degree assault, and theft. CP 71. None of these, including third degree assault, qualify as a “violent offense.” RCW 9.94A.030(55). None of these are a sex offense. RCW 9.94A.030(30).

As for the remaining requirements, there is no indication that Mr. Greene has been found to be subject to deportation or will be subject to a deportation order. Mr. Greene could sign releases of information waivers. And Mr. Greene’s and Ms. Washington’s statements at sentencing did not indicate that Mr. Greene lacked physical custody of his children at the time of the offense.

The court expressed a willingness to continue sentencing to investigate the possibility of a DOSA. Hence, had the court been apprised of the parenting sentencing alternative, the court would have likely continued the hearing to investigate Mr. Greene’s eligibility.

Assuming eligibility, the record indicates that the court would have likely imposed this alternative. The court expressed unhappiness about sending Mr. Greene to prison and hoped Mr. Greene could be reunited with his children. 2RP 254. The court’s sentencing philosophy was that a person should be given the opportunity for treatment if it was available and the person asks for it. 2RP 246. The court could have ordered

treatment under a parenting sentencing alternative. RCW 9.94A.655(5)(a).

Given this record, Mr. Greene’s counsel was deficient for failing to propose the parenting sentencing alternative and to request a continuance to investigate it. See State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (trial counsel deficient in not citing appropriate authority when arguing for court to consider a Special Sex Offender Sentencing Alternative (SSOSA)). There is a reasonable probability that absent counsel’s deficient performance, Mr. Greene would have been sentenced under the parenting sentencing alternative. Hence, this Court should reverse and remand for consideration of the parenting sentencing alternative. See id. at 589 (remanding for consideration of a SSOSA).

4. This Court should direct that no costs will be awarded to the State for this appeal.

If Mr. Greene does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1) (“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.”); RAP 14.2 (“commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.”). This Court has discretion

under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” Sinclair, 192 Wn. App. at 391, citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). A person’s ability to pay is an important factor. Id. at 389.

Here, Mr. Greene was found to be indigent. Supp. CP __ (sub. no. 98); 2RP 254. This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. The trial court further recognized this indigency by declining to impose discretionary legal financial obligations upon Mr. Greene. CP 67; 2RP Given this record, the Court should exercise its discretion and reject any request for costs. Cf. Sinclair, 192 Wn. App. at 392-93 (declining State’s request for costs in light of defendant’s indigency and lack of evidence or findings showing that defendant’s financial situation would improve).

F. CONCLUSION

The evidence was insufficient to prove that Mr. Greene was an accomplice to possession with intent to deliver a controlled substance. The conviction should be reversed and dismissed with prejudice. Alternatively, the conviction should be reversed and the case remanded for a new trial because the trial court committed prejudicial error in its

“opening the door” ruling. If the conviction is not reversed, the case should be remanded for a new sentencing hearing with instruction to consider a parenting sentencing alternative.

DATED this 21st day of June, 2016.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74019-9-I
v.)	
)	
JERMAINE GREENE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] JERMAINE GREENE	(X)	U.S. MAIL
799108	()	HAND DELIVERY
CEDAR CREEK CORRECTIONS CENTER	()	_____
PO BOX 37		
LITTLEROCK, WA 98556-0037		

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JUNE, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710