

NO. 39399-9-II

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

STATE OF WASHINGTON, Respondent

v.

JOANNE MARIE WHITE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00989-1

BRIEF OF RESPONDENT

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CLARK COUNTY
SUPERIOR COURT
RECEIVED
JAN 17 2009
FILED
COURT CLERK
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I. STATEMENT OF FACTS

The State accepts the statement of the facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the evidence was insufficient to establish that the residence involved was within 1,000 feet of a school bus stop. Because of the jury's finding that it was within 1,000 feet, 24 months were added as a school zone enhancement to her sentence.

In reviewing the sufficiency of the evidence to support a guilty verdict in a criminal case, the Appellate Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). A jury verdict will be overturned on review only when it is clear that there is no substantial evidence to support it. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 709, 575 P.2d 215 (1978). To determine whether the

necessary quantum of proof exists, the Court need not be convinced of the defendant's guilt beyond a reasonable doubt; it needs only be satisfied that there was substantial evidence to support the State's case. State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979).

The sentence enhancement applies when a drug offense takes place "[w]ithin one thousand feet of a school bus route stop designated by the school district." RCW 69.50.435(a)(3). Although the statute indicates that maps provide prima facie evidence of the location of a school bus stop, the statute also notes "[t]his 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." RCW 69.50.435(e).

RCW § 69.50.435(5):

(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.

As part of its case in chief, the prosecution called Matt Deitemeyer. Mr. Deitemeyer is a GIS technician for Clark County working out of the Department of Assessment. (RP 10). Mr. Deitemeyer produced Exhibit No. 1, which was a large map of the area in question. He testified that the map that was being used was originally prepared in 1990 and up-dated with the computer software as of 2009. (RP 11-14). There were no objections made by the defense, nor was there any questioning of the witness.

This map, Exhibit 1, comports to the provisions of RCW 69.50.435(5), which allows the use of this type of documentation for the purposes of establishing boundaries and school bus route stops.

The State then utilized Exhibit No. 1 with Cynthia Kidder, who is the assistant dispatcher in the transportation department for the Vancouver School District (RP 64). Part of her duties includes locating and making changes to school bus stops. (RP 64-65). She told the jury that the database used to keep track of school bus stops is regularly updated and that she had an opportunity to review the area in question here and the map, Exhibit 1, shows a school bus stop in close proximity to the residence. (RP 67). In fact, the evidence the jury heard was that there were four school bus stops within 1,000 feet of the defendant's residence. (RP 14-15, 66-68, 106-108). There was no indication of any recent changes in routes.

The prosecution, in its case in chief, then reexamined Mr. Deitemeyer, who used the measuring instrumentations that were recognized as accurate and determined that one of the school bus stops was 135 feet from the area of the defendant's residence. (RP 106-107). There were no objections to any of this information, nor were there any questions asked by the defense.

The State submits that there is abundant circumstantial evidence to establish that the school bus stop was in place in 2008. The map being used was from 1990 and the witness identified it still being there as of the time of trial in 2009. There was no issue about changes in school bus routes.

The other way to approach this is that this matter was never addressed at the trial court level. There was no objection made by the defense concerning this. In fact, in reviewing the closing argument of the defense counsel, it is obvious this was not the area of concern. Certainly if this had been raised as an objection or a point of clarification, it could readily have been answered at that time. The witnesses were present and ready to respond to questions and the court could have made rulings on the evidentiary matters involved. Because that was not done, the State submits that this issue was not preserved for purposes of this appeal.

As stated in State v. Nguyen, 165 Wn.2d 428, 434-435, 197 P.3d 673 (2008):

In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). This is a “narrow” exception. Kirkman, 159 Wn.2d at 934 (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). A “manifest” error is an error that is

“unmistakable, evident or indisputable.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a “plausible showing” “that the asserted error had practical and identifiable consequences in the trial of the case.” State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wn. App. at 345). “The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.”

-(State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)
(citing WWJ Corp., 138 Wn.2d at 603)).

The defendant has the burden of making the required showing of prejudice to the court. This requirement involves the identification of the constitutional error and how the error, in the context of the trial, affected the defendant’s rights. It is the showing of actual prejudice that makes the error “manifest” and allows for appellate review. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The State submits that this is an evidentiary question which is not of constitutional magnitude. Even if it were to be considered or construed by the appellate court as of constitutional magnitude, it does not demonstrate a “manifest error” on the part of the trial court. Again, as mentioned previously, had the trial court been apprised that this was an issue, it could have made its rulings at that time, and the witnesses were

present to give further clarifying evidence and information. This simply was not done. Further, there was ample evidence in the record itself to establish that the school bus stop existed at the time of the search warrant. As indicated in State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), RAP 2.5(a) prevents a party from raising a claim of error on appeal that had not been raised at the trial court unless the claim involves the manifest error affected a constitutional right. Kirkpatrick indicates that whether to allow the new argument on appeal is determined by the appellate court after a two part analysis. First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is “manifest”. By that, they mean whether the error had “practical and identifiable consequences in the trial of the case”. State v. Kirkpatrick, 160 Wn.2d at 879-880.

The State submits that in our case neither of these tests has been met. The alleged error is not truly constitutional. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). And further, that the alleged error does not have practical and identifiable consequences in the trial of the case. State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001); Lynn, 67 Wn. App. at 345.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel because the attorney allowed the lead detective to encapsulate the findings of other officers in their search of the residence. Because of this the defendant claims that this is hearsay, which was not objected to. The area of concern occurred during rebuttal testimony from Detective Conroy, who testified that he had not personally checked the basement. However, because he was the lead officer in the investigation the “standard operating procedure” would have been to provide him information if there was something found down there. (RP 140). The defense did make an objection, but it was that the questioning was going beyond the scope of the cross examination that had previously been conducted. The court allowed a little leeway and the entire matter took no more than 11 lines in the Report of Proceedings.

Also during this case, though, the defense put on witnesses who clearly indicated that the defendant was residing in the basement. Further, that because she was residing in the basement, she would have no access to the drugs found in the upstairs bedroom. Detective Conroy testified that he spoke with the defendant after advice of Miranda Rights and she told the officer that the southeast corner bedroom upstairs was hers. (RP 35,

L7-25). It is in that area that the drugs, scales, packaging materials, and other matters were discovered. She was denying that she made these statements to the officer when she testified in the case.

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show that (1) her trial counsel's performance was deficient and (2) this deficiency prejudiced her. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, the defendant must show that her trial counsel's performance was so inadequate that she was deprived of her right to counsel and that there is a reasonable probability that the trial result would have been different, thereby undermining confidence in the outcome. Strickland, 466 U.S. at 694; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If the defendant fails to establish either deficient performance or prejudice, the Appellate Court need not address the other element because an ineffective assistance of counsel claim requires proof of both elements. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

It is initially presumed that defense counsel's decisions regarding the manner in which to conduct a trial fall within the wide range of reasonable professional assistance. Pirtle, 136 Wn.2d at 487 (citing Strickland, 466 U.S. at 689). Because a presumption runs in favor of effective representation, the defendant must show that her trial counsel lacked legitimate strategic or tactical reasons for not objecting to the witness's testimony. *See* McFarland, 127 Wn.2d at 336. The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

The State submits that the decision not to object to the hearsay is a matter of trial tactics. This is consistent with the fact that the number of witnesses called by the defense clearly painted a different picture than the officers found at the scene. But further, the State submits, the defense did not want to reinforce the fact that the defendant had given a statement to the officers incriminating herself. Rather, the defense (this is particular borne out in their closing argument) concentrated primarily on the questions of credibility and the other witnesses who had testified.

The State submits that this was trial tactics and appropriate under the circumstances.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant concerns one of the provisions in the Felony Judgment and Sentence (CP 21). The specific section is on page 8 of the Judgment and Sentence and is one of the checked boxes in Section 4.6, dealing with community custody. It reads as follows:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances, including scales, pagers, police scanners, and handheld electronic scheduling and data storage devices.

On appeal, the State has reviewed this matter in reference to the total record and agrees with the defense that this provision may not be totally supported as a crime related prohibition. The argument can be made because scales were found, that she shouldn't have access to scales, but matters concerning pagers, scanners, and the like are not supported in the evidence. This was a search warrant dealing with the arrest and recovery of another individual (not the defendant) and her prior history of

drug activity with law enforcement locally does not indicate that these provisions would necessarily be needed.

As stated in State v Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008):

We acknowledge that defendants may employ cellular phones or data storage devices to further their illegal drug possession, particularly if they intend to distribute or to sell the drug. *See State v. Campos*, 100 Wn. App. 218, 224, 998 P.2d 893 (citing People v. Robinson, 167 Ill. 2d 397, 408, 657 N.E. 2d 1020, 212 Ill. Dec. 675 (1995) (possession of police scanners, beepers, or cellular phones with large amounts of a controlled substance are factors that indicate intent to deliver)), *review denied*, 142 Wn.2d 1006 (2000). We also note that cellular phones and data storage devices have become commonplace. *See Motter*, 139 Wn. App. at 806-07 (Van Deren, J. concurring in part and dissenting in part) (noting that, at that time, about 75 percent of Americans owned or used cellular phones).

But there is no evidence in the record that Zimmer possessed or used a cellular phone or data storage device in connection with possessing methamphetamine and no evidence that she intended to distribute or sell methamphetamine using such devices. Thus, on the record before us, the trial court's prohibition of these items is not crime-related. Accordingly, we hold that the trial court abused its discretion when it prohibited Zimmer from possessing a cellular phone and handheld electronic data storage devices as conditions of community custody.

With that in mind, the State concurs with the defense that that particular paragraph should be struck from the Judgment and Sentence.

The State submits that this matter need not come back for resentencing, but it can be done with an Order Correcting Judgment and Sentence.

V. CONCLUSION

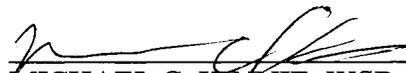
With the exception of the striking of the one paragraph, which the State agrees should be struck from the Judgment and Sentence, the State submits that the trial court should be affirmed in all other respects.

DATED this 19 day of Jan, 2010.

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