

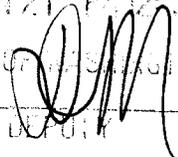
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COURT OF APPEALS, DIVISION II

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DIVISION II

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

vs.

BRADLEY D. KENYON,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY
The Honorable Theodore F. Spearman, Visiting Judge
Cause No. 09-1-00398-0

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecutor in rebuttal closing argument over objection to argue that Kenyon failed to produce evidence and thereby improperly shifted burden of proof to Kenyon.
2. The trial court erred in imposing the school bus stop sentence enhancement where there was insufficient evidence supporting the enhancement
3. The trial court erred in imposing the school bus stop sentence enhancement where the State failed to establish that the device used to measure the distance from the school bus stop to Kenyon's trailer was reliable.
4. The trial court erred in imposing the school bus stop sentence enhancement where the court incorrectly instructed the jury that its special finding had to be unanimous.
5. The trial court erred in allowing Kenyon to be represented by counsel who provided ineffective assistance in failing to make the proper objections regarding the lack of reliability of the measuring device used to establish the distance for purposes of the school bus stop sentence enhancement and regarding the incorrectly worded special verdict instruction.
6. The trial court erred in denying Kenyon's motion for a new trial based on jury misconduct where extrinsic evidence of bias was introduced by Juror 4 when she referred to Kenyon/his supporters as the "Manson Family."
7. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing the prosecutor in rebuttal closing argument over objection to argue that Kenyon failed to produce evidence and thereby improperly shifted burden of proof to Kenyon? [Assignment of Error No. 1].
2. Whether the trial court erred in imposing the school bus stop sentence enhancement? [Assignments of Error Nos. 2-5].
3. Whether the trial court erred in denying Kenyon's motion for a new trial based on jury misconduct where extrinsic evidence of bias was introduced by Juror 4 when she referred to Kenyon/his supporters as the "Manson Family?" [Assignment of Error No. 6].
4. Whether there was sufficient evidence to uphold Kenyon's conviction for delivery of a controlled substance? [Assignment of Error No. 7].

C. STATEMENT OF THE CASE

1. Procedure

Bradley D. Kenyon (Kenyon) was charged by first amended information filed in Mason County Superior Court with one count of delivery of a controlled substance (methamphetamine) as well as a sentence enhancement allegation that the crime was committed within 1000 feet of a school bus stop. [CP 180-181].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Kenyon was tried by a jury, the Honorable Theodore F. Spearman, visiting judge, presiding. Kenyon had no objections and took no exceptions to the

Court's Instructions to the Jury. [CP 155-17-; Vol. XIV RP 157-161, 169]. Kenyon did move for a directed verdict on the school bus stop sentence enhancement arguing that the State failed to prove the enhancement and thus a special verdict form was not proper, which motion was denied. [Vol. XIV RP 161-167, 169-171] The jury found Kenyon guilty as charged of delivery of a controlled substance and entered a special verdict finding that the crime was committed within 1000 feet a school bus route stop. [CP 153, 154; Vol. XIV RP 223-226].

Post-trial, Kenyon made a motion for a new trial based on juror misconduct where a juror referred to the defendant/his supporters as the "Manson Family" in the presence of the entire jury, which was denied without benefit of an evidentiary hearing. [CP 25-28, 29-32, 33-34, 35-36, 37-38, 39-45, 46-59, 60-71, 72-79, 80-90, 91-99, 100-110, 111-120, 121-128, 129-137, 138-139, 143-145, 146-147, 148-150, 151-152; Vol. XVII RP 272-298].

The court then sentenced Kenyon to a standard range sentence of 110-months plus 24-months for the school bus route stop sentence enhancement for a total sentence of 134-months based on an offender score of 8. [CP 12-24; Vol. XVII RP 299-311].

Timely notice of appeal was filed and this appeal follows. [CP 7].

2. Facts

On September 2, 2009, Rebecca Giles (Giles), working as a confidential informant for the West Sound Narcotics Enforcement Team (WestNET) at the direction of Shelton Police Detective Tasesa Maiava (Maiava), called Kenyon arranging to purchase methamphetamine from him. [Vol. I Trial RP 46-49; Vol. II Trial RP 107-112]. Giles agreed to go to Kenyon's home, a trailer in Shelton, to make the purchase. [Vol. I Trial RP 49-50; Vol. II Trial RP 107-112].

Prior to going to Kenyon's trailer, Giles was searched and given pre-recorded buy money by Maiava. [Vol. I Trial RP 50-51, 75-76; Vol. II Trial RP 112-113]. Maiava then took Giles to a location near Kenyon's trailer, and observed Giles walk away towards Kenyon's trailer until she was out of sight. [Vol. I Trial RP 51; Vol. II Trial RP 113-118].

Bremerton City Police Officer and WestNET member Jeff Inklebarger (Inklebarger) assisted Maiava by taking up a location where he could observe Giles after Maiava lost sight of her. [Vol. I Trial RP 51, 71, 74; Vol. II Trial RP 115, 122]. Inklebarger observed Giles walking to Kenyon's trailer, Giles emerging a short time later, and Giles returning to Maiava's location. [Vol. I Trial RP 74-78; Vol. II Trial RP 117-118, 122-124]. Upon her return to Maiava, Giles gave him a substance that field tested positive for methamphetamine that Giles said she had purchased

from Kenyon, who had been alone in the trailer. [Vol. I Trial RP 50, 52-53; Vol. II Trial RP 124-126]. Neither Maiava nor Inklebarger actually saw Kenyon make the delivery, and more than one vehicle was parked in front of Kenyon's trailer. [Vol. I Trial RP 94-96; Vol. II Trial RP 151]. Kenyon was not immediately arrested. [Vol. II Trial RP 133]. The pre-recorded buy money was never recovered. [Vol. II Trial RP 155-156].

Rebecca Brewer, a forensic scientist with the Washington State Patrol Crime Lab, tested the substance Giles gave Maiava and testified that it contained methamphetamine. [Vol. II Trial RP 186-193].

Maiava testified that he contacted the Shelton School District bus garage and was told that a school bus stop was located at the corner of Olympic Highway and C Street, which is Skipworth's saw shop. [Vol. II Trial RP 139]. Maiava further testified that he measured the distance from this location to Kenyon's trailer as 525 feet using a measuring wheel. [Vol. II Trial RP 139-140, 146, 147]. Maiava did not testify as to whether the measuring wheel was functioning properly or whether it produced accurate results—"It's the recording I got that day when I measured it." [Vol. II Trial RP 147, 176]. Moreover, Maiava testified that he knew there was a school bus stop at C Street and Adams based on the printout he received from the Shelton School District bus garage office listing school bus stops. [Vol. II Trial RP 140-143]. Maiava also admitted that C

Street and Adams is fully a block away from C Street and Olympic Highway, but the distance from this location to Kenyon's trailer was never measured. [Vol. II Trial RP 178-179].

Kenyon did not testify.

D. ARGUMENT

- (1) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT BY IMPORPERLY SHIFTING THE BURDEN OF PROOF TO KENYON REQUIRING THE REVERSAL OF HIS CONVICTION.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

a. Overview Of What Occurred

Kenyon was charged with delivery of a controlled substance occurring on September 2, 2009. At trial in support of this charge, the State presented the testimony of Giles, a confidential informant, who allegedly made a controlled by from Kenyon inside Kenyon's trailer as well as two WestNET officers, who merely observed Giles enter Kenyon's trailer at which more than one vehicle was parked then observed Giles emerge shortly thereafter with methamphetamine. As his right, Kenyon did not testify. During rebuttal closing argument the following occurred:

State:The defense is not obligated to put on any kind of a case whatsoever. But you have to ask yourself if someone argues to you about what if there's somebody else in the trailer, wouldn't you want to hear from that person?

Defense: Objection, your Honor, it's improper.

Court: Overruled.

State: Again, they don't have to do anything; can sit on their hands throughout trial, ladies and gentlemen. But, if you make a suggestion, if you argue that there's maybe some kind of missing witness—

Defense: I object, your Honor. This shifts the burden. It's improper.

Court: Overruled.

State: —do you want to see it or not?

Defense: And I object. There's no ground for any missing witness instruction or any missing witness argument.

Court: Counsel, overruled.

Defense: Thank you.

[Emphasis added]. [Vol. XIV RP 216-217].

b. The Prosecutor Committed Misconduct In Rebuttal Closing Argument By Improperly Shifting The Burden Of Proof To Kenyon.

Due process requires that the State bear the burden of proving every element to the crime beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 944 (2008). The constitutional harmless error standard applies when a prosecutor's comment implicates a

constitutional right other than the right to a fair trial. State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006). A constitutional error is only harmless when the appellate court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The court will presume constitutional errors to be prejudicial and, as such, the State bears the burden to show the error was not harmless. Id.

It is improper to even imply that the defense has a duty to present evidence as such an argument constitutes the unconstitutional shifting of the State's burden to the defense in violation of due process. State v. McKenzie, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006); *see also* State v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009); State v. Traweck, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991) (a prosecutor may not argue in closing that the defense failed to present a witness or argue that the defense failed to explain the factual basis for the charges or argue that the jury should find guilt simply because the defense did not present evidence to support its theory). The remedy once such misconduct is found is to reverse and remand to dismiss. State v. Dixon, 150 Wn. App. 46, 58-59, 207 P.3d 459 (2009).

Here, the State's case against Kenyon on the essential fact of whether he in fact was the person who delivered methamphetamine to Giles on September 2, 2009 was weak. The State only had the testimony of Giles that Kenyon committed the crime as neither Maiava nor Inklebarger actually saw the delivery as it took place inside Kenyon's trailer. Of import in considering Giles's testimony is the fact that she was working as a confidential informant solely because she was in legal trouble and that her prior criminal history includes crimes of dishonesty. Moreover, it cannot be disputed that at the time of the delivery more than one car was parked in front of Kenyon's trailer and the evidence that Kenyon was alone in his trailer when the delivery occurred is based solely on Giles's testimony.

Given these facts, the State sought a conviction by any means resulting in it arguing to the jury that it should convict Kenyon because he had produced no evidence/witness supporting his suggestion that it was possible that some other person had delivered the methamphetamine to Giles. [Vol. XIV RP 216-217]. This argument was a wholly improper shifting of the burden of proof to Kenyon and constituted prosecutorial misconduct to which Kenyon repeatedly objected to no avail.

Moreover, this error was not harmless beyond a reasonable doubt because it likely affected the outcome of the case as Kenyon was

convicted; the jury likely inferred that Kenyon had the burden of producing some “missing witness,” given the State’s improper argument; and in failing to do so Kenyon must be guilty.

c. Conclusion.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Sadly, this is what has occurred in the instant case. The only issue involved in the instant case was whether Kenyon in fact delivered methamphetamine to Giles. Instead of focusing on presenting evidence on this issue, the State by its misconduct improperly focused the jury on the fact that Kenyon failed to produce evidence/witness supporting his suggestion that it was possible that some other person had delivered the methamphetamine to Giles thereby unconstitutionally shifting the burden of proof to Kenyon in order to obtain a conviction. It cannot be said based on the totality of this record that the jury rendered a verdict based solely on the evidence given that the State’s misconduct tainted this trial. This court should reverse and dismiss Kenyon’s conviction.

(2) THE TRIAL COURT ERRED IN IMPOSING THE SCHOOL BUS STOP SENTENCE ENHANCEMENT.

a. Lack Of Evidence Supporting Sentence Enhancement.

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The same is true for sentence enhancements. State v. Recuenco, 163 Wn.3d 428, 180 P.3d 1276 (2008).

Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty.

State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995), *quoting State v. Lua*, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn.2d 1025, *review denied*, 117 Wn.2d 1026, 820 P.2d 510 (1991). The test for determining sufficiency of the evidence is whether a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the enhancement. State v. Hennessey, 90 Wn. App. at 194, *citing Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); and State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

In the instant case, the State bore the burden of establishing beyond a reasonable doubt the exact location of a school bus stop and whether that

school bus stop was within 1000 feet of Kenyon's trailer where the alleged delivery of methamphetamine occurred in order to obtain the sentence enhancement. This is a burden the State cannot sustain.

The evidence in support of the sentence enhancement elicited at trial demonstrates two flaws that negate the State's ability to obtain the sentence enhancement to-wit: 1) the exact location of the school bus stop cannot be established beyond a reasonable doubt as there are two possible locations; and 2) the distance between Kenyon's trailer and only one of the possible school bus stops (the one least likely to be the actual school bus stop) was measured.

The sum of the evidence supporting the sentence enhancement was Maiava's testimony. Maiava testified that he contacted the Shelton School District bus garage and was told that a school bus stop was located at the corner of Olympic Highway and C Street, which is Skipworth's saw shop. [Vol. II Trial RP 139]. Maiava further testified that he measured the distance from this location to Kenyon's trailer as 525 feet using a measuring wheel. [Vol. II Trial RP 139-140, 146, 147]. Moreover, Maiava testified that he knew there was a school bus stop at C Street and Adams based on the printout he received from the Shelton School District bus garage office listing school bus stops. [Vol. II Trial RP 140-143]. Maiava also admitted that C Street and Adams is fully a block away from

C Street and Olympic Highway, but the distance from this location to Kenyon's trailer was never measured. [Vol. II Trial RP 178-179]. The confusing and imprecise nature of this evidence is more than enough to establish reasonable doubt in the mind of any rational trier of fact given that it cannot be ascertained with any certainty which location was in fact the school bus stop and the distance from one location to Kenyon's home was never measure. The State failed to satisfy its burden of proof regarding the sentence enhancement. This court should vacate Kenyon's 24-months sentence enhancement.

b. The State Failed To Establish The Reliability Of The Device Used To Measure The Distance Between The School Bus Stop And Kenyon's Trailer The Evidence In Support Of The Sentence Enhancement.

It is fundamental that evidence must be authenticated before it is admitted. ER 901. The party offering the evidence must make a prima facie showing consisting of proof that is sufficient "to permit a reasonable juror to find in favor of authenticity or identification." State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). The admission of evidence is reviewed for an abuse of discretion. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based

upon untenable grounds or reasons. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Recently, in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the State Supreme Court addressed whether a trial court abuses its discretion in admitting the results of a measuring device without any showing of reliability. In Bashaw, the defendant was charged with three counts of delivery of a controlled substance. In Bashaw, the State sought sentence enhancements on each of these three counts based on the fact that the deliveries took place within 1000 feet of a school bus stop. In Bashaw, a police officer testified that he used “one of those rolling wheel measurers you can zero out and roll along ahead of you and it counts out feet,” Id at p. 138, to determine the three distances for purposes of the sentence enhancement; but no testimony was presented regarding whether the device was functioning properly and no evidence was presented regarding whether the device produced accurate results at the time it was employed. Over an objection based on lack of foundation, the police officer was allowed to testify as to the results of the measuring device for the three distances. In Bashaw, the State Supreme Court held that a showing that a distance measuring device is functioning properly and producing accurate results is, under ER 901, a prerequisite to admission of its results. State v. Bashaw, 169 Wn.2d at p. 142. The State Supreme Court also held that

such error was subject to evidentiary harmless error analysis that is such error is not harmless, if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Id at p. 143. The State Supreme Court, applying this analysis, upheld two of the sentence enhancements given the distances at issue were significantly less than 1000 feet and reversed one of the sentence enhancements as the distance was almost 1000 feet. Id at pp. 143-44.

Like Bashaw, Kenyon was charged with delivery of a controlled substance. Like Bashaw, the State sought a sentence enhancement against Kenyon based on the fact that the delivery took place within 1000 feet of a school bus stop. Like Bashaw, Maiava testified that he measured the distance from Olympic Highway and C Street (one of two possible locations for the school bus stop) to Kenyon's trailer as 525 feet (the distance from the other possible school bus stop was never measured) using a measuring wheel. [Vol. II Trial RP 139-140, 146, 147, 178-179]. Like Bashaw, Maiava did not testify as to whether the measuring wheel was functioning properly or whether it produced accurate results—"It's the recording I got that day when I measured it." [Vol. II Trial RP 147, 176]. Like Bashaw, the trial court in the instant case abused its discretion in admitting the results of the measuring device. Like Bashaw, applying evidentiary harmless error analysis, the outcome of the instant case was

materially affected given the fact that there are two possible locations for the school bus stop only one of which was measured thus it is likely that the jury made the special verdict finding based solely on the distance measurement presented regardless of whether it was reliable.

This court should vacate Kenyon's sentence enhancement of 24-months.

c. The Special Verdict Incorrectly Requires A Unanimous Verdict.

In the instant case, the jury was told that they had to be unanimous to return a special verdict on the school bus stop sentence enhancement as instructed by the court in Instruction No. 14, which states:

You will also be given a special verdict form for the crime of unlawful delivery of a controlled substance. If you find the defendant not guilty of this crime, do not use the special verdict form. 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".

[Emphasis added]. [170].

This instruction is incorrect. Unanimity is not required for a special verdict to be final. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.2d 1083 (2003). Unanimity is required if a jury is to answer "yes" to a

special verdict. Id. But a non-unanimous jury decision on a special finding is a final determination that the State has not proven that finding beyond a reasonable doubt. Id. at 895.

Recently, in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the State Supreme Court again addressed the correct instruction to be given when the State seeks a special verdict supporting an enhanced sentence. In Bashaw, the defendant was charged with three counts of delivery of a controlled substance. In Bashaw, the State sought sentence enhancements on each of these three counts based on the fact that the deliveries took place within 1000 feet of a school bus stop. In Bashaw, the trial court instructed the jury that in order to enter any special finding that “since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” In Bashaw, the jury found the defendant guilty as charged on all three counts and entered special verdicts on all three counts finding that each of the deliveries took place within 1000 feet of a school bus stop. In Bashaw, the State Supreme Court, based on State v. Goldberg, supra, held that a jury instruction requiring all twelve jurors agree on an answer to a special verdict is an incorrect statement of law. State v. Bashaw, 169 Wn.2d at 147. Moreover, the State Supreme Court held that while unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the

absence of such a special finding. Id. An instruction that requires unanimity for either determination is error. Id. More importantly, the State Supreme Court held that such an instructional error was not harmless because it could not be determined what would have occurred had the jury been properly instructed. Id. at 147-48. The State Supreme Court vacated the school bus stop sentence enhancements.

Like Bashaw, Kenyon was charged with delivery of a controlled substance. Like Bashaw, the State sought a sentence enhancement against Kenyon based on the fact that the delivery took place within 1000 feet of a school bus stop. Like Bashaw, the trial court instructed the jury that in order to enter a special verdict against Kenyon that “because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.” [CP 170]. Like Bashaw, the jury found Kenyon guilty of delivery of a controlled substance as charged and entered a special verdict finding that the delivery took place within 1000 feet of a school bus stop. [CP 153, 154]. Like Bashaw, the instruction used in Kenyon’s case requiring unanimity for either determining the existence of the special finding or the absence of the special finding was error. Like Bashaw, the instructional error in Kenyon’s case cannot be harmless because it cannot be determined what would have occurred had the jury been properly instructed.

The jury was incorrectly instructed regarding the school bus stop sentence enhancement with the result that Kenyon's sentence enhancement of 24-months must be vacated.

d. Ineffective Assistance of Counsel.

Should this court find that trial counsel waived the errors claimed and argued in the preceding sections, 2(b) and 2(c), of this brief by failing to object to the lack of reliability of the device used to measure the distance between the school bus stop and Kenyon's trailer and failing to object to the court instructing the jury that it had to be unanimous before finding the presence or absence of special verdict on the school bus stop sentence enhancement (Instruction No. 14), [CP 170], then both elements of ineffective assistance of counsel have been established.

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).

Here, both prongs of ineffective assistance are met. First, the record does not, reveal any tactical or strategic reason why trial counsel would have failed to object to the reliability of the measuring device as such an objection would have prevented the admission of its distance reading preventing the imposition of the school bus stop sentence enhancement; nor does the record reveal why trial counsel would have failed to object to Instruction No. 14, which is an incorrect statement of the law, that would have required the court to properly instruct the jury regarding the sentence enhancement.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to object on these bases, Kenyon

received a sentence enhancement of 24-months that he should not have received.

- (3) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY KENYON'S MOTION FOR A NEW TRIAL BASED ON JURY MISCONDUCT WHERE JUROR 4 IMPROPERLY INJECTED EXTRINSIC EVIDENCE OF HER BIAS BY REFERRING TO KENYON/HIS SUPPORTERS AS THE "MANSON FAMILY."

The United States and Washington Constitutions entitle a criminal defendant the right to a trial by an impartial jury. Sixth Amendment to the United States Constitution; Art. 1, sec. 22 (amend. 10) of the Washington Constitution; *See Duncan v. Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). One guarantee of impartiality is that the jury is constrained to determine factual issues only on the basis of evidence produced in open court. *Bayamoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); *See Turner v. Louisiana*, 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546, 549-550 (1965).

The interjection of extrinsic evidence into the jury's deliberations violates this principle as well as a defendant's right to due process of law. Fifth Amendment to the United States Constitution; Art. 1, sec. 3 of the Washington Constitution. "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

Consideration by the jury of information that is outside the evidence admitted at trial necessitates a new trial if there is a reasonable ground to believe that the defendant may have been prejudiced thereby. State v. Cummings, 31 Wn. App. 427, 642 P.2d 415 (1982); State v. Barnes, 85 Wn. App. 638, 669, 932 P.2de 669 (1997); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992).

Here, Kenyon was charged with delivery of a controlled substance. [CP 180-181]. The critical evidence presented at trial was the testimony of the confidential informant, Giles, as neither Maiava nor Inklebarger actually saw the delivery as it took place inside Kenyon's trailer. Thus, the case turned on credibility—that of Giles as Kenyon did not testify. With regard to credibility, the record establish that Giles was only working as a confidential informant to resolve her own legal trouble and that she had prior criminal history involving crimes of dishonesty.

During trial while the jury was on a break outside the presence of the court, Juror 4 made a comment in front of the entire jury referring to Kenyon/his supporters as the "Manson Family." [CP 33-34, 35-36, 37-38, 39-45, 46-59, 60-71, 72-79, 80-90, 91-99, 100-110, 111-120, 121-128, 129-137, 138-139, 143-145, 148-150].

Kenyon brought the matter to the attention of the trial court via a motion for a new trial based on jury misconduct, which the trial court

denied. [CP 25-28, 29-32, 33-34, 35-36, 37-38, 39-45, 46-59, 60-71, 72-79, 80-90, 91-99, 100-110, 111-120, 121-128, 129-137, 138-139, 143-145, 146-147, 148-150, 151-152; Vol. XVII RP 272-298].

Contrary to the trial court's holding in denying Kenyon's motion for a new trial, it cannot be disputed that Juror 4's "comment" constituted improper extrinsic evidence demonstrating bias against Kenyon by associating him with the "Manson Family" in derogation of the presumption of innocence requiring a new trial. Moreover, there is every likelihood that Juror 4's misconduct contributed to the verdict in that at least for Juror 4, if not the other jurors who acknowledge hearing Juror 4's "comment" even while asserting it was not mentioned during deliberations, she had prejudged the case and had a bias against Kenyon. The case against Kenyon was not strong and turned on the credibility of Giles, who had every reason to accuse Kenyon given her legal problems that resulted in her acting as a confidential informant despite prior criminal history involving crimes of dishonesty. Any improper information injected into the deliberation process tending to influence the determination of credibility calls into doubt the verdicts found by the jury.

Any doubt that consideration of extrinsic evidence affected a verdict must be resolved against the verdict. Halverson v. Anderson, 82

Wn.2d 746, 752, 513 P.2d 827 (1973); Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962).¹

[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict....

State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (*citing* United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir. 1980) (*quoting* Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980))).

Here, based on the fact that the jury reached its verdicts in a case where Kenyon exercised his right not to testify and the matter turned on the credibility of a confidential informant, it cannot be concluded beyond a reasonable doubt that extrinsic evidence of bias on the part of Juror 4 given her comment equating Kenyon/his supporters to the criminally notorious “Manson Family” did not contribute to the verdict with the result that the jury’s verdict of guilty cannot stand. The trial court erred in failing to grant Kenyon’s motion for a new trial based on jury misconduct. This court should reverse Kenyon’s conviction and remand for a new trial.

¹ Washington courts have not hesitated to reverse a conviction when the jury considered matters outside the evidence. *See, e.g.*, State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967); State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (unproven aliases on cover sheet to instructions submitted to the jury); State v. Boggs, 33 Wn.2d 21, 207 P.2d 743 (1949), *overruled on other grounds*, in State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) (jury considered exhibits previously ruled inadmissible by the court); State v. McChestney, 114 Wash. 113, 194 Pac. 776 (1921) (juror’s personal knowledge of cattle theft); State v. Parker, 25 Wash. 405, 65 Pac. 776 (1901) (juror’s personal knowledge of defendant).

- (4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND KENYON GUILTY BEYOND A REASONABLE DOUBT OF DELIVERY OF A CONTROLLED SUBSTANCE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime 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.

Here, the State charged and Kenyon was convicted of delivery of a controlled substance. [CP 154, 180-181]. The sole issue in dispute at trial which the State bore the burden of establishing beyond a reasonable doubt was whether Kenyon was in fact the person who delivered methamphetamine to Giles. This is a burden the State cannot sustain.

The Sum of the State's evidence against Kenyon was the testimony of Giles that Kenyon committed the crime as neither Maiava nor Inklebarger actually saw the delivery as it took place inside Kenyon's trailer. Of import in considering Giles's testimony is the fact that she was working as a confidential informant solely because she was in legal trouble and that her prior criminal history includes crimes of dishonesty. Moreover, it cannot be disputed that at the time of the delivery more than one car was parked in front of Kenyon's trailer and the evidence that Kenyon was alone in his trailer when the delivery occurred is based solely on Giles's testimony.

Given the totality of the evidence elicited at trial it cannot be said beyond a reasonable doubt that it was Kenyon who delivered methamphetamine to Giles. This court should reverse and dismiss Kenyon's conviction.

E. CONCLUSION

Based on the above, Kenyon respectfully requests this court to reverse and dismiss his conviction and/or vacate his sentence enhancement.

DATED this 21st day of January 2011.

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COURT OF APPEALS
DIVISION II

11 JAN 21 PM 12:30

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

Patricia A. Pethick hereby certifies under penalty of perjury under

the laws of the State of Washington that on the 21st day of January 2011, I
delivered a true and correct copy of the Brief of Appellant to which this
certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 21st day of January 2011.

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