NO. 35312-1-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

GRANT WELLINGTON CHILDERS, SR.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable H. John Hall, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering a verdict finding Appellant Grant Childers guilty of delivery of methamphetamine, possession of methamphetamine, and fourth degree assault.

2. The trial court erred in not dismissing Count I as a matter of law for insufficient evidence of transfer of methamphetamine from one person to another.

3. In entering a verdict finding Childers guilty of Count I, the trial court erred in entering the following Finding of Fact insofar as the court found that that he arranged to purchase methamphetamine for Danielle Ortiz and that he delivered methamphetamine to Ortiz, and that Ortiz gave methamphetamine received from Childers to law enforcement:

> **Count I of the Second Amended Information.** The Court finds that On September 29, 2005, Grant Childers (Defendant) made arrangements with one Danielle Ortiz to purchase for Ms. Ortiz methamphetamine, a controlled substance as defined by RCW 69.50.401(1) & (2)(b) and RCW 69.50.206(d)(2). The two met at Fords Prairie School in Centralia, Lewis County Washington. Childers went to 1610 Windsor, in Centralia, where the buy was to take place. Ortiz went to Centralia College. Childers came back to Centralia College and told Ortiz to get into his truck. The two of them drove back to 1610 Winsor[sic]. Childers purchased the methamphetamine from Susan Kilpela, and then got back into his truck. During the purchase, Danielle Ortiz hid behind the front seat of the truck in the truck's extended cab. After taking his share of the methamphetamine, Grant Childers delivered the remaining methamphetamine to Danielle Ortiz

> at the corner of North Tower and 6th Street, in Centralia, Lewis County, Washington. Thereafter, Ortiz gave the methamphetamine to Centralia Police, who were monitoring the transaction.
>
> The Court did not find the bus stop testified to was a bus stop designated by the Centralia School District as required in RCW 69.50.435(c).

4. The trial court erred by entering the following Finding of Fact regarding Count II:

> **Count II of the Second Amended Information.** On September 30, 2005, Grant Childers (Defendant) was arrested at a Shell Station in Chehalis, Lewis County, Washington, for the delivery of the methamphetamine he made to Danielle Ortiz the day before. When he was arrested and placed into custody, a baggie of methamphetamine was found on his person. Childers admitted to officers the baggie did contain methamphetamine. Childers admitted this Count II when he took the stand and testified in his own defense at trial.

5. The trial court erred by entering the following Finding of Fact regarding Count III:

> **Count III of the Second Amended Information.** On September 29, 2005, when Childers stopped his truck for the purpose of allowing Ortiz to get behind the seat so she would no[t]sic be seen at the 1610 Windsor address, Childers purposely and intentionally struck Ortiz in the face with his left fist.

6. The trial court erred by making the findings in its oral ruling of July 24, 2006, insofar as it pertains to Counts I, II, and III, and the following Finding of Fact:

> These findings further adopt and incorporate by this reference all facts contained in the Court's oral ruling dated July 24, 2006.

7. In entering a verdict finding Childers guilty of Count I, the trial court erred in entering the following Conclusion of Law:

> The Court makes the following conclusions of law:
>
> a. Count I: THE DEFENDANT IS GUILTY OF VUCSA – Delivery of a Controlled Substance, Methamphetamine, occurring on September 29, 2005.

8. In entering a verdict finding Childers guilty of Count II, the trial court erred by entering the following Conclusion of Law:

> c. Count II: THE DEFENDANT IS GUILTY OF VUCSA – Possession of a Controlled Substance, Methamphetamine.

9. In entering a verdict finding Childers guilty of Count III, the trial court erred by entering the following Conclusion of Law:

> d. Count III: THE DEFENDANT IS GUILTY of Assault in the Fourth Degree, a Gross Misdemeanor.

10. The trial court abused its discretion in failing to recuse itself.

11. The court erred in finding Childers guilty in Counts I, II, and III, and erred by denying the defense motion for mistrial, where the State lost or failed to preserve pieces of evidence and failed to disclose a plea

agreement by a critical witness called by the State.

12. The trial court erred in permitting Childers to be represented by counsel who provided ineffective assistance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Childers' conviction for delivery of methamphetamine must be dismissed as a matter of law for insufficient evidence of transfer of the methamphetamine from one person to another? Assignments of Error No. 1, 2, 3, 6, and 7.

2. Should a trial court judge recuse himself when the defendant appeared before the judge on behalf of the Department of Corrections as a community corrections officer for a number of years? Assignment of Error No. 10.

3. Whether the proper remedy for the State's failure to preserve an interview tape of a critical witness and a surveillance videotape is dismissal of the charges or new trial? Assignments of Error No. 1, 3, 4, 5, 6, 7, 8, 9, and 11.

4. Whether the proper remedy for the State's failure to disclose the terms of a plea agreement involving a critical witness called by the State is dismissal of the charges or new trial? Assignments of Error No. 1, 3, 4, 5, 6, 7, 8, 9, and 11.

5. Whether the trial court erred in permitting Childers to be represented by counsel who provided ineffective assistance by failing to move for recusal of the trial court judge, and by failing to move to dismiss the charges when the State lost two pieces of evidence and failed to disclose the plea agreement of witness? Assignment of Error No. 12.

C. STATEMENT OF THE CASE[1]

1. Procedural history:

By second amended information filed March 10, 2006, the Lewis County Prosecutor charged appellant Grant Childers with delivery of methamphetamine,[2] with a school bus stop enhancement (Count I); possession of methamphetamine[3] (Count II); fourth degree assault[4] (Count III); and unlawful imprisonment (Count IV). Clerk's Papers [CP] at 78-80.

Childers waived his right to a jury trial on July 13, 2006. CP at 44-45.

The matter was tried to the Honorable H. John Hall on July 19, 20, and 24, 2006. On July 24, 2006, the court convicted Childers of delivery of methamphetamine (Count I), possession of methamphetamine (Count II), and fourth degree assault (Count III). 3RP at 67, 71, 73. He was found not guilty

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[1]This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

[2] RCW 69.50.401(1)
[3] RCW 69.50.4013(1)
[4] RCW 9A.36.041

of unlawful imprisonment. 3RP at 75. The court did not find that the delivery alleged in Count I occurred within 1000 feet of the perimeter of a school bus stop court. 3RP at 72.

a. Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law were entered August 28, 2006:

I. FINDINGS OF FACT

> **Count I of the Second Amended Information.** The Court finds that On September 29, 2005, Grant Childers (Defendant) made arrangements with one Danielle Ortiz to purchase for Ms. Ortiz methamphetamine, a controlled substance as defined by RCW 69.50.401(1) & (2)(b) and RCW 69.50.206(d)(2). The two met at Fords Prairie School in Centralia, Lewis County Washington. Childers went to 1610 Windsor, in Centralia, where the buy was to take place. Ortiz went to Centralia College. Childers came back to Centralia College and told Ortiz to get into his truck. The two of them drove back to 1610 Winsor [sic]. Childers purchased the methamphetamine from Susan Kilpela, and then got back into his truck. During the purchase, Danielle Ortiz hid behind the front seat of the truck in the truck's extended cab. After taking his share of the methamphetamine, Grant Childers delivered the remaining methamphetamine to Danielle Ortiz at the corner of North Tower and 6th Street, in Centralia, Lewis County, Washington. Thereafter, Ortiz gave the methamphetamine to Centralia Police, who were monitoring the transaction.
>
> The Court did not find the bus stop testified to was a bus stop designated by the Centralia School District as required in RCW 69.50.435(c).

Count II of the Second Amended Information. On September 30, 2005, Grant Childers (Defendant) was arrested at a Shell Station in Chehalis, Lewis County, Washington, for the delivery of the methamphetamine he made to Danielle Ortiz the day before. When he was arrested and placed into custody, a baggie of methamphetamine was found on his person. Childers admitted to officers the baggie did contain methamphetamine. Childers admitted this Count II when he took the stand and testified in his own defense at trial.

Count III of the Second Amended Information. On September 29, 2005, when Childers stopped his truck for the purpose of allowing Ortiz to get behind the seat so she would no[t] [sic] be seen at the 1610 Windsor address, Childers purposely and intentionally struck Ortiz in the face with his left fist.

Count IV of the Second Amended Information. Danielle Ortiz voluntarily got into Grant Childers' truck and voluntarily got behind his back seat to hide. Ortiz admitted that after being hit in the face by Childers, she could have left. However, Ortiz said she stayed in the truck to complete the purchase of methamphetamine.

These findings further adopt and incorporate by this reference all facts contained in the Court's oral ruling dated July 24, 2006.

Based on the foregoing Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

2.1 The Court has jurisdiction over the Defendant and the subject matter of this action. All acts testified to by the witnesses occurred within Lewis County, Washington State[.]sic

2.2 The Court makes the following conclusions of law:

a. Count I: THE DEFENDANT IS GUILTY OF VUCSA – Delivery of a Controlled Substance, Methamphetamine, occurring on September 29, 2005.

b. There is no finding that the delivery occurred within 1000 feet of the perimeter of a school bus stop determined to be a school bus stop by the Centralia School District.

c. Count II: THE DEFENDANT IS GUILTY OF VUCSA – Possession of a Controlled Substance, Methamphetamine.

d. Count III: THE DEFENDANT IS GUILTY of Assault in the Fourth Degree, a Gross Misdemeanor.

e. Count[y]sic IV: THE DEFENDANT IS NOT GUILTY of Unlawful Imprisonment.

CP at 29-32. Appendix A-1 through A-4.

2. Sentencing:

The matter came on for sentencing on August 28, 2006. Childers was given an opportunity for allocution. RP (August 28, 2006) at 8. The court sentenced Childers to a standard range sentence of 16 months for Count I, three months for Count II, and 30 days for Count III, to be served concurrently. RP (August 28, 2006) at 10. CP at 24. Timely notice of this appeal followed. CP at 1-11, 18.

3. Substantive facts:

Danielle Ortiz worked for the Centralia Police Department as a paid "confidential informant," starting in August, 2005. 1Report of Proceedings [RP] at 9, 44,106.[5] Her contact at the Centralia Police Department was Christi Fitzgerald. 1RP at 10. In her capacity as a snitch, Ortiz would engage in "controlled buys," where she would take money from the police and use it to obtain drugs. 1RP at 106. Including the alleged offense involving Childers, Fitzgerald stated Ortiz made seven or eight "buys" for the police. 1RP at 44. Ortiz was not facing criminal charges, but her children had been removed by the Department of Child and Family Services due to drug abuse by Ortiz, which Fitzgerald cited as one of the reasons that Ortiz wanted to do drug buys for the police. 1RP at 10, 45.

Fitzgerald described Ortiz as a drug addict who had been arrested for drug offenses in the past. 1RP at 45. Ortiz was a drug addict for twenty years, and described herself as being "in recovery." 1RP at 106, 132. Ortiz had been drug free for a little over a month at the time she engaged in the

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[5] The Verbatim Report of Proceedings consists of 13 volumes of transcripts [RP], which are referred to in this Brief as follows:
1RP July 19, 2006 Trial
2RP July 20, 2006 Trial
3RP July 24, 2006 Trial
RP (April 11, 2006) Pretrial hearing
RP (August 28, 2006) Sentencing

alleged controlled buy with Childers. 1RP at 42. Ortiz asserted that Childers would sell her drugs and they had used drugs together in the past. 1RP at 107, 134. She acknowledged having been a drug dealer. 1RP at 134. She asserted that she was clean in August, 2005 and that she went to the police regarding Childers "[b]ecause he used to always sell me the dope." 1RP at 107.

Childers was Ortiz's protective payee between October 2004 and April 2005. 1RP at 105. Childers worked as a protective payee for the Department of Social and Health Services after he retired from his previous job with the Department of Corrections. 1RP at 104, 3RP at 7-9. He was a protective payee between May 2003 and June, 2005. 3RP at 9. He stated that Ortiz was referred to him due to drug addiction and mental health issues. 3RP at 9.

a. September 28, 2005

Ortiz called Fitzgerald on September 28, 2005, and asked her if she knew Grant Childers. 1RP at 12, 48. Fitzgerald knew Childers as a former Department of Corrections officer. 1RP at 11. Fitzgerald stated that Oritz told her that she had made an agreement to buy an eighth of an ounce of methamphetamine from Childers for $150.00. 1RP at 12. Fitzgerald stated that they were going to meet at 9:00 a.m. the next day in the parking lot of

Fords Prairie Elementary School in Centralia. 1RP at 13.

b. September 29, 2005

On September 29, 2005 Ortiz was searched by Fitzgerald at a location close to the school. 1RP at 15, 53, 55. Her Ford Explorer was also searched. 1RP at 16, 2RP at 27. She was given $150.00 in cash, and she then drove to the school. 1RP at 16-17. The school parking lot was under observation by members of law enforcement. 1RP at 17-18. Ortiz stated that Childers asked her for money and that he would then "go get it[,]" and that he did not have methamphetamine with him. 1RP at 111. She stated she refused to give him money, and that he then used her cell phone to make a call. 1RP at 111. She stated that she told him when he got the drugs, he should go to Centralia College, where she was taking a parenting class as part of her DCFS case. 1RP at 111. Ortiz drove back from the school to meet police at the location where she was initially searched and told them that she had not purchased drugs, but that Childers was going to meet her at a location near the Centralia College. 1RP at 20. Ortiz was searched again, and then she drove to the college. 1RP at 112, 2RP at 29.

At a college parking lot, Childers pulled up behind her in his truck, rolled down his window and told her that she was being followed. 1RP at 113. He told her to get into his truck. 1RP at 113.

Fitzgerald stated that while they were going to the college, Ortiz called her to say that the Childers called her to point out Fitzgerald's vehicle as a drug enforcement vehicle, and that she was being followed. 1RP at 26.

Ortiz got into Childers' truck and they drove to a location in north Centralia, where Childers pulled over and told her to get into the back of the truck cab. 1RP at 116. The police followed Childers from the college to a trailer located at 1610 Windsor, in north Centralia. 2RP at 96-97.

Ortiz stated that when she was climbing into the back portion of the truck, Childers hit her in the forehead and told her that he heard from two different people that she was a snitch. 1RP at 117. He then drove while she was on floorboard of the vehicle. 1RP at 119. He parked the truck and told her to give him the money. 1RP at 149. Childers was observed by police getting out of the truck, going inside the trailer, and then returning a few minutes later. 2RP at 97, 104.

When he returned, Ortiz stated that he said that he had already taken his part out. 1RP at 119. She stated that while driving back to the college, Childers pulled over at 6th and Tower Street and told her that she could get into the front of the truck. 1RP at 120. She stated that Childers gave her the drugs at Sixth and Tower before she got out to get into the front seat. 1RP at 121. 3RP at 38. He then took her back to Centralia College. 1RP at 123.

Fitzgerald testified that she saw Ortiz standing outside the truck on the corner of 6th and Tower, when they were returning from 1610 Windsor. 1RP at 25.

After she was dropped off at the college, Ortiz met with Fitzgerald. Fitzgerald stated that Ortiz told her that Childers had hit her. She stated that Ortiz had a knot on her forehead. 1RPat 29. Exhibits 2 and 3. Ortiz gave Fitzgerald a Ziploc baggie containing a while crystalline powder. 1RP at 32. Exhibit 4. The powder tested positive for the presence of methamphetamine. 1RP at 84.

Ortiz was debriefed by police following the incident, she made a taped statement to Fitzgerald on September 30, 2005. 1RP at 153. In her statement she stated that after buying the drugs at 1610 Windsor, Childers pulled over and let her out of the truck. She stated that Childers was not going to let her in the truck again at first and that he had the methamphetamine. 1RP at 155. In her statement, she said that when got back into the truck and grabbed the methamphetamine from him because he told her that he was not going to give it to her. 1RP at 155. The statement was marked as Defendant's Identification 6 but was not introduced into evidence.

Childers testified that Ortiz owed him $500.00, but Jennifer Langford, a friend of Ortiz', paid him $200.00 of the debt in January, 2005. 3RP at 12,

13. He stated that the debt was incurred when Ortiz was arrested and put in the Lewis County jail in January, 2005. 3RP at 12. He wrote a check for $500.00, which she "was going to pay the rent and she was going to use some of it for bail money." 3RP at 12. The rent was not paid, and so Childers paid the rent amount of $500.00 out of his own funds. 3RP at 13. Ortiz did not repay Childers the $300.00. 3RP at 14. Ortiz called Childers' house on September 28, 2005 a number of times. When Childers spoke with her, she said that he had her social security settlement and would repay him $500.00 if Childers purchased methamphetamine for her. 3RP at 15. He refused to do so. She called his house a number of times, irritating his wife. 3RP at 15-16. He then agreed to meet her on the morning of September 29 at Fords Prairie School. 3RP at 16. He testified that he went to her car in the school parking lot and told her that he was going to try to get the drugs for her, and then left her there. 3RP at 16. He then went to Susan Kilpela's trailer at 1610 Windsor. 3RP at 16. He testified that he talked with her about his computer. 3RP at 17. He denied buying methamphetamine from Kilpela. 3RP at 17.

Childers then went to Centralia College and met with Ortiz. 3RP at 17. He told her that he was going to take her to Kilpela's house to get her methamphetamine and that "she would have to come along to pay for it." 3RP at 17. He stated that she didn't want to give him the money to take.

3RP at 17. They then went to Kilpela's trailer in his pickup truck. He told Ortiz that if she "wanted it to go through" she should get into the back seat of the truck, which was a crew cab, and stay out of sight because the methamphetamine dealer did not like strangers. 3RP at 19. He pulled over and she got into the back portion of the truck. 3RP at 19, 20. He denied hitting her. 3RP at 19, 22.

Childers testified that Ortiz gave him $150.00, and he went into the house and talked to Kilpela. 3RP at 25. He bought methamphetamine from Kilpela, then went back out and told Ortiz that Kilpela did not have any methamphetamine and that he was keeping the $150.00 because it was part of what she owed to him from the rent money he paid on her behalf. 3RP at 25. She agreed, and they drove back to Centralia College and he dropped her off at her vehicle. 3RP at 25.

Susan Kilpela lived at 1610 Windsor, Space 16 in Centralia until June, 2006. 2RP at 2. She stated that she sold 3.5 grams of methamphetamine for $150.00 to Childers in September, 2005. 2RP at 4, 22.

Childers was friends with Susan Kilpela, and admitted using methamphetamine with her in the past. 3RP at 10. He acknowledged getting methamphetamine from Ortiz on approximately twelve occasions over the course of a year and a half. 3RP at 10, 33. He denied selling

methamphetamine he obtained from Kilpela. 3RP at 10-11. He stated that all the methamphetamine that he obtained from Kilpela was for his personal use and that he did not sell it to others. 3RP at 33. He denied giving or selling Ortiz methamphetamine. 3RP at 35. He stated that he stashed the drugs that he obtained from Kilpela on September 29. 3RP at 32.

c. September 30, 2005

Fitzgerald said that Ortiz arranged to buy a quarter ounce of methamphetamine for $250.00 from Childers on September 30. 1RP at 35, 36. Ortiz called Childers and they arranged to meet at a Laundromat in Centralia. 1RP at 125. On that day Fitzgerald searched Ortiz at the Centralia police station and gave her $250.00 to purchase methamphetamine. 1RP at 36, 126; 2RP at 31. At the Laundromat, she got into Childers' Mustang and they went over the viaduct to Kilpela's house. Ortiz stated that Kilpela was not home and that Childers used her cell phone to make calls. She stated that he then took her a "caravan ride everywhere trying to find some stuff." 1RP at 128. Ortiz was upset because she said Childers was going to take the $250.00 because she owed him money. She stated that Childers was driving erratically and was accusing her of being a snitch. 1RP at 42. She stated that they went to a Shell gasoline station in Centralia, that Childers was angry, and that he took the money she had in her hand and said that he was "going to

get gas and donuts like they used to do at the Shell station." 1RP at 128. She testified that before he got out, he said that she was a snitch and that he was "going to slam a syringe in my leg." 1RP at 129. While he was in the gas station, she remained in the car and locked the doors. She used her cell phone to call Fitzgerald and said that she was scared. 1RP at 130. The police surveilling the Mustang placed Childers under arrest at the gas station. 1RP at 131; 2RP at 33. The $250.00 provide by police was recovered, including $20.00 that Childers had spent at the station. 1RP at 39. Police found syringes in the back of the Mustang. 1RP at 75. They found a Q-tip and a plastic Ziploc bag containing white crystalline residue in Childers' left front pants pocket. 1RP at 39; 2RP at 34, 79. Exhibit 5. The contents of the bag tested positive for the presence of methamphetamine. 1RP at 86. Childers was administered his constitutional warnings pursuant to *Miranda*. According to law enforcement, Childers first said that it was a sugar supplement, but then said that it was methamphetamine.[6]

Fitzgerald stated that Ortiz told her that he had syringes in the back of the Mustang and that he was going to force her to "fire up"---or inject methamphetamine---and then would see whether she was a snitch. 1RP at 42,

[6] During trial, Childers waived his right to a Criminal Rule 3.5 hearing. 2RP at 77-78. Childers admitted during his testimony that the Ziploc bag recovered on September 30, 2005 contained methamphetamine. 3RP at 31.

77.

The $150.00 given to Ortiz on September 29 was not obtained by police. 1RP at 54; 2RP at 38.

Childers testified that he heard from Ortiz later on September 29, 2005, and that "[s]he wanted to buy more, she wanted to get more methamphetamine, she would repay me the rest of the money." 3RP at 26. He agreed to meet with her on September 30. 3RP at 26. He picked her up at the Laundromat in Centralia and they drove back to Kilpela's trailer and he knocked on the door. 3RP at 27. The person who answered said that Kilpela was not there. 3RP at 27. While en route back to the Laundromat, he stopped for gasoline at the Shell station, and was arrested. 1RP at 180-81, 191-93; 3RP at 27-29. Childers acknowledged that he had methamphetamine residue in a baggie in his pocket. 3RP at 31-32. Exhibit 5. He stated that while parked at the station, Ortiz handed him $20.00, which he used to buy gas and "a couple apple strudels[.]" 3RP at 28. He stated that the syringes in the back of the Mustang were for Ortiz, because she had "mentioned on the phone the first day that she always had a problem getting syringes." 3RP at 30. He denied threatening to inject her with drugs. 3RP at 30. He stated that he suspected she was a snitch, but did not take it seriously because he had no intention of providing her with drugs. 3RP at 30.

D. ARGUMENT

1. CHILDERS' CONVICTION FOR DELIVERY OF METHAMPHETAMINE MUST BE DISMISSED AS A MATTER OF LAW FOR INSUFFICIENT EVIDENCE OF TRANSFER OF THE METHAMPHETAMINE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to 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). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilty beyond a

reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Childers was charged and convicted of delivery of a controlled substance. A conviction for delivery of a controlled substance under the Washington Uniform Controlled Substance Act, RCW 69.50 et seq., requires, in part, proof beyond a reasonable doubt that a person (1) delivered, (2) a controlled substance, (3) through either "actual or constructive transfer from one person to another." *See* RCW 69.50.101(f) and RCW 69.50.401.

Neither "transfer" nor "constructive transfer" is defined by the Act. Washington case law defines "transfer" as "to cause to pass from one person or thing to another" or "to carry or take from one person or place to another." *State v. Ramirez*, 62 Wn. App. 301-308-09, 814 P.2d 227 (1991).

There was insufficient evidence presented at trial that Childers delivered methamphetamine to Ortiz. As noted *supra*, in order to prove that Childers committed the unlawful delivery of a controlled substance, the State had to prove beyond a reasonable doubt that Childers (1) actually transferred the methamphetamine to Ortiz, and (2) that he knew that it was methamphetamine. *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). The evidence presented at trial does not support the finding that Childers delivered methamphetamine to Ortiz; instead, the record shows that

her initial statement to police on September 30, 2005 was that she grabbed the methamphetamine from his hand.

Ortiz' story changed by the time the case went to trial ten months later. Ortiz testified at trial that on September 29, 2005, Childers took the money and left the truck while she remained on the floorboard of the vehicle. 1RP at 119. She testified that he returned to the truck and then drove back over the viaduct and then pulled over and said that she could get up in the front. 1RP at 120. She testified that Childers "handed [the drugs] to me before I got out of the car to get in the front seat" and that this occurred at 6th and Tower 1RP at 120, 121. In her taped debriefing with Fitzgerald, however, Ortiz stated that after he pulled the truck over, she got out of the truck without the methamphetamine. 1RP at 155. She got back into the truck grabbed the methamphetamine from Childers because he told he that he was not going to give it to her at first. 1RP at 155. On cross-examination, Ortiz adopted the taped statement she made to Fitzgerald rather than her testimony during direct examination. 1RP at 155-56. On cross-examination, counsel asked Ortiz about her taped September 30, 2005 statement to Fitzgerald:

> [Defense counsel]: Then you said, ["]I get back in and I just grabbed it from him because he told me he wasn't going to give it to me at first.["] So you're back in the truck when you

get the dope from him, aren't you?

[Ortiz]: No. This here is a statement after. When things happened I would be able to remember it better then. It's been almost a year later. I can't remember the time, date, what exactly happened.

Q: You're saying this is more reliable than the testimony you gave today, is that your testimony?

A: If I said it in here is when this happened.

. . .

Q: You testified today that he handed you the drugs at that stop sign?

A: Um-hmmm.

Q: At 6th and Tower?

A: Uh-huh.

Q: Is that when you were out of the truck or lying in the back?

A: This here says what it says. I was out of the truck, he handed it to me.

Q: Your testimony today was you were still in the back of the truck when he handed it to you?

A: I know.

Q: Which is it?

A: What this says.

1RP at 157-58.

Ortiz initially told the police that she grabbed the methamphetamine from Childers. At trial she testified during direct examination that Childers gave the drug to her, but on cross examination she tries to have it both ways, but clearly endorses her statement to police by stating that she would have been able to remember it better back on September 30, 2005. 1RP at 157-58.

The term "transfer" in the context of the definition of "delivery," "contemplates that a person who transfers undertakes the active task of relinquishing control to another." *State v. Morris*, 77 Wn. App. 948, 951, 896 P.2d 81 (1995). Based on this definition of transfer, there is insufficient evidence to support a finding that Childers delivered the drug to Ortiz, particularly where she impliedly adopted her September 30, 2005 statement to police that she grabbed the drugs from Childers because he was not going to give the drugs to her.

Based on her testimony regarding the September 30 statement, Childers' conviction for delivery of methamphetamine, as a matter of law, must be reversed and dismissed.

2. JUDGE HALL ABUSED HIS DISCRETION BY FAILING TO RECUSE HIMSELF.

The appearance of fairness doctrine, which applies to judicial and quasi-judicial officers, seeks to prevent the evil of a biased decision maker. *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). Not only must a judge be impartial, but he or she must appear to be impartial. *Id.*

Canon 3 of the Code of Judicial Conduct (CJC) requires a judge to perform the duties of his office impartially and diligently. *Sherman v. State*, 128 Wn.2d 164, 204, 905 P.2d 355 (1995). Due process, the appearance of fairness doctrine and CJC Canon 3(D)(1) require a judge to disqualify himself if he or she is biased against a party or when his or her impartiality may be reasonably questioned. *State v. Dominguez*, 81 Wn. A pp. 325, 328, 914 P.2d 141 (1996) (citations omitted).

The party claiming bias must present evidence of the judge's actual or potential bias. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013 (1995). A decision on recusal is reviewed for an abuse of discretion. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), *review denied*, 134 Wn.2d 1014 (1998).

A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d

822, 830, 845 P.2d 1017 (1993).

Childers was retired after a 26-year career with the Department of Corrections. 3RP at 7. While employed with the DOC he worked as counselor at Cedar Creek Corrections Center, a unit supervisor at Shelton Corrections Center, and as a community corrections officer in Lewis County. 3RP at 7. At sentencing Judge Hall stated:

> I've known Mr. Childers as a community corrections officer for a number of years. He's generally appeared in the court on probation violations through those years and I'm well aware of his former Department of Corrections position and that he is retried from the Department of Corrections.

RP (August 28, 2006) at 8-9.

Judge Hall's contact with Chiders, who had appeared in his courtroom over "a number of years" in his capacity as a community corrections officer, violated the appearance of fairness doctrine due to his potential bias. Judge Hall abused his discretion by failing to recuse himself.

3. THE LOSS OF TWO PIECES OF EVIDENCE BY THE STATE MANDATES DISMISSAL.

The State has the constitutional duty to afford defendants due process by preserving material exculpatory evidence; if it does not do so, the remedy is dismissal of charges against the defendant. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires criminal

prosecutions to "conform with prevailing notions of fundamental fairness." *Id.* Constitutional error may be raised for the first time on appeal. RAP 2.5(a).

To constitute material exculpatory evidence, "the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Wittenbarger, supra,* citing *California v. Trombetta*, 467 U.S 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). If the evidence does not meet this test and is only "potentially useful" to the defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the *State. Wittenbarger*, 124 Wn.2d at 477, 880 P.2d 517 (*citing, Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). See, *State v. Burden*, 104 Wn. App. 507, 17 P.3d 1211 (2001).

In the case at bar, a videotape made by Officer Tracy Murphy of the Centralia Police Department on September 29, 2005 at Fords Prairie School and Centralia College was lost. RP (April 11, 2006) at 10-11. 2RP at 66-67, 82-83. In addition, Susan Kilpela was interviewed twice by law enforcement: the first time on February 17, 2006, and again on April 20, 2006. 2RP at 7, 48. The recording of the February 17, 2006 interview was lost. RP (April 11,

2006) at 8-9. 2RP at 14, 15, 48-49. The April 20, 2006 Kilpela interview was not provided to the defense. 2RP at 8.

Kilpela was interviewed by a defense investigator on April 7, 2006. 2RP at 17-18.

The April 20 interview of Kilpela may have contained information that would have assisted counsel in the impeachment of Kilpela. During Kilpela's testimony on July 20, 2006, she revealed that she had been convicted of selling methamphetamine and was testifying against Childers as part of a plea agreement. 2RP at 13-17. Her testimony at Childers' trial helped her avoid an additional four years in prison. 2RP at 17. Defense counsel had not previously been aware of the plea agreement and vigorously objected to her testimony and moved for mistrial. 2RP at 7-11. The defense motion for mistrial and motion to strike Kilpela's testimony were denied. 2RP at 11. The fact of her plea agreement was not revealed to defense counsel, who learned of it for the first time on the morning of July 20, 2006, the second day of trial. 2RP at 6, 9. The interview was provided to the defense investigator Jim Armstrong by the prosecution, but it was not received by defense counsel. 2RP at 8. The deputy prosecutor, on the other hand, stated that a copy of the interview was sent to defense counsel. 2RP at 9.

The April 20 interview occurred approximately two weeks after Kilpela entered guilty pleas to drug charges. 2RP at 19. There can be no question of the value of the April 20 interview. Regardless of the circumstances of the transcript, it is uncontested that the State lost the audiotape recording of Kilpela interview and it is uncontested that the State did not provide a copy of the Kilpela's plea agreement to the defense. 2RP at 8. The State had the Constitutional duty to preserve the Kilpela interview, the videotapes by Murphy, and the State has no excuse for having lost that evidence. The error claimed is not an obscure equipment maintenance record such as the evidence in *Wittenbarger*. In *Wittenbarger*, the question was whether the police should have known the records were important enough to retain. Here, even the greenest police officer—even the greenest layman to be found on the street—knows the importance of the evidence and the importance of not losing it.

To have the State lose one piece of evidence is damning, and each error on its own argues for reversal or summary dismissal; but their combined force, in addition to the failure to disclose Kilpela's plea agreement, mandates at least reversal for retrial, but, more properly, dismissal with prejudice.

4. CHILDERS' TRIAL COUNSEL FAILED HIM IN A VARIETY OF WAYS.

a. A criminal defendant is guaranteed the effective assistance of counsel.

The Sixth Amendment to the United States Constitution and Const. art. I, § 22 (amend. 10) guarantee the accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The accused has received ineffective assistance of counsel when (1) counsel's performance was deficient and (2) the deficient performance prejudiced the accused. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. Where counsel's conduct cannot be characterized as legitimate tactics, it constitutes ineffective assistance. 109 Wn.2d at 228-30.

Counsel's performance falls below an objective standard of reasonableness when she fails to bring a motion concerning a material issue on which his client most likely would have prevailed. *See, e.g., State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001) (counsel's failure to bring a meritorious motion was deficient performance; the defense was prejudiced

where there was a reasonable probability the motion would have been granted; because no legitimate tactical reason supported counsel's failure, reversal was required); *State v. Rainey*, 107 Wn. App. 129, 135-35, 28 P.3d 10 (2001 (counsel's failure to bring a meritorious motion was deficient performance which prejudiced the accused; reversal was required); *State v. Klinger*, 96 Wn. App. 619, 623-24, 629, 908 P.2d 282 (1999) (defense counsel failed to move to suppress; counsel's performance was deficient because counsel normally brings such a motion when there is a question as to the validity of the search and seizure); *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (the failure to argue a rule requiring dismissal in the face of a motion to amend constitutes ineffective assistance of counsel). By bringing such a motion, defense counsel affords the court the opportunity to correct the error, and thereby avoid unnecessary appeals and retrials. *State v. Thompson*, 55 Wn. App. 88, 892, 781 P.2d 501 (1989) (citations omitted).

b. <u>Counsel's representation fell below an objective standard of reasonableness when he failed to move for recusal</u>.

As stated previously, CJC Canon 3(D)(1) require a judge to disqualify himself if his impartiality may be reasonably questioned. Had counsel moved for recusal, Judge Hall would have been required to grant the motion. Had Judge Hall denied the motion, the issue would have been preserved for

appeal. Consequently, Childers was prejudiced by counsel's deficient performance in failing to bring the motion for recusal. *See, e.g., State v. Klinger*, 96 Wn. App. at 623-24, 629 (counsel's failure to move to suppress prejudiced Klinger as it was likely that, had the motion been made, the court would have granted it); *State v. Carter*, 56 Wn. App. at 225 (had counsel moved to dismiss, the motion probably would have been granted; thus, counsel's failure to do so prejudiced Carter). Childers' convictions therefore, must be vacated and his case remanded for new trial before a different judge.

c. Childers was prejudiced as a result of his trial counsel's failure to move for dismissal of the case when Kilpela's interview and the videotape was lost by the State, and when the State failed to disclose Kilpela's plea agreement.

As noted *supra*, a criminal defendant claiming ineffective assistant must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.

App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *see State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. *State v. Doogan*, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this Court find that trial counsel waived or invited the error claimed and argued in the preceding sections of this brief, both elements of ineffective assistance of counsel have been established.

The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

First, the record does not reveal any tactical or strategic reason why

trial counsel would have failed to present the argument set forth in Section 3, *supra*. And had counsel done so, the motion to dismiss would have been granted under the law set forth therein.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to argue for dismissal, the motion would have been granted for the reasons articulated in the preceding section.

Trial counsel's performance was thus deficient, which was highly prejudicial to Childers, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions. There was a reasonable probability that, but for counsel's error, the results of the trial would have been different.

E. CONCLUSION

For the foregoing reasons, Childers respectfully requests that this Court reverse and dismiss his conviction in Count I, consistent with the argument presented herein. In the alternative, this Court should vacate

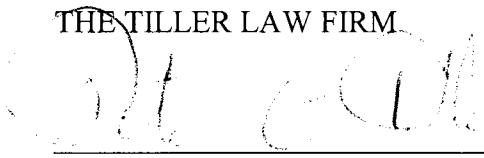
Childers' convictions and dismiss the case with prejudice or remand for new trial.

In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: March 21, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



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Of Attorneys for Grant Childers

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON Plaintiff, vs. GRANT CHILDERS, Defendant.	No. 05-1-00714-6 FINDINGS OF FACT AND CONCLUSIONS OF LAW (BENCH TRIAL)

THIS MATTER came on before the Court for bench trail on July 19, 2006. Trial concluded July 24, 2006. The Defendant was present and represented by his counsel, Michael Underwood. The State was represented by J. Bradley Meagher, Deputy Prosecuting Attorney. The Court, having reviewed the evidence submitted and having heard the testimony presented, now, therefore, makes the following:

I. FINDINGS OF FACT

Count I of the Second Amended Information. The Court finds that On September 29, 2005, Grant Childers (Defendant) made arrangements with one Danielle Ortiz to purchase for Ms. Ortiz methamphetamine, a controlled substance as defined by RCW 69.50.401(1) & (2)(b) and RCW 69.50.206(d)(2). The two met at Fords Prairie School, in Centralia, Lewis County

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Washington. Childers went to 1610 Windsor, in Centralia, where the buy was to take place. Ortiz went to Centralia College. Childers came back to Centralia College and told Ortiz to get into his truck. The two of them drove back to 1610 Winsor. Childers purchased the methamphetamine from Susan Kilpela, and then got back into his truck. During the purchase, Danielle Ortiz hid behind the front seat of the truck in the truck's extended cab. After taking his share of the methamphetamine, Grant Childers delivered the remaining methamphetamine to Danielle Ortiz at the corner of North Tower and 6th Street, in Centralia, Lewis County, Washington. Thereafter, Ortiz gave the methamphetamine to Centralia Police, who were monitoring the transaction.

The Court did not find the bus stop testified to was a bus stop designated by the Centralia School District as required in RCW 69.50.435(c).

Count II of the Second Amended Information. On September 30, 2005, Grant Childers (Defendant) was arrested at a Shell Station in Chehalis, Lewis County, Washington, for the delivery of the methamphetamine he made to Danielle Ortiz the day before. When he was arrested and placed into custody, a baggie of methamphetamine was found on his person. Childers admitted to officers the baggie did contain methamphetamine. Childers admitted this Count II when he took the stand and testified in his own defense at trial.

Count III of the Second Amended Information. On September 29, 2005, when Childers stopped his truck for the purpose of allowing Ortiz to get behind the seat so she would no be seen at the 1610 Windsor address, Childers purposely and intentionally struck Ortiz in the face with his left fist.

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Count IV of the Second Amended Information. Danielle Ortiz voluntarily got into Grant Childer's truck, and voluntarily got behind his back seat to hide. Ortiz admitted that after being hit in the face by Childers, she could have left. However, Ortiz said she stayed in the truck to complete the purchase of methamphetamine.

These findings further adopt and incorporate by this reference all facts contained in the Court's oral ruling dated July 24, 2006.

Based on the foregoing Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

2.1 The Court has jurisdiction over the Defendant and the subject matter of this action. All acts testified to by the witnesses occurred within Lewis County, Washington State

2.2 The Court makes the following conclusions of law:

a. Count I: THE DEFENDANT IS GUILTY OF VUCSA - Delivery of a Controlled Substance, Methamphetamine, occurring on September 29, 2005.

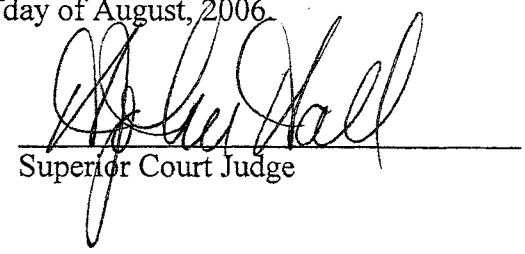
b. There is no finding that the delivery occurred within 1000 feet of the perimeter of a school bus stop determined to be a school bus stop by the Centralia School District.

c. Count II: THE DEFENDANT IS GUILTY OF VUCSA - Possession of a Controlled Substance, Methamphetamine.

d. Count III: THE DEFENDANT IS GUILTY of Assault in the Fourth Degree, a Gross Misdemeanor.

e. County IV: THE DEFENDANT IS NOT GUILTY of Unlawful Imprisonment.

DONE IN OPEN COURT this 28th day of August, 2006.



Superior Court Judge

Prepared and Presented by:

Approved as to form and content:

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. GRANT WELLINGTON CHILDERS, SR., Appellant.	COURT OF APPEALS NO. 35312-1-II CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Grant W. Childers, Appellant, and Michael Golden, Prosecuting Attorney, by first class mail, postage pre-paid on March 21, 2007, at the Centralia, Washington post office addressed as follows:

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DATED: March 21, 2007.

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