

No. 40392-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK D. GRIMES
Appellant.

A handwritten signature in black ink, appearing to read "John C. Skinder", is written over a vertical stamp. The stamp contains the text "FILED" at the top, "BY" followed by a signature, "CLERK OF COURT", "SUPERIOR COURT", "COUNTY OF THURSTON", and "WASHINGTON" at the bottom.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Thomas McPhee
Cause No. 09-1-01080-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

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

B. STATEMENT OF THE CASE 1

C. ARGUMENT 4

 1. The State produced sufficient evidence at trial to allow a rational trier of fact to find that Mr. Grimes was the person who failed to appear for a hearing and that he knowingly failed to do so..... 4

 2. The court’s instruction on the special verdict form is not a manifest constitutional error..... 11

 3. Trial counsel’s performance was not deficient but, assuming for the sake of argument that this court found a deficiency, there was no prejudice suffered by Mr. Grimes..... 17

D. CONCLUSION..... 19

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L. Ed. 2d 674 (1984) 18

United States v. Tateo,
377 U.S. 463, 84 S. Ct. 1587,
12 L. Ed. 2d 448 (1964) 16

Washington Supreme Court Decisions

In the Matter of the Personal Restraint Petition of Pirtle,
136 Wn.2d 467, 965 P.2d 593 (1996) 18

In re Benn,
134 Wn.2d 868, 952 P.2d 116 (1998) 18

State v. Bashaw,
169 Wn.2d 133, 234 P.3d 195 (2010) 11, 13, 15, 17

State v. Bencivenga,
137 Wn.2d 703, 974 P.2d 832 (1999) 6

State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 5

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 5

State v. Ervin,
158 Wn.2d 746, 147 P.3d 567 (2006) 17

State v. Goldberg,
149 Wn.2d 888, 72 P.3d 1083 (2003) 11, 14-15

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 5

<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	18
<i>State v. Hill</i> , 83 Wn.2d 558, 520 P.2d 618 (1974)	9
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.2d 136 (2008)	16
<i>State v. Johnston</i> , 156 Wn.2d 355, 127 P.3d 707 (2006)	16
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	13, 15
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	12, 14, 18
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	13-14
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	4-5
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).....	17
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	17

Decisions Of The Court Of Appeals

<i>State v. Brezillac</i> , 19 Wn. App. 11, 573 P.2d 1343 (1978).....	10
<i>State v. Huber</i> , 129 Wn. App. 499, 119 P.3d 388 (2005).....	7
<i>State v. Hunter</i> , 29 Wn. App. 218, 627 P.2d 1339 (1981).....	9

State v. Lynn,
67 Wn. App. 339, 835 P.2d 251 (1992)..... 12-13

State v. Walton,
64 Wn. App. 410, 824 P.2d 533 (1992)..... 5

Statutes and Rules

RAP 2.5(a) 12

RAP 2.5(a)(3)..... 13

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the State produce sufficient evidence at trial to allow a rational trier of fact to find that Mr. Grimes was the person who failed to appear for a hearing and that he knowingly failed to do so?
2. Was the court's instruction on the special verdict form a manifest constitutional error?
3. Was Mr. Grimes' trial counsel deficient or did Mr. Grimes suffer any prejudice?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

After Mr. Grimes sold methamphetamine to Mr. Santos in the Safeway parking lot on June 27, 2009, the police arrested Mr. Grimes who was sitting in the front passenger seat of his automobile and also arrested Ms. Crandell who was driving that same vehicle. [RP 210-211]. Detective Davis Miller identified Mr. Grimes in open court as the individual who law enforcement arrested on June 27, 2009; he also identified both Mr. Grimes and Ms. Crandell by their respective booking photos that were taken of them at the time of their arrest. [RP 211].

Ms. Crandell also identified Mr. Grimes in open court. [RP 268]. She testified that she has been in a relationship for

approximately the past 4 years with Mr. Grimes. [RP 267-268]. Ms. Crandell testified that she pleaded guilty to a charge of conspiracy to deliver methamphetamine based on the delivery to Mr. Santos on June 27, 2009. [RP 277]. Ms. Crandell testified that her court conditions included that she not communicate with Mr. Grimes. [RP 279]. She also testified that she had been subpoenaed to be a witness in Mr. Grimes' trial for the delivery of methamphetamine to Mr. Santos. [RP 278-280]. Ms. Crandell testified, after she had received one of her subpoenas to testify in Mr. Grimes' trial, she left the State of Washington and travelled to the State of Arizona with Mr. Grimes. [RP 280-286]. Ms. Crandell acknowledged that her leaving the State of Washington with Mr. Grimes was a violation of her prohibition to have no contact with Mr. Grimes. [RP 286]. Mr. Grimes subsequently failed to appear for his December 2nd trial status conference. [RP 252].

Mr. Santos testified that he had known Mr. Grimes for approximately a year before the drug delivery of June 27, 2009. [RP 156]. He testified that their relationship was primarily based on using methamphetamine together. [RP 156-157]. Mr. Santos identified both Ms. Crandell and Mr. Grimes by their booking photos. [RP 164-165]. Perhaps, most importantly, he also

identified Mr. Grimes in open court as the person who sold him the methamphetamine on June 27, 2009 and the defendant in this case. [RP 156].

Mr. Eric Weight, the Director of Transportation for North Thurston Public Schools, testified that there were two separate school bus route stops well within 1,000 feet of the front of the Safeway store where the June 27, 2009 methamphetamine delivery took place. [RP 147-151].

Deputy Prosecutor David Bruneau testified regarding court documents concerning Mr. Grimes bail jumping charge for missing his trial status conference on December 2, 2009 (his jury trial was set for the following Monday, December 7, 2009). [RP 242-257; also see CP 90]. One of those documents was the Order Establishing Conditions of Release entered on June 29, 2009 which included the prohibition that Mr. Grimes have no contact with Ms. Crandell. [CP 89]. This Order Establishing Conditions of Release also orders that Mr. Grimes be released upon posting \$10,000 bail pursuant to a set of conditions of his release. [CP 89].

Deputy Prosecutor Bruneau also testified regarding the Agreed Order of Trial Continuance entered October 14, 2009. [CP 90]. This order set a trial status conference for December 2, 2009

and a trial beginning December 7, 2009. [CP 90]. Both the Order Establishing Conditions of Release and the Agreed Order of Trial Continuance were signed by the appellant, defense counsel and Superior Court Judge Pomeroy. [CP 89 and 90]. Mr. Bruneau testified that on December 2, 2009, Mr. Grimes did not appear in court as ordered; Mr. Bruneau noted that Mr. Grimes did not appear for that hearing and the trial court issued a warrant for Mr. Grimes at 9:23 a.m. that morning. [RP 252]. The Return of Service for that warrant reflected that the warrant was served on Mr. Grimes on December 30, 2009. [RP 256].

C. ARGUMENT.

1. The State produced sufficient evidence at trial to allow a rational trier of fact to find that Mr. Grimes was the person who failed to appear for a hearing and that he knowingly failed to do so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record

evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, 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).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be

unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Mr. Grimes asserts that the State failed to prove he was the person who signed the order on October 14, 2009, requiring his appearance at a December 2, 2009 trial status conference. [CP 90]. The State was not required to prove he signed it, of course, but rather that he was the person ordered to appear and that he knew of the order. The elements of the crime, as set forth in Jury Instruction No. 15, are:

To convict the defendant of the crime of bail jumping as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 2, 2009, the defendant failed to appear before a court;
 - (2) That the defendant was charged with the crime of unlawful delivery of a controlled substance;
 - (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
 - (4) That the acts occurred in the State of Washington.
- If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[CP 53].

The State had to prove only that Mr. Grimes knowingly failed to appear before the court on December 2, 2009. His real argument, of course, is that the State failed to prove that the Mark D. Grimes sitting in the courtroom during the trial was the same Mark D. Grimes who was ordered, but failed, to appear on December 2, 2009. In support of that argument he cites to *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005).

In *Huber*, the defendant was charged with violating a protection order and tampering with a witness. He was released, ordered to appear on July 10, 2004, and he failed to appear as ordered. A bench warrant was issued and a charge of bail jumping was added. At trial, the State introduced certified copies of the information charging him with the first two crimes, an order requiring his appearance in court on July 10, 2004, the clerk's minutes showing that he had failed to appear on that date, and the bench warrant. There was no testimony that those documents related to the same person sitting in the courtroom. Mr. Huber did not testify or present any evidence, and his attorney did not even make an opening statement. The attorney did argue to the jury, and, following the jury's departure to deliberate, made a motion to dismiss, based on the lack of evidence making the connection.

Both the trial court and the jury ruled against him; on appeal, however, he was more successful and his conviction was reversed. This division of the Court of Appeals held that the State must show, “independent of the record,” that the person named in those documents is the defendant. *Id.*, at 390.

The facts of this case are significantly different, and despite Mr. Grimes’ assertion to the contrary, the State did establish that the person sitting at the defense table with his attorney was the same Mark D. Grimes who was the subject of the court order to appear on December 2, 2009. Mr. Grimes was positively identified by Detective Miller, Ms. Crandell and Mr. Santos as part of the evidence regarding the delivery of methamphetamine. The charge of bail jumping was based on Mr. Grimes being charged and released on the condition of appearing in court on the charge of delivery of controlled substance. As he was positively identified for the drug delivery charge he is also positively identified for the bail jumping charge.

“It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” . . . Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in

carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974) (cite omitted).

In *Hill*, the defendant was charged with possession of narcotics. At trial, there was no specific in-court identification; however, he was present in the courtroom at all times. There were many references to “the defendant” and to “Jimmy Hill.”

The arresting officer testified that it was “the defendant” whom he observed at the scene of the arrest, that he had ordered “the defendant” to halt, and that it was “the location where the defendant was finally stopped that the Kleenex was found.” The jury verdict was in the form: “We, the Jury . . . , find the defendant [Jimmy Hill] Guilty”

Id., at 560. The Supreme Court found this sufficient to establish Mr. Hill’s identity as the person who committed the crime. *Id.*

In *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981), the defendant was charged with first degree escape, and one piece of the evidence was the judgment and sentences resulting from the convictions for which he was incarcerated. A probation officer testified that Mr. Hunter had been in a work release facility after transfer from a state prison, at least until his work release was revoked, and the court found that sufficient to establish a prima

facie case that the person on trial was the same person named in the judgment and sentences. Once that was accomplished, the “burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents.” *Id.*, at 222, citing to *State v. Brezillac*, 19 Wn. App. 11, 573 P.2d 1343 (1978). Here the State produced sufficient evidence to put on Mr. Grimes some burden of challenging his identity as the person who failed to appear.

The State presented sufficient evidence that Mr. Grimes knowingly failed to appear. Mr. Grimes was identified by three separate witnesses; the testimony of Ms. Crandell is especially important as she was ordered to have no contact with Mr. Grimes pursuant to the criminal charges arising from the June 27, 2009 delivery of controlled substance charge. In fact, Ms. Crandell testified that she left the State of Washington with Mr. Grimes after she had been served her subpoena to appear in his trial; clearly there is strong direct and circumstantial evidence of Mr. Grimes’ identity. Proof of identity on one charge satisfies proof on the other based on the direct and circumstantial evidence in this case.

2. The court's instruction on the special verdict form is not a manifest constitutional error.

The jury instructions regarding the school zone enhancement stated:

You will also be given a special verdict form for the crimes charged in count I. If you find the defendant not guilty of the crime, do not use the special verdict forms. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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 form "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 this question, you must answer "no".

[CP 54].

The defendant argues for the first time on appeal that this instruction was error which entitles him to an order vacating the special verdict findings and sentence enhancements. He relies on *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). *Bashaw* relied on *Goldberg* to hold that a unanimous jury decision is not required to find the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. *Bashaw*, 169 Wn.2d at 146. The Court in *Bashaw*

overturned a special verdict where the jury had been given the same instruction given in this case, stating the instruction erroneously required the jury agree on their answer to the special verdict even if they did not unanimously find the presence of the special finding. *Id.* at 147.

The defendant did not object to the special verdict instruction at trial. [RP 260-262]. Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a), *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error which was not objected to at the trial level may be considered by the court if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3), *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Whether the Court will consider an asserted error under these circumstances is determined by a four part analysis set out in *Lynn*.

First, reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was

committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

This Court should decline to consider the issue because the defendant has not identified any constitutional provision implicated by the instruction given in this case. The rule which the Court in *Bashaw* relied on to find the special verdict instruction in that case was erroneous is not compelled by double jeopardy protections. *Bashaw*, 169 Wn.2d at 146, n. 7. Since it is not readily apparent that the issue raised by the defendant here implicates the constitution, the Court should decline to consider this issue for the first time on appeal.

This Court has recognized that “instructional errors may implicate constitutional due process.” *Lynn*, 67 Wn. App. at 343. Even if due process is implicated by the instruction given the jury here¹, no manifest error exists here. “Manifest” within the meaning of RAP 2.5(a)(3) requires the defendant to show that he was actually prejudiced. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The actual prejudice standard differs from the harmless

¹ The State does not concede that the defendant’s due process rights were violated by the special verdict instruction. However, it is addressed for the sake of argument.

error standard in that under the former test the focus is on “whether the error is so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 99-100.

To show actual prejudice the defendant must show that the error had a practical and identifiable consequence in the trial of the case. *Id.* “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333. Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. *O’Hara*, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

The uncontroverted evidence established that Mr. Grimes delivered methamphetamine, a controlled substance, within 1,000 feet of two separate school bus route stops. [RP 147-151]

In light of the forgoing circumstances the defendant cannot show that he was prejudiced by the special verdict jury instruction. In *Goldberg* the jury was actually hung on the aggravating factor before it reached a unanimous verdict. *Goldberg*, 149 Wn.2d at 894. Here the jury did not initially come back without a unanimous verdict on the school bus route stop allegation. [2/25/10, RP 3-7].

In *Bashaw* there was conflicting evidence regarding the school zone enhancement. *Bashaw*, 169 Wn.2d at 138-39. One or more jurors may not have been convinced that the facts supporting the enhancement were credible. However here there was no contradictory evidence that Mr. Grimes delivered methamphetamine, a controlled substance, within 1,000 of a school bus route stop. Where there is no evidence the jury was actually hung on the school zone enhancement question, or that there would have been a basis for disagreement on that finding, the defendant cannot show that he was prejudiced by the instruction.

The defendant's failure to object deprived the trial court of the opportunity to prevent the instructional error he now raises. *Kirkman*, 159 Wn.2d at 935. Had the defendant argued the holding in *Goldberg* applied to the special verdict instruction in this case the court could have easily modified the instruction to ensure jurors were not required to be unanimous on a "no" vote. This Court should decline to consider the issue for the first time on appeal because the special verdict instruction does not raise an issue of manifest constitutional error.

Finally, even if the Court considers the issue and reverses the special verdict, the Court should decide what the appropriate

remedy should be. The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., *State v. Jackman*, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming and uncontroverted. Here the base sentence was 90 months. The school zone enhancement added an additional 24 months to the defendant's term of confinement. The jury made the finding beyond a reasonable doubt finding this enhancement was proved by the State; it would be unfair to the State, if the Court overturns the jury's finding, to not allow the State the opportunity to bring this issue before the jury again.

In *Bashaw*, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the “policies of judicial economy and finality.” *Bashaw*, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). While judicial economy is a worthy goal, it should not be used to subvert the will of the public through the jury and the legislature.

3. Trial counsel's performance was not deficient but, assuming for the sake of argument that this court found a deficiency, there was no prejudice suffered by Mr. Grimes.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v.*

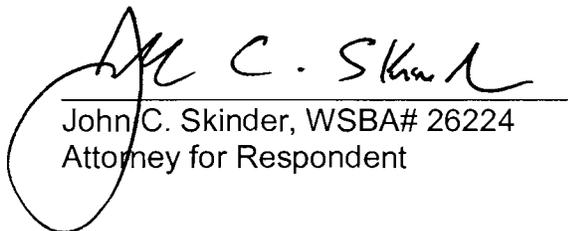
Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when “but for the deficient performance, the outcome would have been different.” *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

The appellant contends that his trial counsel erred by failing to anticipate this change in the law. But courts have consistently held that failure to anticipate a change in the law does not constitute ineffective assistance. *In re Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). Even if this Court disagrees and determines that somehow trial counsel should have anticipated this change, the claim of ineffective assistance must fail because there is no indication from the facts in this case that the outcome would have been any different. There was no argument that the illegal drug delivery did not occur within 1,000 of a school bus route stop and the evidence supporting the school zone enhancement was overwhelming.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm the convictions, the special verdict and the sentence in Mr. Grimes' case.

Respectfully submitted this 23rd day of NOVEMBER 2010.


John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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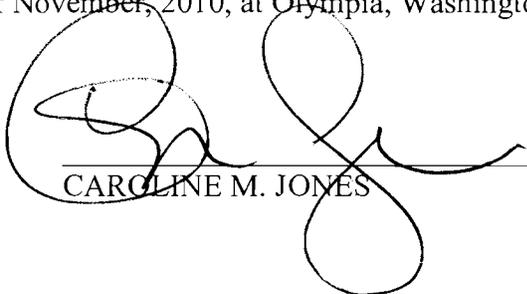
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of November, 2010, at Olympia, Washington.



CAROLINE M. JONES