

NO. 39036-1-II

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

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

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN KENTRELL ROSS,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John F. Nichols, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR .....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1

C. STATEMENT OF THE CASE.....2

    1. Procedural history .....2

    2. Trial testimony .....4

D. ARGUMENT.....9

    1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ROSS POSSESSED MARIJUANA FOUND IN AN APARTMENT ON JUNE 13, 2008 .....9

        a. The State was required to prove every element of the crime beyond a reasonable doubt.....9

        b. The State did not prove beyond a reasonable doubt that Ross was in actual possession of marijuana on June 13, 2008 .....11

        c. The State did not prove beyond a reasonable doubt that Ross was in constructive possession of marijuana.....12

        d. This Court must reverse and dismiss the conviction in Count II .....14

    2. RCW 9.94A.533(6) IS AMBIGUOUS AS TO WHETHER THE IMPOSITION OF CONSECUTIVE 24-MONTH ENHANCEMENTS TO ALL OTHER SENTENCING PROVISIONS INCLUDES OTHER 24-MONTH ENHANCEMENTS AND

**THUS UNDER THE RULE OF LENITY THE  
STATUTE MUST BE INTERPRETED TO  
REQUIRE CONCURRENT  
ENHANCEMENTS .....15**

**a. The Legislature’s wording of the school bus stop enhancement is different than other enhancements and thus the school bus stop enhancement must be interpreted differently.....16**

**F. CONCLUSION .....20**

**F. APPENDIX..... A-1**

## TABLE OF AUTHORITIES

| <u>WASHINGTON CASES</u>  | <u>Page</u>    |
|--|----------------|
| <i>State v. Amezola</i> , 49 Wn.App. 78, 741 P.2d 1024 (1987) .....  | 13, 14         |
| <i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004),<br><i>cert. denied</i> , 125 S.Ct. 1662 (2005)..... | 10, 13         |
| <i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969) .....  | 11, 12, 13, 15 |
| <i>State v. Collins</i> , 76 Wn.App. 496, 886 P.2d 243 (1995).....   | 13             |
| <i>State v. Cote</i> , 123 Wn.App. 546, 96 P.3d 410 (2004).....  | 12, 13         |
| <i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d<br>1, 43 P.3d 4 (2002).....                    | 16             |
| <i>State v. Dobbins</i> , 67 Wn. App. 15, 834 P.2d 646 (1992).....   | 17             |
| <i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....   | 10             |
| <i>In the Matter of the Postsentencing Review of Gutierrez</i> , 146 Wn. App.<br>151, 188 P.3d 546 (2008).....     | 17, 19         |
| <i>State v. Huff</i> , 64 Wn.App. 641, 826 P.2d 698<br><i>review denied</i> , 119 Wn.2d 1007 (1992).....           | 14             |
| <i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005) .....  | 19, 20         |
| <i>State v. Johnson</i> , 116 Wn. App. 851, 68 P.3d 290 (2003).....  | 17             |
| <i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986).....  | 14             |
| <i>State v. Lusby</i> , 105 Wn. App. 257, 18 P.3d 625 (2001).....  | 16             |
| <i>State v. Nunez-Martinez</i> , 90 Wn. App. 250, 951 P.2d 823 (1998) .....  | 17             |
| <i>In re Post Sentencing Review of Charles</i> , 135 Wn.2d 239,<br>955 P.2d 798 (1998).....                        | 16             |
| <i>State v. Roberts</i> , 117 Wn.2d 576, 817 P.2d 855 (1991).....  | 16             |
| <i>State v. Silva-Baltazar</i> , 125 Wn.2d 472, 886 P.2d 138 (1994).....   | 17             |
| <i>State v. Spruell</i> , 57 Wn. App. 383, 788 P.2d 21 (1990).....   | 12, 15         |
| <i>In re Detention of Swanson</i> , 115 Wn.2d 21, 804 P.2d 1 (1990).....   | 19             |

|  |    |
|--|----|
| <i>United Parcel Serv., Inc. v. Department of Revenue</i> ,<br>102 Wn.2d 355, 687 P.2d 186 (1984)..... | 15 |
| <i>Wash. Pub. Ports Ass'n v. Dep't of Revenue</i> , 148 Wn.2d 637, 62<br>P.3d 462 (2003).....          | 15 |
| <i>State v. Wimbs</i> , 74 Wn. App. 511, 874 P.2d 193 (1994) .....                                     | 17 |

**UNITED STATES CASES**

**Page**

|  |    |
|--|----|
| <i>Chapman v. California</i> , 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824<br>(1967).....      | 6  |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147<br>L.Ed.2d 368 (1970)..... | 9  |
| <i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560<br>(1979).....      | 10 |

**REVISED CODE OF WASHINGTON**

**Page**

|                           |                    |
|---------------------------|--------------------|
| RCW 9.94A.533(3)(e) ..... | 17, 18, 20         |
| RCW 9.94A.533(4)(e) ..... | 15, 16, 17, 18, 19 |
| RCW 9.94A.605.....        | 17, 19, 20         |
| RCW 69.50 RCW .....       | 17                 |
| RCW 69.50.401(1).....     | 2                  |
| RCW 69.50.401(2)(c) ..... | 2                  |
| RCW 69.50.435 .....       | 17, 19, 20         |
| RCW 69.50.435(1)(c) ..... | 3                  |
| RCW 9.94A.533.....        | 3                  |

**COURT RULES**

**Page**

|              |   |
|--------------|---|
| CrR 3.5..... | 3 |
| CrR 3.6..... | 3 |

**CONSTITUTIONAL PROVISIONS**

**Page**

U.S. Const. Amend. VI .....9  
U.S. Const. Amend XIV .....9  
Wash. Const. art 1, § 3.....9  
Wash. Const. art 1, § 21 .....9  
Wash. Const. art 1, § 22.....9

**A. ASSIGNMENTS OF ERROR**

1. The trial court deprived appellant Kevin Ross of due process of law in entering a conviction for possession of marijuana with intent to deliver in the absence of proof beyond a reasonable doubt of each element of the offense.

2. The trial court erred in imposing consecutive sentencing enhancements.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To convict a defendant of possession of a controlled substance, the State must prove beyond a reasonable doubt the defendant actually or constructively possessed a controlled substance. Police found marijuana in a closet in the master bedroom, in the entertainment center in the master bedroom, and in the computer room of an apartment. Ross was in the apartment when police arrived. Law enforcement stated that the appellant told them that he lived in the apartment, which he denied at trial. Police found the appellant's resident identification and a letter to him in the apartment. The apartment was not leased to the appellant. Several witnesses testified that the appellant lived in a different residence, with his mother. The appellant denied ownership of the marijuana found in the apartment. Looking at the evidence in the light most favorable to the State, could a rational trier of fact conclude beyond a reasonable doubt that the appellant actually or constructively possessed marijuana with

intent to deliver? Assignment of Error No. 1.

2. Whether RCW 9.94A.533(6) is ambiguous to whether the imposition of consecutive 24 month school bus stop enhancements to all other sentencing provisions includes the other 24 months enhancements, and thus does the rule of lenity require the court to impose concurrent enhancements, where the language pertaining to the firearm and deadly weapon enhancements provides: “[n]otwithstanding any other provision of law, all firearm enhancements under this section . . . shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements**, for all offenses sentenced under this chapter” [RCW 9.94A.533(3)(e), emphasis added] while the language in subsection (6) of the statute, pertaining to the school bus stop enhancement, provides that “[a]ll enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter”? Assignment of Error No. 2.

### C. STATEMENT OF THE CASE

#### 1. Procedural history:

Kevin Ross [Ross] was charged by second amended information filed in Clark County Superior Court with one count of delivery of marijuana and possession of marijuana with intent to deliver, contrary to RCW 69.50.401(1) and (2)(c). Clerk’s Papers [CP] 8. The State alleged

that both counts were committed within 1000 feet of a school bus stop designated by a school bus district, adding an additional 24 month sentencing enhancement to each count, pursuant to RCW 69.50.435(1)(c). CP 8.

No motions were filed nor heard regarding a CrR 3.6 hearing. A CrR 3.5 hearing was conducted February 25, 2009. 1Report of Proceedings [RP] at 15-26.<sup>1</sup>

Trial to a jury commenced on February 25, 2009, the Honorable John F. Nichols presiding.

No objections or exceptions to the court's instructions to the jury were made. 2RP at 254.

The jury returned a verdict of guilty to both counts as charged on February 27. CP 62. By special verdict, the jury found that Counts 1 and 2 were committed within 1000 feet of a school bus stop. CP 61, 63. 2RP at 310-11.

At a sentencing hearing on March 13, 2009, the State argued that both school zone enhancements should to be served consecutively under RCW 9.94A.533 to all other sentencing provisions for all other offenses. 2RP at 316. The State argued that Ross' standard range with an offender score of "3" should be 6 to 18 months for each count, following by 24

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<sup>1</sup>The record consists of two volumes:  
1RP February 11, 25. 2009, CrR 3.5 hearing and jury trial.  
2RP February 26, 27, and March 13, 2009, jury trial and sentencing.

months for each enhancement. The defense argued that the court has the power to run the enhancements concurrently. 2RP at 320. Judge Nichols imposed 7 months for each count to be served concurrently, and 24 months for each enhancement, to be served consecutively, for a total sentence of 55 months. 2RP at 327. CP 73.

Timely notice of appeal was filed on March 16, 2009. CP 85. This appeal follows.

**2. Trial testimony:**

Members of the Vancouver Police Department did a controlled buy operation on June 4, 2008, using Anthony Gallucci as a “confidential informant” to buy marijuana. 1RP at 42, 44, 60, 63. Officer Leonard Gabriel of the Vancouver Police Department stated that Gallucci was searched at the police station and then given \$50.00, which was photocopied in advance. 1RP at 45, 51. Gallucci was observed going to the Springs Apartments, located at 3214 Southwest 146<sup>th</sup> Place, Apt. 149, in Vancouver, Washington. 1RP at 47, 60, 77. Officer Gabriel saw the apartment door open and saw Gallucci go inside, and then leave the apartment a while later. 1RP at 48. Gallucci gave Officer Dustin Nicholson a bag of suspected marijuana and he was then transported back to the police station. 1RP at 48, 80.

Gallucci agreed to buy marijuana for the police because he was arrested for delivery of marijuana in 2008. 1RP at 71, 88. He stated that

he agreed to work as a confidential informant and to testify in exchange for an agreement that the State would not prosecute him for the offense. 1RP at 71. Gallucci testified that on June 4, 2008, while at the Vancouver Police Department, he called Kevin Ross and asked if he had marijuana. 1RP at 63. He stated that he was searched and then given 'buy money' by police. 1RP at 65. He stated that he then drove to the apartment, went inside, and bought of marijuana from Ross. 1RP at 66. He stated that Ross used a scale to weigh the marijuana. 1RP at 67, 68. Gallucci testified that the apartment at the Springs Apartments was Ross' residence. 1RP at 61.

Law enforcement obtained a search warrant for the apartment and served it at 8:30 a.m. on June 13, 2008. 1RP at 79, 104. Ross was inside the apartment when the warrant was served. 1RP at 104, 119. Amanda Brumgardt was also in the apartment when the police arrived. 1RP at 107.

Police found Ziploc sandwich baggies in a kitchen drawer. 1RP at 108. Police found musical equipment in another room. 1RP at 108. Police also found a piece with paper with the name "Ross" written on it posted on a wall. 1RP at 109. Police found two bags of marijuana and a "bong" in a computer room in the apartment. 1RP at 120, 121. One bag contained .4 grams and the other 1.5 grams of marijuana. 1RP at 124. Police also found a plastic bag contained 94 grams of marijuana in the

closet of the master bedroom, and \$240.00 in a coat pocket in the same closet. 2RP at 156-57, 168, 174. Police found \$713.00 in an entertainment center in the master bedroom. 2RP at 196, 201. They found two 100 gram weights in a file cabinet in one of the bedrooms and a digital scale was found in the kitchen. 2RP at 161, 181, 226. Police found a piece of paper in the entertainment center in the master bedroom from an athletic club, dated May 14, 2008 and addressed to Kevin Ross. The address on the document was 2617 Northeast 84<sup>th</sup> Avenue in Vancouver. 2RP at 203, 204.

Officer Nicholson stated that Ross denied selling marijuana and “he denied even understanding why the police were in his apartment.” 2RP at 137. Officer Nicholson stated that Ross said that the marijuana in the apartment was for his personal use. 1RP at 137.

Amanda Brungardt lived at the apartment. 2RP at 138. She owned a Volkswagen, which was found the parking lot of the apartment complex. 2RP at 141. The electrical services at the address were in her name. 2RP at 142. The Department of Licensing records showed that Ross’ address was 2908 Watson Avenue in Vancouver 2RP at 142.

Jason Chun stated that Ross lived with his mother at the Watson Avenue house, and that he had never known Ross to live anywhere else.

1RP at 93. Michael Culver stated that that Ross lives off of Fourth Plain at his mother's house. 1RP at 98.

Katy Burckhardt stated that she first met Ross on June 12, 2008 and she drove him and several other people from a bar to her house early on June 13. 2RP at 245. She later took Ross to Amanda Brungardt's apartment. 2RP at 247. She stated that she was going to take Ross to his house off Fourth Plain, but she did not have enough gas to go to both places. 2RP at 247. She stated that she understood that Ross lived at the house off Fourth Plain. 2RP at 248. Brungardt stated that she lived in apartment number 149 at 3214 Southeast 146<sup>th</sup> Place in June, 2008 with her roommate Ashley Hughes. 2RP at 261. She and Hughes were on the apartment's rental agreement; Ross' name was not on the agreement 2RP at 261. Defense Exhibit 1. Brungardt moved out of the apartment on June 19, 2008. 2RP at 261. She stated that she got a call from Ross around 6:30 a.m. on June 13, 2008, and he asked if he could come over to her apartment. 2RP at 262. She agreed and Ross got there at approximately 6:45 a.m. 2RP at 262. She stated that Ross did not keep personal property at her apartment, and that the money found by police in the apartment belonged to her. 2RP at 263. She stated that that money—approximately \$1100.00—was from a settlement she recently received from a car accident. 2RP at 263. She denied that the marijuana found in the apartment belonged to Ross, and stated that it did not belong to her either.

2RP at 264, 267. She told police at the time of the search that she did not know where the marijuana came from. 2RP at 264. She stated the musical equipment described as “a rap studio” in the apartment belonged to her and that she let people, including Ross, use the equipment. 2RP at 265.

Ross’ mother, Karla Ross, testified that her son lived with her at 2908 Watson Avenue in Vancouver, and that he has lived there for the last six years. 2RP at 250.

Ross testified that he lived at 2908 Watson Avenue in June, 2008, and that he had lived there with his mother since 1999. 2RP at 269. He stated that had an on and off relationship with Brungardt over the past three years. 2RP at 270. He stated that he was in her apartment on June 13 because he had been driven early in the morning by Burckhardt after the birthday party. 2RP at 271. He was sleeping on the couch the morning when the police arrived with the warrant. 2RP at 273. He stated that he was still intoxicated from the party when they came into the apartment. He denied telling them that he lived at Brungardt’s apartment. 2RP at 274. He denied ownership of the marijuana, the bong, and the money found by police. 2RP at 275. He stated that his resident identification was found in Brungardt’s apartment because she was trying to help him pay off some medical bills and so he had bought it over “a long time ago.” 2RP at 276. Ross denied selling marijuana to Gallucci on

June 4. 2RP at 276.

Caroline Dorey, the traffic and safety officer supervisor for the Evergreen School District, testified that in June 2008 there were four school bus stops designated by the Evergreen School District located near the apartment complex at 3214 Southeast 146<sup>th</sup> Place, in Vancouver. 2RP at 211, 212, 213. These stops were Cascade Park Drive at Briarwood, Briarwood Drive at 146<sup>th</sup>, Briarwood Drive at 14<sup>th</sup>, and Briarwood Drive at 148<sup>th</sup>. 2RP at 213.

Clark County employee Matt Deitmeyer stated that the distance from the school bus stops identified by Dorey were within 1000 feet of the apartment. 2RP at 242. The farthest bus stop, located at Cascade Park Drive, was 842 feet from the apartment. 2RP at 242.

#### **D. ARGUMENT**

**1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ROSS POSSESSED THE MARIJUANA FOUND AT THE APARTMENT ON JUNE 13, 2008**

- a. The State was required to prove every element of the crime beyond a reasonable doubt.**

The federal and state constitutional rights to a jury trial and due process of law require that the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art I, §§ 3, 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348,

147 L.Ed.2d 368 (1970). The crucial inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found every element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Ross was charged in Count 2 with possession of marijuana with intent to deliver. CP 8-9. The elements of the crime are simple: the defendant must possess a controlled substance. RCW 69.50.401; *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), *cert. denied*, 125 S.Ct. 1662 (2005).

Possession is not defined by statute. RCW 69.50.101. The trial court defined possession and explained the concept of constructive possession in Instruction 15:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

CP at 39-61. The instruction is consistent with Washington law.

*See State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

**b. The State did not prove beyond a reasonable doubt that Ross was in actual possession of marijuana on June 13, 2008.**

“Actual possession means that the goods are in the personal custody of the person charged with possession.” *Callahan*, 77 Wn.2d at 29. In *Callahan* the Court reversed a possession of dangerous drugs conviction because the State did not prove beyond a reasonable doubt the defendant actually or constructively possessed drugs. When the police executed a search warrant on a houseboat, they found the defendant and another man at a desk with drug paraphernalia. *Id.* at 28. A cigar box filled with various drugs was on the floor between the two men, and other drugs were located in the kitchen and a bedroom. *Id.* The defendant said he had been staying at the houseboat for several days and had handled the drugs earlier that day. *Id.* The Court said:

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control...

*Id.* at 29 (Citations omitted).

A similar result was reached by Division 1 of this Court in *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). The police executed a search warrant at Spruell’s home and found Hill in the kitchen where they

also discovered white powder residue and marijuana. *Id.* at 384. While the police were in another room, they heard what sounded like a plate hitting the back door and found more white powder and a plate near the door. *Id.* Relying upon *Callahan*, Division 1 found Hill's presence in the kitchen combined with his fingerprints on the plate did not establish actual possession of the drugs in Spruell's home. *Spruell*, 57 Wn.App. at 385-87. *Spruell* echoed the holding of *Callahan*, that unless the drugs were "found on the defendant" actual possession could not be established. *Spruell*, 57 Wn.App. at 386 (quoting *Callahan*, 77 Wn.2d at 29); *see also*, *State v. Cote*, 123 Wn.App. 546, 549, 96 P.3d 410 (2004) (State must show constructive possession unless defendant is "in actual possession of the contraband upon his arrest").

In this case, it is uncontested that the marijuana was not found on Ross' person, but rather in the master bedroom, and in the computer room of the apartment. Therefore, the State did not establish actual possession. *Callahan*, 77 Wn.2d at 29.

**c. The State did not prove beyond a reasonable doubt that Ross was in constructive possession of marijuana.**

Constructive possession is established when "the defendant was in dominion and control of either the drugs or the premises on which the drugs were found." *Callahan*, 77 Wn.2d at 30-31. Constructive possession

need not be exclusive, but mere proximity to the drugs is not sufficient. *State v. Amezola*, 49 Wn.App. 78, 86, 741 P.2d 1024 (1987). The court must view the totality of the circumstances in determining if the defendant has dominion and control over an item – no particular factor is determinative. *Cote*, 123 Wn.App. at 549.

Cases finding constructive possession have involved control of areas where drugs were found, like a home or a car. *See Bradshaw*, 152 Wn.2d at 530 (defendants were the operator of borrowed truck and a commercial driver of a semi-truck where controlled substances found); *State v. Collins*, 76 Wn.App. 496, 886 P.2d 243 (1995)(defendant and his personal possessions in apartment where drugs located, defendant admitted staying there 15 to 20 times in a one-month period, several people called the apartment to buy drugs from defendant while officers executing search warrant), *review denied*, 126 Wn.2d 1016 (1995); *State v. Huff*, 64 Wn.App. 641, 826 P.2d 698 *review denied*, 119 Wn.2d 1007 (1992) (defendant driving car where drugs found, both car and defendant smelled of methamphetamine).

In the present case, when police arrived the morning of June 13, Ross was sleeping on a couch in the apartment. 2RP at 272. The lease was not in his name, Brungardt and Hughes were the lessees. 2RP at 261. There was a letter to him in the apartment, but it listed another address.

2RP at 203, 204. His resident ID was in the apartment. 2RP at 275. Police said that Ross said that he lived there; Ross, on the other hand, stated that he did not live there, and that he asked for permission when he wanted to go over to the apartment. 2RP at 276. This was supported by testimony from Brungardt, his mother and several other witnesses.

The State did not establish that Ross had dominion or control of the apartment, or of the master bedroom. *See State v. Knapstad*, 107 Wn.2d 346, 348, 729 P.2d 48 (1986) (evidence defendant's brother resided in house where marijuana found combined with items like a credit card receipt showing defendant lived at a different address did not establish dominion and control); *Amzola*, 49 Wn.App. at 87 (facts sufficient for constructive possession where defendant resided in home and drugs not kept out of her presence).

Similarly, the State did not establish Ross had dominion and control of the closet in the master bedroom where the large bag of marijuana was located.

**d. This Court must reverse and dismiss the conviction in Count 2.**

Because there was insufficient evidence from which to find Ross possessed marijuana, his conviction for possession with intent to deliver in Count 2 must be reversed and dismissed. *Callahan*, 77 Wn.2d at 32; *Spruell*, 57 Wn.App. at 389.

2. RCW 9.94A.533(6) IS AMBIGUOUS AS TO WHETHER THE IMPOSITION OF CONSECUTIVE 24-MONTH ENHANCEMENTS TO ALL OTHER SENTENCING PROVISIONS INCLUDES OTHER 24-MONTH ENHANCEMENTS AND THUS UNDER THE RULE OF LENITY THE STATUTE MUST BE INTERPRETED TO REQUIRE CONCURRENT ENHANCEMENTS.

The court erred in ordering the 24-month school bus stop enhancements to be served consecutively under RCW 9.94A.533(6). Ross argues that the court improperly interpreted the statute to require mandatory consecutive school bus zone enhancements.

Statutory interpretation involves questions of law that is reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In construing a statute, the court's objective is to determine the legislature's intent. *Id.* “[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* at 9-10. The “plain meaning” of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). If after that examination, the provision is still

subject to more than one reasonable interpretation, it is ambiguous. *Id.* If a statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant, absent legislative intent to the contrary. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585, 817 P.2d 855 (1991).

- a. **The Legislature's wording of the amended enhancement provision is different than other enhancements and thus the school bus zone enhancement must be interpreted differently.**

The school bus stop enhancement as defined by RCW 9.94A.533(6) is “an additional” twenty-four months “added to the standard sentence range.” The statutory language explicitly provides that the 24-month enhancement is “added to” the standard range sentence imposed. During the 17 years that the school bus stop enhancement legislation has been in effect, it has been consistently applied in accordance with the plain language of the statute as an additional 24-month period of confinement added to the sentence imposed. *See State v. Silva-Baltazar*, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (enhancement provision adds 24 months onto the presumptive sentence); *State v. Lusby*, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (citing legislative history that the bus stop enhancement statute intended to add two years to the presumptive sentence); *See also, State v. Johnson*, 116 Wn. App. 851, 856,

68 P.3d 290 (2003); *State v. Nunez-Martinez*, 90 Wn. App. 250, 256, 951 P.2d 823 (1998); *State v. Wimbs*, 74 Wn. App. 511, 514, 874 P.2d 193 (1994); *State v. Dobbins*, 67 Wn. App. 15, 18-19, 834 P.2d 646 (1992).

RCW 9.94A.533(6) provides:

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

The second sentence of the statute was added by Laws of 2006, ch. 339 § 301. The sentence, requiring drug zone enhancements to be served consecutively “to all other sentencing provisions,” was added by the Legislature in order to overturn the decision in *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). See, *In the Matter of the Postsentencing Review of Gutierrez*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008).

In *Jacobs*, the Court found that the statute was ambiguous as to whether sentencing courts should apply sentence enhancements under RCW 69.50.435 and RCW 9.94A.605 consecutively or concurrently. The *Jacobs* court found the statute was ambiguous, and relied upon rule of lenity to hold that sentencing courts should apply those enhancements concurrently to each another. In its analysis, the *Jacobs* court noted that the legislature specified that in the case of deadly weapon and

firearm sentence enhancements, sentencing courts must apply them consecutively. RCW 9.94A.533(3)(e),(4)(e). “Thus, the legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons.” *Jacobs*, 154 Wn.2d at 603.

The additional language of the amended statute fails to resolve the issue of whether multiple drug zone enhancements must be served consecutively. In contrast to the language to subsection (6), the Legislature used different language in directing the sentencing courts to apply the firearm enhancement; the statute contains specific language that any additional firearm or deadly weapon enhancements are also to be served consecutively, “including other firearm or deadly weapon enhancements.” The statute provides:

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter....

RCW 9.94A.533(3)(e).

Similarly to the firearm enhancement, the Legislature crafted the deadly weapon enhancement to make it clear that the enhancement applies not only to other sentencing provisions, but also to other firearm or deadly

weapon enhancements:

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter....

RCW 9.94A.533(4)(e).

In *Gutierrez*, Division 3 found that the 2006 amendments, which have the effect of “stacking enhancements and setting minimum terms for prison-based DOSA sentences—simply did not change the way a sentence range is calculated when an enhancement exists.” *Gutierrez*, 146 Wn. App. at 157. The *Gutierrez* court reviewed the statute in the context of DOSA; the court’s ruling that there is no ambiguity in the DOSA statute does not resolve the issue of the ambiguity contained in the amended subsection 6. “ ‘[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.’ ” *In re Detention of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990)(quoting *United Parcel Serv., Inc. v. Department of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). Because the Legislature used different language in the enhancements for firearm and deadly weapons, it is axiomatic that the Legislature had a different intent related to the drug zone enhancement.

It is clear from the language of the amendment, that unlike the language pertaining to firearms and deadly weapons, the Legislature did not intend multiple enhancements to be served consecutively. If it had, the Legislature could have easily crafted the statute to mirror subsections 3(e) and 4(e) to read as follows:

All enhancements under this subsection shall run consecutively to all other sentencing provisions, including other enhancements under RCW 69.50.435 or 9.94A.605, for all offenses sentenced under this chapter.

However, the Legislature chose not to do so. The Legislature knew how to require a sentence enhancement be served with another enhancements imposed under the same subsection of the statute, but chose not to use such language. The trial court erred by adding the school bus zone enhancement consecutively.

#### **D. CONCLUSION**

For the foregoing reasons, the Court should reverse the conviction for possession of marijuana with intent to deliver in Count 2 and the accompanying enhancement. In the alternative, the Court should remand the case for resentencing with the direction that the lower court must impose the enhancements concurrently. In the event that Ross does not prevail on appeal, he asks this Court to deny any request for costs.

DATED: July 30, 2009.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. B. Tiller", written over the text "THE TILLER LAW FIRM".

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PETER B. TILLER-WSBA 20835  
Of Attorneys for Kevin Ross

## APPENDIX A

### STATUTES

#### ***RCW 69.50.401***

Prohibited acts: A — Penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories,

sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

***RCW 9.94A.533***

Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or

enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9A.72A.028(4);

(f) The firearm enhancements in this section shall apply to all felony

crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or

an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is

being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may

not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related

felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

***RCW 69.50.435***

Violations committed in or on certain public places or facilities — Additional penalty — Defenses — Construction — Definitions.

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana to a person:

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a

drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or

testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

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STATE OF WASHINGTON  
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DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN K. ROSS,

Appellant.

COURT OF APPEALS NO.  
39036-1-II

CLARK COUNTY NO.  
08-1-01002-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Kevin K. Ross, Appellant, and Michael Kinnie, Deputy Prosecutor, by first class mail, postage pre-paid on July 30, 2009, at the Centralia, Washington post office addressed as follows:

Mr. Michael Kinnie  
Deputy Prosecutor  
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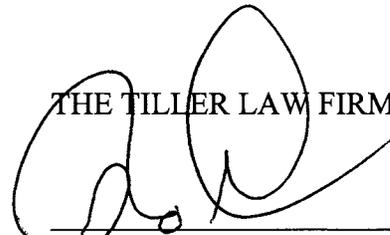
Mr. David Ponzoha  
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Court of Appeals  
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CERTIFICATE OF  
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