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C. STATEMENT OF THE CASE

I. FACTUAL HISTORY

Appellant Michael Johnson was convicted of three counts of delivery of methamphetamine, each with a school zone enhancement, and one count each of possession of methamphetamine and possession of marijuana (less than 40 grams). CP 160-167. He was given a standard range sentence. CP 201-212. The delivery charges were based on three controlled buys allegedly conducted by a police informant on September

26th, 2003, January 16th, 2004, and January 27th, 2004. Deputy Ty Mackay of the Skamania County Sheriff's Department testified about the three controlled buys on behalf of the State. RP 21. He testified the first buy occurred on September 26th, 2003. RP 28. Using an informant by the name of Tracy Foster, whom he characterized as a citizen informant, he conducted the first buy on September 26th, 2003. RP 29. He arranged for the buy to take place at 20 Leavens Street in Stevenson, an address shared by Mr. Johnson and several other people. RP 32, 188. Mr. Foster testified that this buy, from September of 2003, consisted of him buying methamphetamine from Mr. Johnson. RP 141.

The second buy occurred, according to the testimony of Deputy Mackay, on January 16th, 2004. RP 35. This buy also occurred at 20 Leavens Street. RP 38. Mr. Foster was asked by the prosecutor about this buy with the following question: "And in January 2004, did you make arrangements to buy something more than a quarter gram?" RP 143. Mr. Foster testified that in this "January 2004" buy, he purchased a teener of methamphetamine from Mr. Johnson. RP 145.

Regarding the third buy, Deputy Mackay did not testify, on direct examination by the State, the date on which it occurred. RP 42-45. He merely indicated that he needed to do one more controlled buy because his probable cause needed to be refreshed before he made application for a

search warrant. RP 42. Mr. Foster testified about this third buy but also did not indicate, during direct examination by the State, the date on which it occurred. RP 146-148. Mr. Foster testified that on this third occasion, he bought methamphetamine from Mr. Johnson. RP 147. Deputy Mackay testified on direct examination that after Mr. Foster gave him the substance he purchased from Mr. Johnson, he field tested it and it was positive for the presence of methamphetamine. RP 45. The prosecutor then asked: "What did you do with the substance then after that?" RP 45. Deputy Mackay then testified that it was secured to be sent up to the crime lab. RP 45. Deputy Mackay was then asked to identify Plaintiff's Exhibit number 4. He identified it by looking at the case number, date, and his initials contained on the outside of the envelope. RP 45. He testified that the date on the envelope was "1/27 of '04." RP 45. He did not testify that the date on this envelope was the same date on which the buy occurred.

On cross examination of Deputy Mackay, defense counsel asked: "And during the three times that you used Mr. Foster, that being September 26th, January 16th, and January 27..." RP 68. And on cross examination of Mr. Foster, defense counsel asked "Now the third time, that being January 27th, you agreed to do another buy; is that correct?" RP 159.

Mr. Johnson testified on his own behalf. He denied selling any methamphetamine at any time to Mr. Foster. RP 187-197.

Deputy Scheyer testified on behalf of the State regarding the distance from Mr. Johnson's residence to a school zone. Deputy Scheyer testified that she measured the distance with a digital range finder, pointing it at the residence at 20 Leavens Street while standing on the school property. RP 121-122. When asked if she had been trained in using this digital range finder, she replied that Sergeant Buettner "showed me how to use it." RP 122. When asked where she was standing at the time she made the measurement, she apparently became quite confused. RP 122-23. The prosecutor asked for a short recess so that she could further prepare her testimony, but the request was denied upon the objection of defense counsel. RP 123.

The prosecutor asked Deputy Scheyer if, using the range finder, she was able to come up with a distance from the school zone to the residence. RP 125. Defense counsel objected based on the lack of foundation for the reliability of the range finder, and the objection was sustained. RP 125. In an attempt to lay a proper foundation, the prosecutor asked Deputy Scheyer to explain what the range finder is. RP 125. She explained: "It's basically a digital readout, showing us the distance that you—there are cross hairs where you point to the distance

that you want to measure out, and you line up the cross hairs with the area that you want to measure in distance.” RP 125. The following exchange then occurred:

Prosecutor: “Okay. And has this item been used previously by the Sheriff’s Office?”

Scheyer: “I can’t say for sure. I’m assuming yes.”

Prosecutor: “Okay. And have you had any opportunity to use this item to measure its accuracy?”

Scheyer: “Rephrase the question.”

Prosecutor: “Have you ever had an opportunity to have this item used to kind of gauge its accuracy?”

Scheyer: “I haven’t personally, no.”

Prosecutor: “Okay. And do you know if this is an item that’s used by the Sheriff’s Office for this purpose?”

Scheyer: “Yes, it is.”

Prosecutor: “Okay. And has it been used for this purpose in the past?”

Scheyer: “I believe so, yes.”

Prosecutor: “Okay. And after having used this range finder to find a location from the school zone—school grounds to the residence at 20 Leavens Street...have—did you—would that be con—finding that—would that be consistent with what you would underest—understand that distance to be?”

Scheyer: “Pretty much, yes.”

Prosecutor: “Okay. And you weren’t shocked by the reading on the range finder?”

Scheyer: "No, not at all."

Prosecutor: "And the distance is approximately one city block?"

Scheyer: "Yes, yes."

Prosecutor: "As the crow flies?"

Scheyer: "Uh-huh."

Prosecutor: "Okay. And that's approximately how far?"

Scheyer: "Five hundred fifty-five feet."

Prosecutor: "And is that the—the number that you just indicated, is that the number that was—you—"

Defense counsel: "And Your Honor, I guess I would object as far as the form of the question. I don't know if that was dealing with how much is a city block, or what her believed estimate of the distance is. And if it was purportedly what the machine read out, I would renew my objection. I still don't see that there's been proper foundation laid as far as its reliability."

Court: "The answer is already in, Counsel. Overruled."

Prosecutor: "And now this figure that you had is consistent with the distance you would believe from the school grounds where you were standing to the location of 20 Leavens Street?"

Scheyer: "Yes."

Prosecutor: "Okay. And that distance was?"

Scheyer: "Five hundred fifty-five feet."

RP 126-27.

Mr. Johnson was convicted of each count as charged, and the jury found by special verdict that counts I, II, and III were committed within 1000 feet of a school zone. CP 160-167.

D. ARGUMENT

I. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL ELICITED PROOF OF AN ELEMENT OF COUNT III, WHERE THE STATE FAILED TO ELICIT PROOF OF THIS ELEMENT.

The State had two opportunities in which to elicit proof of an essential element of Count III, namely that Mr. Johnson delivered methamphetamine on January 27th, 2004. There were only two witnesses to the allegations of delivering methamphetamine: Deputy Mackay and Tracy Foster. Neither of these witnesses was asked, on examination by the prosecutor, the date of the third delivery. However, defense counsel asked each of these witnesses if the date of the third delivery was January 27th, 2004, to which they both replied yes. RP 68, 159. The jury was instructed that in order to find Mr. Johnson guilty of Delivery of Methamphetamine, as charged in Count III, they had to find, among other things: “That on or about the 27th day of January, 2004, the defendant delivered a controlled substance.” CP 147. It is ineffective assistance of

counsel for defense counsel to supply proof of an essential element of a crime charged where the State has failed to elicit such proof.

In order to establish a claim for ineffective assistance of counsel, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's errors, such that "but for counsel's errors the outcome of the proceedings would have been different." *State v. Varga*, 151 Wn.2d 179, 198 (2004); citing *State v. Brett*, 126 Wn.2d 136, 199, 829 P. 2d 29 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A reviewing court will presume the defendant received effective assistance of counsel unless that presumption is overcome by a clear showing of incompetence. *Varga* at 199; *State v. Piche*, 71 Wn.2d 583, 590-591, 430 P.2d 522 (1967). Ineffective assistance will not be found where counsel's actions go to the theory of the case or trial tactics. *Varga* at 199; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

It can hardly be argued that supplying proof of an essential element, where the State has failed to offer such proof, does not go to a legitimate trial tactic. A similar situation occurred in *State v. Lopez*, 107 Wn.App. 270, 27 P.3d 237 (2001), where the State failed to prove, in a prosecution for unlawful possession of a firearm, that the defendant had been convicted of a predicate felony. Defense counsel in that case failed

to move to dismiss the charge at the close of the State's case, and elicited from the defendant the necessary proof of the predicate felony during his testimony. *Lopez* at 276. The court reversed the defendant's conviction for unlawful possession of a firearm finding "no sound strategic or tactical reason" for counsel's error. *Lopez* at 277.

Here, counsel's performance was clearly deficient. The only question is whether it caused Mr. Johnson prejudice. The State may argue that it did, in fact, elicit proof of the essential element that the date of the Count III delivery was January 27th, 2004 by pointing to the fact that the date Deputy Mackay put on the outside of the evidence envelope was "1/27 '04." This, however, is proof of nothing but the date on which the evidence was logged. Absent some testimony or evidence that the date Deputy Mackay packaged the evidence was the same date the delivery occurred, this does not constitute proof of the essential element that Mr. Johnson delivered methamphetamine on January 27th, 2004. The only proof in the record that the delivery in Count III occurred on January 27th, 2004 came from proof elicited by defense counsel. As such, Mr. Johnson was denied effective assistance of counsel and his conviction on Count III should be reversed.

**II. THE TRIAL COURT ERRED IN ADMITTING
EVIDENCE OF A DIGITAL READOUT FROM THE**

**RANGE FINDER AS PROOF THAT THE DEFENDANT
DELIVERED METHAMPHETAMINE WITHIN ONE
THOUSAND FEET OF A SCHOOL ZONE.**

The State failed to lay a proper foundation for the admission of the digital readout from the range finder, used to establish proof that Mr. Johnson delivered methamphetamine within 1000 feet of a school zone. The sole foundation laid by the State consisted of testimony from Deputy Scheyer that she had been shown how to use the range finder by her Sergeant, that she assumed it had been used by the Sheriff's Department in the past, and that she was not "shocked" by the readout she got. Notably, Deputy Scheyer, according to her testimony, had never had the opportunity to measure the accuracy of the range finder. In an attempt to make up for this deficiency, the State simply asked Deputy Scheyer whether she was shocked at the digital readout she got, as though this would satisfy the need to lay a proper foundation for this type of evidence. The State made no attempt to establish that this device had been measured or certified for accuracy, or that it had been calibrated either the day the measurement was taken or ever. In fact the State made no attempt to even explain what this device does, beyond Deputy Scheyer's testimony that she simply points the cross hairs at the distance she wishes to measure.

Defense counsel twice objected to the admission of this evidence based on the total lack of foundation. The first objection was sustained.

Prior to the second objection, however, the prosecutor asked a very confusing and inartful series of questions: He asked Deputy Scheyer whether she believed that the distance from Mr. Johnson's residence to the school zone was approximately the same as one city block. Deputy Scheyer replied "yes." The prosecutor then asked her if she believed the distance of one city block was five hundred fifty five feet, and she replied "yes." The prosecutor, still having failed to lay a proper foundation for this evidence, began to ask Deputy Scheyer whether that distance, meaning the five hundred fifty five feet that comprises one city block, is the same distance she got on the digital readout from the range finder. At this point, before the prosecutor had even finished the question, defense counsel made a timely, if not early, objection. The court, however, ruled that the objection was untimely because it was tardy, saying "The answer is already in, Counsel. Overruled." Deputy Scheyer was then permitted to testify that the distance from Mr. Johnson's residence to the school zone, as revealed by a digital readout from a range finder of unknown reliability, was five hundred fifty five feet.

A court's decision whether to admit evidence is reviewed for abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Perrett*, 86 Wn.App.

312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997). Here, the trial court's decision to allow this evidence was not based on tenable grounds. The court did not rule that the State had laid a proper foundation for this incredibly damaging evidence, but rather ruled that defense counsel had made his objection at the wrong time. This was an abuse of discretion first, because the record reveals that the objection was timely rather than tardy, and second, even if the objection was tardy, the court should have treated it as a motion to strike the answer. Instead, the court gave the State a windfall and allowed in evidence which constituted the sole proof of three sentence enhancements and for which there was a total lack of foundation. There are better ways to train counsel on when to make objections than to punish Mr. Johnson in such a way that the State was able to prove three school zone sentence enhancements. It is apparent that without this unfounded range finder evidence, the State lacked the ability to prove these enhancements or else it would have done so from the beginning and saved the needless waste of trying to lay a foundation for this evidence (which it ultimately never did). Mr. Johnson's three sentence enhancements for delivering methamphetamine within one thousand feet of a school zone should be reversed.

E CONCLUSION

Mr. Johnson's conviction for Count III should be reversed, and Mr. Johnson's three sentence enhancements should be reversed.

RESPECTFULLY SUBMITTED this 15th day of 2005.


ANNE M. CRUSER, WSB# 27944
Attorney for Mr. Johnson

FILED
COURT OF APPEALS
DIVISION II

06 FEB 17 PM 2:41

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	Court of Appeals No. 33571-9-II
)	Skamania County No. 04-1-00010-4
Respondent,)	
)	AFFIDAVIT OF FAXING
vs.)	
)	
MICHAEL BRUCE JOHNSON,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 15th day of February 2006, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Peter S. Banks
Skamania County Prosecuting Attorney
P.O. Box 790
Stevenson, WA 98648
Phone # (509) 427-9406
Fax # (509) 427-4340

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
Phone # (253) 593-2970
Fax # (253) 593-2806

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

1
2
3 AND

4 Mr. Michael Johnson
5 DOC# 884822
6 Airway Heights Correctional Center
7 1919 West Sprague Avenue
8 Airway Heights, WA 99001

9 and that said envelope contained the following

- 10 (1) BRIEF OF APPELLANT
11 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. BANKS)
12 (3) R.A.P. 10.10 (TO MR. JOHNSON)
13 (4) AFFIDAVIT OF MAILING

14 Dated this 15th day of February 2006,

15 
16 ANNE M. CRUSER, WSBA #27944
17 Attorney for Appellant

18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
19 Washington that the foregoing is true and correct.

20 Date and Place: February 15th, 2006, Kalama, Washington

21 Signature: Anne M. Cruser