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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
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NO. 40392-7-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARK D. GRIMES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Thomas McPhee, Judge
Cause No. 09-1-01080-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II, bail jumping, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict form finding that Grimes delivered a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district.
03. The trial court erred in permitting Grimes to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 16 that it must be unanimous before returning a verdict on the special verdict form and by failing to propose an accurate instruction and special verdict form.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Grimes knowingly failed to appear for a required appearance before the court? [Assignment of Error No. 1].
02. Whether the trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict form finding that Grimes delivered a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district? [Assignment of Error No. 2].
03. Whether the trial court erred in permitting Grimes to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 16 that it must be unanimous before returning a verdict on the special verdict

form and by failing to propose an accurate instruction and special verdict form? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Mark D. Grimes (Grimes) was charged by second amended information filed in Thurston County Superior Court on December 3, 2009, with delivery of methamphetamine, with school bus route enhancement, count I, and bail jumping, count II, contrary to RCWs 69.50.401(2)(b), 69.50.435(1) and 9A.76.170(1). [CP 9].

The court denied Grimes's motions to sever the charges [RP 02/17/10 11]¹ and to suppress his admissions following his arrest. [RP 57-58]. Trial to a jury commenced on February 23, 2010, the Honorable Thomas McPhee presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 302].

The jury returned verdicts of guilty as charged, Grimes was sentenced within his standard range, including enhancement, and timely notice of this appeal followed. [CP 55-57, 65-77].

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¹ All references to the VRP, unless otherwise indicated, are to the transcripts entitled Jury Trial – Volumes I-II.

02. Substantive Facts

02.1 Delivery: Count I: 06/27/09

On June 27, 2009, at approximately 1:30 in the morning, the police used an informant, Michael Santos, to conduct a controlled buy² of methamphetamine from Grimes. [RP 84-85, 85-88, 94, 97-98, 140-41, 144, 208]. The purchase took place in a parking lot of a Safeway store in Thurston County, where a vehicle driven by Johanna Crandell [RP 232] arrived and Santos leaned “basically in the passenger’s side of the window.” [RP 95]. Grimes was sitting in the front passenger’s seat and provided approximately 3.5 grams of methamphetamine to Santos for \$100. [RP 165, 168-170, 173, 178].

After Santos gave a pre-arranged signal indicating the buy had been consummated [RP 96, 170], the vehicle was stopped, the occupants arrested and the prerecorded purchase money recovered. [RP 142-44, 214, 216-18]. Following the waiver of rights, Grimes confessed to the delivery to Santos and indicated he was willing to work for the police in order to stay out of jail. [RP 213-14, 220-21].

² In a “controlled buy,” an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant “goes in empty and comes out full,” his or her assertion that drugs were available is proven, and his or her reliability confirmed. State v. Lane, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, Search and Seizure SS 3.3(b), at 512 (1978)).

Crandell testified that she and Grimes had driven to the parking lot to get money that Santos owed her [269-70], that Santos gave her \$100 “(t)hat was owed [RP 273](,)” and that she gave him a baggy of methamphetamine she located in the corner of her car by handing it to Grimes who in turn gave it to Santos. [RP 275-76]. Crandell was originally charged with delivery of a controlled substance and eventually pleaded guilty to “conspiracy to deliver.” [RP 277].

The place of the transaction was within one thousand feet of a school bus route stop designated by the school district. [RP 147-150, 222-23].

02.2 Bail Jumping: Count II: 12/02/09

Through Senior Deputy Prosecutor David Bruneau, the State introduced the Agreed Order of Trial Continuance allegedly signed by Grimes on October 14, 2009, wherein he promised to next appear in court the following December 2 for a status conference hearing. The order further indicated that failure to appear could result in criminal prosecution for bail jumping. [RP 249-250; State’s Exhibit 11]. When Grimes did not appear for the status hearing, a bench warrant was secured for his arrest. [RP 254-55].

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D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT GRIMES KNOWINGLY FAILED TO APPEAR FOR A REQUIRED APPEARANCE BEFORE THE COURT.

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.

To prove the charge of bail jumping, the State had to prove that Grimes knowingly failed to appear for a required appearance before the court, which, in this case, translated to proof that he was the same person

who had signed the order requiring the appearance at the status conference hearing on December 2, 2009.

[W]hen criminal liability depends on the accused's being the person to whom a document pertains(,) ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt "that the person named therein is the same person on trial."

State v. Hubner, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (emphasis added) (footnotes omitted). If the State presents only a document bearing an identical name, the State produces insufficient evidence to support a criminal conviction beyond a reasonable doubt. State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981).

Here, the State merely produced the Agreed Order of Trial Continuance bearing Grimes's name to demonstrate that he was aware of the pending December 2 status hearing, but it presented no evidence to show that Grimes was the person who had signed the document: no booking fingerprints, eyewitness identification or distinctive personal information. Nothing.

Under these limiting facts, Grimes's conviction for bail jumping must thus be reversed and dismissed.

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02. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM FINDING THAT GRIMES DELIVERED A CONTROLLED SUBSTANCE TO A PERSON WITHIN ONE THOUSAND FEET OF A SCHOOL BUS ROUTE STOP DESIGNATED BY A SCHOOL DISTRICT.

As instructed in Court's Instruction 16, the jury was told that it had to be unanimous to return a verdict on the special verdict form.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer "no".

[CP 54].

But this is incorrect. As explained in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), where, as here, the trial court had instructed the jury that unanimity was required to answer "no" on the special verdict, our Supreme Court vacated two school zone drug offense sentencing enhancements. Bashaw is directly on point, with the result that the 24-month enhancement must be vacated in this case and the matter remanded for resentencing.

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03. GRIMES WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE COURT'S INSTRUCTION 16 THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM AND BY FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.

A criminal defendant claiming ineffective assistance 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 the issue set forth in the preceding section of this brief relating to the trial court instructing the jury that it must be unanimous before returning a verdict on the special verdict form, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to Court's Instruction 16 and the accompanying special verdict form for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected and/or proposed an accurate instruction and special verdict form, there is every likelihood that the court would have upheld the objection and the jury would have been correctly instructed and would have issued a verdict on the special verdict form that would not be subject to speculation, for "when unanimity is

required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” State v. Bashaw, 169 Wn.2d at 148.

E. CONCLUSION

Based on the above, Grimes respectfully requests this court to reverse and dismiss his conviction for bail jumping and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 1st day of October 2010.

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WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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Dated this 1st day of October 2010.

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