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Court of Appeals
Division I
State of Washington

NO. 74019-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE GREENE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS – THE FIRST TRIAL.....	2
3. SUBSTANTIVE FACTS – THE SECOND TRIAL.....	5
C. <u>ARGUMENT</u>	8
1. SUFFICIENT EVIDENCE SUPPORTED THE COURT’S DENIAL OF GREENE’S MOTION TO DISMISS IN HIS FIRST TRIAL, AND THE JURY VERDICT IN HIS SECOND TRIAL.....	8
2. THE TRIAL COURT PROPERLY RULED THAT GREENE OPENED THE DOOR TO EVIDENCE THAT OFFICER EDISON KNEW ONE OF THE PEOPLE WHO APPROACHED GREENE WAS A DRUG USER	14
a. Relevant Facts	16
b. The Trial Court’s Ruling Was Correct.....	20
3. GREENE’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM LACKS MERIT.....	23
a. What Is A Parenting Sentencing Alternative .	23
b. The Relevant Facts.....	25
c. A Failed Ineffective Assistance Of Counsel Claim.....	26
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 27, 28

Washington State:

Adkins v. Aluminum Co. of America, 110 Wn.2d 128,
750 P.2d 1257 (1988)..... 9

In re Wilson, 91 Wn.2d 487,
588 P.2d 1161 (1979)..... 11, 12

McMullen v. Warren Motor Co., 174 Wash. 454,
25 P.2d 99 (1933)..... 9

State v. Adamy, 151 Wn. App. 583,
213 P.3d 627 (2009)..... 29

State v. Blackwell, 120 Wn.2d 822,
845 P.2d 1017 (1993)..... 9

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997)..... 22

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 10

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 10, 13

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

State v. Gladstone, 78 Wn.2d 306,
474 P.2d 274 (1970)..... 12

<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	26, 27
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008).....	14
<u>State v. J-R Distribs., Inc.</u> , 82 Wn.2d 584, 512 P.2d 1049 (1973).....	12
<u>State v. Kelley</u> , 36 Wn.2d 772, 220 P.2d 342 (1950).....	9
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	27
<u>State v. Mendoza</u> , 63 Wn. App. 373, 819 P.2d 387 (1991), <u>rev. denied</u> , 841 P.2d 1232 (1992)...	23
<u>State v. Mohamed</u> , 187 Wn. App. 630, 350 P.3d 671 (2015).....	27
<u>State v. Ortega</u> , 134 Wn. App. 617, 142 P.3d 175 (2006), <u>rev. denied</u> , 160 Wn.2d 1016 (2007).....	15
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	15
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	10, 14
<u>State v. Vreen</u> , 99 Wn. App. 662, 994 P.2d 905 (2000), <u>aff'd</u> , 143 Wn.2d 923 (2001).....	22

Statutes

Washington State:

RCW 9.94A.510 23
RCW 9.94A.530 23
RCW 9.94A.655 23, 24, 25
RCW 9.94A.660 24
RCW 9.94A.662 24
RCW 9.94A.858 26
RCW 9A.08.020 11
RCW 69.50.401 10

Rules and Regulations

Washington State:

ER 403 16
RAP 2.4 8, 9

Other Authorities

WPIC 10.51 11

A. ISSUES PRESENTED

Greene went to trial twice for a drug offense; possession with intent to deliver cocaine. The first trial ended in a hung jury. The second trial ended with a jury finding Greene guilty as charged. Greene now raises the following issues on appeal:

1. In regards to his first trial, has Greene shown that the trial court abused its discretion in denying his motion to dismiss for lack of evidence?

2. In regards to his second trial, has Greene shown that no rational trier of fact could have found him guilty as charged?

3. Has Greene shown that the trial court abused its discretion in ruling that he opened the door to evidence that Officer Simon Edison was aware that one of the three people who individually approached the defendant was a drug user?

4. In claiming ineffective assistance of counsel at sentencing, has Greene shown that (1) he was eligible for a Parenting Sentencing Alternative (PSA), (2) that no reasonable attorney would have failed to ask for a PSA, and (3) that there was a substantial likelihood the judge would have imposed a PSA?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Jermaine Greene and co-defendant, Alvalina Fortson, were charged with Violation of the Uniform Controlled Substances Act, possession with intent to deliver cocaine (VUCSA PWI). CP 1, 103.¹ Greene proceeded to trial in March of 2015, with a mistrial declared when the jury was unable to reach a verdict. CP18-20. In a subsequent trial, a jury found Greene guilty as charged. CP 62. He received a low-end standard range sentence of 60 months. CP 68.

2. SUBSTANTIVE FACTS – THE FIRST TRIAL

On October 27, 2014, Seattle Police officers were conducting a drug operation in the 1500 block of 3rd Avenue between Pike and Pine. 2RP² 70-71. Specifically, Officer Simon Edison was dressed in plain clothes looking for drug traffickers. 2RP 72. At approximately 10:30 p.m., he observed Greene and Fortson together, noticing them because they were approached by persons known to the officer. 2RP 72, 74.

¹ Fortson entered Drug Court and subsequently entered a plea of guilty to a charge of conspiracy to commit VUCSA PWI. CP 103, 110-14, 115-35. Her case is not on appeal.

² The verbatim report of proceedings is cited as follows: 1RP—3/16/15, 2RP—3/17/15, 3RP—3/18/15, 4RP—5/21/15, 5RP—5/27/15, 6RP—5/28/15, 7RP 9/18/15.

Officer Edison watched as James Lamping, with cash visible in his hand, walked up and engaged Greene in some manner. 2RP 75-76. Greene then nodded or pointed to Fortson, whereupon Lamping turned toward Fortson. 2RP 76. Fortson then dropped a rock of cocaine into Lamping's hand. 2RP 77. Lamping took a moment to inspect the rock and then he handed some cash to Fortson and walked away. 2RP 77. Greene then reached into the breast pocket of his jacket, retrieved something and dropped it into Fortson's hand. 2RP 81-82. When Greene dropped the item(s) into Fortson's hand, Officer Edison was able to see what appeared to be a few rocks of cocaine. 2RP 82.

Officer Edison then observed Eric Jordan walk up to Greene and Fortson. 2RP 82. Again Greene made a gesture towards Fortson. 2RP 114-15. Jordan then handed Fortson some cash and Fortson dropped a rock of cocaine into Jordan's hand. 2RP 82-83. Jordan then walked off. 2RP 83.

Officer Edison then observed an unknown female walk up to Greene and Fortson. 2RP 84. Again Greene made a gesture towards Fortson. 2RP 110-11, 114-15. Like the other two exchanges, the female exchanged cash for what appeared to be a single rock of cocaine. 2RP 84. Officer Edison, who had worked

hundreds of these types of operations testified that it is common for street dealers to work in pairs. 2RP 77-78, 81.

After this third transaction, Greene reached into the breast pocket of his jacket and dropped what appeared to be a couple more rocks of cocaine into Fortson's hand. 2RP 85. Officer Edison observed Fortson place the rocks in the bra area of her clothing. 2RP 85.

For the entire time Officer Edison had Greene and Fortson under observation, they never separated. 2RP 109. After the third transaction, Greene and Fortson began walking together eastbound on Pine Street. 2RP 88, 124. Arrest teams were then notified via radio to enter the area. 2RP 88, 123. Greene and Fortson were arrested as they stood together at a bus stop shelter. 2RP 124.

Greene had a "wad" of cash totaling \$120 in a zipper pocket on the sleeve of his jacket. 2RP 128. He had another \$13 in cash in another pocket. 2RP 156. In total, Greene had three \$20 bills, five \$10 bills, three \$5 bills and eight \$1 bills. 2RP 161. No drugs were found on Greene. 2RP 156.

Fortson had \$22 in cash and a Ziploc baggie containing small rocks of cocaine tucked into her bra. 2RP 140, 151. In total, Fortson had two \$5 bills and twelve \$1 bills.

After the State rested, Greene made a motion to dismiss for lack of evidence. 2RP 166-67. The court denied the motion. 2RP 172. Ultimately the jury was unable to reach a verdict and a mistrial was declared. 3RP 231-33.

3. SUBSTANTIVE FACTS – THE SECOND TRIAL

On October 27, 2014, the West Precinct Anti-Crime Team was working an undercover drug operation, a “see-pop” operation in the area of 3rd Avenue and Pine Street. 5RP 47-48, 52. In this case, the operation involved Officer Simon Edison dressed in plain clothing walking through the area looking for drug transactions. 5RP 52-56.

When Officer Edison reached 3rd and Pine, an observation made him stop. 5RP 55, 58. He observed Greene, Fortson and two other individuals he knew by name and face. 5RP 58.

The first individual was James Lamping, who walked past Officer Edison from the south, cash in hand, and approached Greene and Fortson. 5RP 58-59. Lamping and Greene gave a head nod to each other and then Greene pointed at Fortson, who was standing shoulder to shoulder with Greene. 5RP 59. Lamping then stepped up to Fortson and Fortson dropped a rock of cocaine into Lamping’s hand. 5RP 59-60. Lamping then gave some cash

to Fortson. 5RP 60. Lamping took a moment to check out the rock and then walked away southbound on 3rd Avenue. 5RP 60.

Officer Edison also noticed Eric Jordan, another person he knew by name and face, standing with his back against a wall, waiting and watching the transaction with Lamping, Greene and Fortson. 5RP 61-62. When Lamping walked away, Jordan approached Greene and Fortson. 5RP 62.

Jordan stopped in front of Greene and Fortson. 5RP 62-63. Greene gestured towards Fortson. 5RP 62. Greene then reached into the breast pocket of his jacket, pulled something out and dropped it into Fortson's hand. 5RP 63. Officer Edison could see that it was a couple rocks of cocaine. 5RP 63-64. Fortson then gave a rock of cocaine to Jordan in exchange for cash. 5RP 64. Officer Edison testified that it is common for dealers to work in pairs, with one person holding the money and the other person holding the drugs. 5RP 65-66.

When Jordan walked away, Officer Edison stood his ground because he observed yet another person "waiting their turn." 5RP 66-67. An unknown female, with cash in her hand, walked up to Greene and Fortson. 5RP 68. She interacted with Greene and there was a gesture, "a head nod," although Officer Edison could

not remember specifically if that was the gesture Greene used.

5RP 68. The woman then turned towards Fortson, who put a rock of cocaine in her hand in exchange for the cash. 5RP 58. The woman looked at the rock for a moment and then walked away.

5RP 69.

As Officer Edison was calling the arrest team, Greene again reached into the breast pocket of his jacket, retrieved something and dropped it into Fortson's hand. 5RP 69-70. Officer Edison could see what appeared to be two to four rocks of cocaine. 5RP 70. Officer Edison saw Fortson put the rocks into the right side of her bra. 5RP 98, 103.³ Greene and Fortson then walked away together – shoulder to shoulder, eastbound on Pine, and although they remained in Officer Edison's sight, their backs were turned towards him and he was not able to see their hands. 5RP 72-73, 95.

Greene and Fortson were arrested as they stood together on 3rd Avenue. 5RP 134. Greene had \$120 in an outside zipper

³ In his brief, Greene states that Officer Edison testified that he did not know where Fortson put the rocks of cocaine. Def. br. at 8. He also states that Officer Edison testified that it was the cash he saw Fortson put in her bra. Def. br. at 8. Officer Edison did testify as Greene states. 5RP 71-72. What Greene conspicuously fails to cite is that Officer Edison later corrected himself and testified that he misspoke, it was the drugs he saw Fortson put in her bra, not the cash. 5RP 103.

pocket of his jacket and another \$13 on his person. 5RP 116, 28.

No cocaine was found on his person. 5RP 117. In total, Greene possessed three \$20 bills, five \$10 bills, three \$5 bills and eight \$1 bills. 5RP 138-38.

Fortson had \$22 in cash and a Ziploc baggie containing small rocks of cocaine, both tucked into her bra. 5RP 163, 184-85. In total, Fortson had two \$5 bills and twelve \$1 bills. 5RP 139.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTED THE COURT'S DENIAL OF GREENE'S MOTION TO DISMISS IN HIS FIRST TRIAL, AND THE JURY VERDICT IN HIS SECOND TRIAL

Greene raises two claims, both sufficiency of the evidence related. In regards to his first trial, Greene claims that the trial court abused its discretion in denying his motion to dismiss for insufficient evidence. In regards to his second trial, Greene claims that no rational jury could have found him guilty as charged. Greene's arguments should be rejected. His argument is premised on interpreting facts in his favor or interpreting facts in isolation – contrary to the standard of review on appeal.

To begin, Greene asserts that under RAP 2.4(b), he may challenge the trial court's ruling denying his motion to dismiss in his

first trial, despite the fact that the jury could not reach a verdict and despite the fact that he was convicted at a second trial.

RAP 2.4(b) provides in part that 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.

Greene asserts the requirements of RAP 2.4(b) are satisfied because his second trial would not have occurred if the court had ruled differently on his motion to dismiss made during his first trial. See Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 750 P.2d 1257 (1988). The State will not challenge Greene's ability to challenge the denial of his motion to dismiss.⁴

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to

⁴ A motion to dismiss for insufficient evidence requires the trial court to determine as a matter of law whether the State has made out a *prima facie* case of the accused's guilt. State v. Kelley, 36 Wn.2d 772, 773, 220 P.2d 342 (1950). A *prima facie* case means that there is sufficient evidence to submit the case to the jury. See McMullen v. Warren Motor Co., 174 Wash. 454, 459, 25 P.2d 99 (1933). Generally, a motion to dismiss is reviewed under an abuse of discretion standard. See State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). However, it seems that in this situation, in determining whether the State has made out a *prima facie* case, the trial court is necessarily applying a sufficiency of the evidence standard -- taking the evidence in the light most favorable to the State. While there may be a distinction between review of a denial of a motion to dismiss for lack of evidence, and a challenge to the sufficiency of the evidence on appeal, whatever that distinction is would seem to be a distinction without a difference. Thus, the State will treat the standard of review as the same.

the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id. Circumstantial evidence and direct evidence are deemed equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

As charged here, the trier of fact had to find that on October 27, 2014, Greene or an accomplice possessed a controlled substance and that Greene or an accomplice possessed the substance with the intent to deliver. CP 57 (the "to convict" instruction); CP 7; RCW 69.50.401. By statute and as instructed here,

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 58 (WPIC 10.51 -- accomplice liability definition); RCW

9A.08.020.

Viewed in the light most favorable to the State as required, the evidence in both trials shows that Greene was dealing drugs with Fortson, that Greene was the one holding the drugs, that he would pass the drugs to Fortson and when buyers approached, he would direct the buyers to Fortson to conduct the transaction. Greene's arguments to the contrary are misguided.

For example, Greene cites In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979), for the legal proposition that mere presence at a crime scene with knowledge of the ongoing criminal activity is insufficient to sustain a conviction of the person as an accomplice.

Def. br. at 10. As a legal proposition, this is an accurate statement of the law, and if that were the only evidence that was produced here, Greene would prevail.⁵

Similarly, Greene cites to State v. Gladstone, 78 Wn.2d 306, 474 P.2d 274 (1970), for the legal proposition that merely providing information on where and from whom a person might be able to purchase drugs is insufficient to sustain a conviction as an accomplice to the dealer of the drugs. Again, as a legal proposition, this is an accurate statement, and again, if this were all the evidence presented against Greene, he would prevail. But it is not.⁶

Here, the evidence showed that Greene and Fortson were associated with each other and that Greene was not merely

⁵ In Wilson, a group of youths fashioned a rope from weather-stripping pulled from a building, tied one end around a tree and ran the rope across a roadway, pulling it taut at times in front of oncoming cars. Evidence was presented that Wilson was present at the scene, that he knew some of the active participants, and that he knew about the theft. Wilson, at 490. The Court held that this is not enough. "One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed," Id. (quoting State v. J-R Distributions, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)).

⁶ A CI contacted Gladstone with the intent to purchase marijuana from him. Gladstone told the CI he did not have enough on hand to sell him any but that he knew a person named Kent who did. The CI then asked Gladstone about Kent. Gladstone did not know Kent's address but he gave the CI directions to Kent's house. The CI later purchased marijuana from Kent. On this evidence, the Supreme Court held, Gladstone could not be convicted as an accomplice to Kent's selling of drugs because there was no evidence that Gladstone had any "connection or association" with Kent. Gladstone, 78 Wn.2d at 309.

present. The two stood together the entire time and acted in concert through three separate drug transactions with three different individuals. In each transaction, Greene directed the buyer to Fortson. On two occasions Greene gave rocks of cocaine to Fortson, once after Jordan approached them looking to buy drugs, and once again immediately after the unknown woman purchased drugs from Fortson. Greene also had a significant sum of cash on his person, in denominations indicative of street-level drug transactions.

Finally, Greene attempts to discount the fact that rocks of cocaine were found on Fortson – the rocks given to her by Greene, exactly where Officer Edison said she put it. He does so by asserting that because the rocks of cocaine were found in a baggie in Fortson's bra, and Officer Edison did not see Fortson put them in the baggie, the court must infer that Officer Edison was wrong. Def. br. at 14-15. However, the fact that Officer Edison did not see that Fortson may have had a baggie inside her bra that she would place the rocks of cocaine given to her by Greene is neither surprising nor dispositive. Circumstantial evidence is no less reliable than direct evidence. Delmarter, 94 Wn.2d at 638. Further, the standard of review requires the court will draw all reasonable

inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant – not the other way around. Salinas, 119 Wn.2d at 201.

In sum, there was sufficient evidence in the first trial for the court to deny Greene's motion to dismiss, and there was sufficient evidence in the second trial for a rational trier of fact to have found Greene guilty as charged.

2. THE TRIAL COURT PROPERLY RULED THAT GREENE OPENED THE DOOR TO EVIDENCE THAT OFFICER EDISON KNEW ONE OF THE PEOPLE WHO APPROACHED GREENE WAS A DRUG USER

Greene contends that the trial court erred in ruling that his questioning of Officer Edison opened the door to testimony that the Officer knew Lamping was a drug user. Greene's argument should be rejected. The trial court acted within its discretion in finding that Greene's challenge of the officer's perception of events did in fact open the door to the evidence.

The "open door" rule is an evidence doctrine that allows for the admission of evidence otherwise inadmissible based on the actions of the opposing party. State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Specifically, as a "sound general rule" based on fairness, "[w]hen a party opens up a subject of inquiry on

direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). As the Supreme Court stated, “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him and then bar the other party from all further inquiries about it.” Id.

A trial court’s decision to allow evidence under the open door rule is reviewed for abuse of discretion. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006), rev. denied, 160 Wn.2d 1016 (2007) (charged with a domestic violence offense, Ortega opened the door to evidence of a prior guilty plea to an assault with the same victim when he testified that the victim had made up the story about the prior assault). Discretion is abused only when no reasonable person would have decided the issue as the trial court did. State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994).

a. Relevant Facts

Prior to trial, the court ruled that Officer Edison could testify that he knew Lamping and Jordan but that under ER 403, he could not testify that he knew they were drug users. 4RP 8-9.

During cross-examination of Officer Edison, defense counsel directly challenged the officer about his knowledge of what he had been observing.

Q: It's your job to try and observe whoever is present on the street at that time to determine whether or not they are engaging in suspicious activity, correct?

A: No. My job is to attempt to locate a drug dealer and make an arrest.

Q: Okay. And that job would entail observing bystanders on the street, would it not?

A: Sure. Okay.

Q: You're not going to just pick a person and assume that they are a drug dealer, correct?

A: Correct.

Q: You're going to have to make that determination before you begin to observe them, correct?

A: Right. By behavior and transactions, yes.

...

Q: ... [Y]ou said that you saw a couple, male and female, and you identified one of the individuals as the Defendant, Mr. Greene, correct?

A: Yes.

Q: And the individual that he was working with was a woman named Alvalina Fortson, correct?

A: Correct.

Q: You did not know either Mr. Greene or Ms. Fortson at the time that you first observed them, correct?

A: Correct.

Q: So you had no information on who they were. They were new to you?

A: Correct.

Q: Okay. But you did see them interacting with somebody that you did know, Mr. Lamping first, correct?

A: Correct.

...

Q: Now you said that you saw him 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: No.

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 Fortson, but at that 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.

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 what the gesture was related to?***

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 that gesture?***

A: ***No, I had plenty of context for that 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.

5RP 77-82 (emphasis added).

At this point a sidebar was called to discuss whether the door had been opened to testimony that Officer Edison knew Lamping was a drug user. 5RP 83-84. Defense counsel told the

court that he was challenging Officer Edison's testimony "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." 5RP 83-84. Counsel added, "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. 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." 5RP 84.

The court stated that counsel "put to the test" Officer Edison's "level of certainty based on what he knew and this is a part of it." 5RP 84. The court said it would allow questioning about Lamping being a known drug user but would not allow such testimony in regards to Jordan, i.e., the door had not been opened in regards to the officer's knowledge that Jordan was a drug user. 5RP 84. Subsequently, Officer Edison was asked why he concluded that it was a rock of cocaine that he saw Fortson give

Jordan. 5RP 90. Officer Edison answered, "I actually saw the rock and, you know, putting it in context with what I had seen previously with Lamping, where I also saw the rock, and knowing that Lamping, you know, has a drug problem. Putting that in context, you know, I had witnessed, and I wrote this in my statement, two separate drug transactions." 5RP 90.⁷

b. The Trial Court's Ruling Was Correct

Here, defense counsel directly challenged Officer Edison's conclusion that he witnessed a drug transaction and that Greene gestured at Lamping in facilitating the transaction and directing Lamping to Fortson. Counsel challenged the officer asking "you have no idea what the conversation was about" between Greene and Lamping, and "you're saying that just by virtue of the fact that a drug transaction occurred, that that gesture was related to the transaction." 5RP 81-82. Counsel further challenged Officer Edison's testimony that Greene was directing Lamping to Fortson, "[e]ven though you had no context for that gesture?" 5RP 82.

The court, however, appropriately recognized that Officer Edison did have a context which supported his testimony and his observations, the fact that he knew Lamping was a drug user. In

⁷ No evidence was admitted that Officer Edison knew Jordan was a drug user.

short, counsel tried to paint an incomplete picture, suggesting that Officer Edison was jumping to conclusions based on insufficient facts. This was a reasonable exercise of discretion by the trial court.

Greene argues that if the State thought that Officer Edison's knowledge that Lamping was a drug user was "essential," the State should have made this argument pretrial in response to his motion *in limine* to exclude the evidence. Def. br. at 22. This misses the point. The open door rule allows for the admission of evidence that would not otherwise have been admitted.

Greene next argues that the evidence did not "explain, clarify or rebut" the defense claim that Officer Edison lacked information on what context the gesture was made. Def. br. at 22. This assertion makes no sense. Counsel directly questioned the officer's certainty by stating "Even though you had **no context** for that gesture?" 5RP 82. It is quite possible counsel could have avoided opening the door with more narrowly tailored questions, but he did not. By claiming Officer Edison had "no context" other than what had been admitted, the door was open to the "context" that had not previously been admitted.

In any event, any error was harmless. The improper admission of evidence is reversible error solely if it results in prejudice. State v. Vreen, 99 Wn. App. 662, 671, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923 (2001). An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. Id. No prejudice exists if the inadmissible evidence is "of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the defense theory was not to claim Lamping, Jordan and the unknown woman did not buy drugs, rather, the defense was that while Greene was present and he may have directed them toward Fortson, this was insufficient to convict him as an accomplice. 5RP 84. Thus, the fact that Officer Edison knew Lamping was a drug user was not prejudicial to Greene's case. Additionally, although Greene asserts the evidence showed he "associated" with known drug users, this is incorrect. No evidence tied Greene and Lamping together other than this single observed transaction. Just as with Jordan and the unknown woman, there were no facts admitted and no argument in closing that Greene knew or had previously seen any one of the three buyers. These

were just street level transactions with three apparent drug users who may or may not have known Greene or Fortson. The admitted evidence could not have been prejudicial.

3. GREENE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM LACKS MERIT

Greene claims that his trial attorney was constitutionally ineffective for failing to ask for a Parenting Sentencing Alternative (PSA) under RCW 9.94A.655. This claim lacks factual and legal merit. Greene fails to show that he was eligible for a PSA, that no reasonable attorney would have failed to ask for a PSA, or that there was a substantial likelihood that if requested, the court would have imposed a PSA.

a. What Is A Parenting Sentencing Alternative

Generally, a sentencing court must impose a sentence that falls within a defendant's standard range, a range that is based on the seriousness level of the offense and the defendant's criminal history. State v. Mendoza, 63 Wn. App. 373, 375, 819 P.2d 387 (1991), rev. denied, 841 P.2d 1232 (1992); RCW 9.94A.510; RCW 9.94A.530. There are exceptions to imposing a standard range sentence, two of which include a Drug Offender Sentencing Alternative (DOSA) and a PSA.

There are several types of DOSA sentence options. See RCW 9.94A.660. In this case, the only potential DOSA option was a Prison-Based Drug Offender Sentence Alternative. RCW 9.94A.662. This option would have required a prison sentence of 45 months, followed by 45 months of community custody, with mandatory substance abuse treatment. Id.

A PSA is another sentencing alternative, limited, as its title suggests, to parents or guardians of minor children. If a sentencing court determines that the offender is “eligible” for a PSA “and” that imposition of a PSA is “appropriate,” the court will impose a sentence of 12 months of community custody. RCW 9.94A.655(4). No jail time is imposed. Id. The court may impose conditions of community custody, including chemical dependency treatment. RCW 9.94A.655(5)(b)(ii).

To be statutorily “eligible” for a PSA, an offender must meet a variety of requirements. See RCW 9.94A.655(1)(a) through (1)(e). Included among the many requirements is proof that at the time of the current offense, the offender must have physical custody of a minor child or the person must be a legal guardian or custodian with physical custody of a minor child. RCW 9.94A.655(1)(e).

In determining whether a PSA is “appropriate,” the court “shall consider the offender’s criminal history.” RCW 9.94A.655(4). In addition, to assist the court in making a determination of whether a PSA is appropriate, the court may order a risk assessment report and a chemical dependency report to be completed prior to entering a sentence. RCW 9.94A.655(2).

b. The Relevant Facts

Greene was scheduled to be sentenced on June 9, 2015. CP 80. On June 2, 2015, the State asked for a bench warrant because Greene was in the Snohomish County Jail. CP 81, 82. In a recorded jail phone call, Greene was heard stating that he was going to flee the state once he was released. CP Id. A warrant was issued but sentencing was continued until September 18, 2015, because Greene had a pending trial in Snohomish County. CP 97-102. On September 18, 2015, Greene appeared for sentencing. 7RP.

Greene’s criminal history spans 22 years, from his first offense in 1992 to the date of violation in this case, October of 2014. CP 91-95. During this time period, Greene amassed 10 prior felony convictions and 53 misdemeanor convictions. Id. This

includes 7 assault convictions and 5 convictions involving domestic violence.⁸ Id.

Greene's offender score was calculated as an 8, with a 60 to 120 month standard range. CP 66, 71. At sentencing, Greene indicated that he was not interested in a DOSA even though a DOSA would lessen his confinement time by a minimum of 15 months. 7RP 248. Greene had twice before received a DOSA sentence, including one on his last felony conviction. CP 91, 96; 7RP 245. In exercising his right of allocution, Greene told the court, "I know I got a long extensive criminal history. . .[and] I got three kids, I try to be out there for my kids." 7RP 248. The court agreed with the State's sentence recommendation and imposed a low-end sentence of 60 months. CP 68; 7RP 241, 249. A PSA was never discussed.

c. A Failed Ineffective Assistance Of Counsel Claim

By statute, a sentence within the standard sentence range for an offense shall not be appealed. RCW 9.94A.858. In addition, as a general rule "the decision of whether to grant a sentencing alternative is not reviewable on appeal." State v. Grayson, 154

⁸ It is unknown if the domestic violence convictions involved Greene's children.

Wn.2d 333, 338, 111 P.3d 1183 (2005). However, an offender may challenge the procedure by which a sentence is imposed, but review is limited to circumstances where the court has categorically refused to exercise its discretion or has relied on an impermissible basis for refusing to impose a sentence alternative. Grayson, at 342 (court refused to grant a DOSA because the program lacked full funding); see also State v. Mohamed, 187 Wn. App. 630, 645, 350 P.3d 671 (2015) (trial court mistakenly believed it did not have the power to impose a DOSA or a PSA). No such situation exists here.

In an apparent attempt to get past the prohibition on appealing a standard range sentence, Greene claims his counsel was constitutionally ineffective for failing to recommend a PSA. Such a claim, however, has two hurdles Greene cannot overcome.

First, to prove a claim of ineffective assistance of counsel, Greene must show that counsel's performance was constitutionally deficient. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Strickland, at 687. The test to determine whether counsel was constitutionally ineffective requires a showing that counsel's representation fell below an objective standard of reasonableness based on a consideration of all of the circumstances. Strickland, at 688. A reviewing court will presume until proven otherwise that counsel acted appropriately. Id.

Second, Greene must prove that counsel's deficient performance prejudiced him. Id. This requires a finding that but for counsel's deficient performance, there is a reasonable probability that the proceedings would have been different. Id.

Here, Greene cannot meet the first prong of the Strickland test for two reasons. First, he cannot show that he was *eligible* for a PSA. While he may be the father of minor children, Greene must prove that he had actual custody at the time of the offense. There is nothing in the record that proves this.

Greene must also prove that he had no disqualifying convictions. While the list of convictions attached to his judgment and sentence do not necessarily show a disqualifying conviction (although the domestic violence convictions may have involved his children), it is unknown what charge he faced in Snohomish County and whether he was convicted of a disqualifying offense.

Secondly, even if he was statutorily eligible, Greene must show that it would have been objectively unreasonable for his counsel not to recommend a PSA. However, considering Greene's lengthy criminal record, high offender score, and two prior failed DOSA sentences, counsel may very well have reasonably thought that it would have been futile to ask the judge to go from a minimum of 60 months jail time to absolutely no jail time. After all, it is one thing to impose a DOSA, something the court said it would consider, that would still have imposed 45 months confinement followed by treatment and 45 months of community custody, to no jail time and 12 months of community custody for an offender who has amassed 63 criminal convictions.⁹

Finally, Greene must show prejudice. Here, this would require that there be a reasonable likelihood that the court would have imposed a PSA, a sentencing alternative designed to foster positive family environments and stability in family units. Nothing in

⁹ Greene's citation to State v. Adamy, 151 Wn. App. 583, 213 P.3d 627 (2009) is unavailing. In Adamy, the sentencing judge incorrectly believed that it did not possess the legal authority to impose a Special Sex Offender Sentencing Alternative or SSOSA, because Adamy was subject to deportation. At the time of Adamy's sentencing, there was a Supreme Court case that held a sentencing court did have authority to impose a SSOSA despite the possibility of deportation. Thus, the court found Adamy's counsel "deficient for failing to recognize and cite the appropriate case law" and "to argue for the consideration" of a SSOSA. Adamy, at 588. There is no indication here that either the court or counsel misunderstood or were ignorant of the law.

the record shows that Greene possesses any parenting skills or that he has undertaken the role of a father, let alone evidence that he even had custody of his children. Instead, the record shows he was dealing crack on the streets and that he intended to flee the state if released from custody. Add to this the fact that Greene had been through substance abuse treatment at least twice previously and failed, and he indicated that he had no desire to go through treatment again, and it becomes highly speculative and an unlikely proposition that the court would have imposed a PSA.

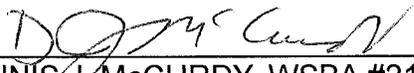
D. CONCLUSION

For the reasons cited above, this Court should affirm Greene's conviction and sentence.

DATED this 19 day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Richard Lechich at Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. GREENE, Cause No. 74019-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

08-19-16

Date