

No. 43823-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

STEPHANEY L. MALONE,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
DAVID PHELAN/WSBA #36637
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

| | |
|--|-----------|
| I. ANSWERS TO ASSIGNMENT OF ERROR | 3 |
| II. STATEMENT OF THE CASE | 3 |
| III. ARGUMENT..... | 4 |
| A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT COUNT I, II, IV, V, and VI..... | 4 |
| 1. COUNT I..... | 5 |
| 2. COUNT II..... | 6 |
| 3. COUNT IV..... | 7 |
| 4. COUNT V..... | 8 |
| 5. COUNT VI..... | 9 |
| i. FRANK ARCE JR. (DELIVERY COUNT IV) | 10 |
| ii. CARLOS VARGAS (DELIVERY COUNT III)..... | 10 |
| iii. FINANCIAL GAIN..... | 11 |
| B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SCHOOL BUS ENHANCEMENTS..... | 12 |
| C. THE SCHOOL BUS STOP ENHANCEMENT FOR COUNT III WAS NOT BASED ON ACCOMPLICE LIABILITY | 13 |
| D. THE SCHOOL BUS ENHANCEMENT FOR COUNT IV WAS LAWFUL AND APPROPRIATE..... | 13 |
| E. RCW 9.94A.535(3)(e) IS CONSTITUTIONAL | 17 |
| F. THE AGGRAVATOR INSTRUCTIONS DID NOT MISSTATE THE LAW, BUT IF SO, THE ERROR WAS HARMLESS..... | 18 |
| G. COUNT VI AND COUNT I, III AND IV ARE NOT THE SAME CRIMINAL CONDUCT..... | 20 |
| H. COUNTS I AND II ARE NOT THE SAME CRIMINAL CONDUCT | |
| 21 | |
| IV. CONCLUSION..... | 21 |
| APPENDIX..... | 23 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---------------|
| <i>State v. Barnes</i> , 85 Wn.App. 638, 932 P.2d 669 (1997) | 18 |
| <i>State v. Branch</i> , 129 Wn.2d 635, 919 P.2d 1228 (1996) | 16 |
| <i>State v. Campbell</i> , 59 Wn.App. 61, 63, 795 P.2d 750 (1990)..... | 15 |
| <i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992)..... | 12 |
| <i>State v. Duran-Davila</i> , 77 Wn.App. 701, 892 P.2d 1125 (1995) | 6 |
| <i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995) | 5 |
| <i>State v. Green</i> , 95 Wn.2d 216, 616 P.2d 628 (1980) | 5 |
| <i>State v. Halstein</i> , 122 Wn.2d 109, 857 P.2d 270 (1993) | 16 |
| <i>State v. Hennessey</i> , 80 Wn.App. 190, 907 P.2d 331 (1995) | 10 |
| <i>State v. Lopez</i> , 79 Wn.App. 755, 904 P.2d 1179 (1995)..... | 7 |
| <i>State v. McKim</i> , 98 Wn.2d 111, 653 P.2d 1040(1982)..... | 13 |
| <i>State v. Pineda-Pineda</i> , 154 Wn.App. 653, 226 P.3d 164 (2010) .. | 12, 13, 14 |
| <i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997)..... | 5 |
| <i>State v. Reynolds</i> , 80 Wn.App. 851, 912 P.2d 494 (1996) | 17 |
| <i>State v. Sigman</i> , 118 Wn.2d 442, 826 P.2d 144 (1992) | 16 |
| <i>State v. Silva-Baltazar</i> , 125 Wn.2d 472, 886 P.2d 138 (1994),..... | 12 |

Statutes

| | |
|---------------------------|--------|
| RCW 69.50.101..... | 14 |
| RCW 69.50.401..... | 14, 15 |
| RCW 69.50.435..... | 14 |
| RCW 9.94A.535(3)(e) | 16 |

I. ANSWERS TO ASSIGNMENT OF ERROR

1. There was sufficient evidence to support the Appellant's conviction on counts I and IV under an accomplice liability theory.
2. There was sufficient evidence to support the Appellant's conviction for Possession with the Intent to Deliver.
3. There was sufficient evidence to support the conviction for Leading Organized Crime.
4. There was sufficient evidence to support the conviction for involving a minor in a drug transaction.
5. There was sufficient evidence to support the school bus enhancements and evidence established the location of the transaction.
6. There was sufficient evidence to support the school bus enhancement for Counts III and IV, because Appellant personally appeared in the school zone for Count III and decided the location of the transaction for Count IV.
7. RCW 9.94A.535(3)(e) is not unconstitutionally vague.
8. There was sufficient evidence to support the finding of the aggravator of Major Violation of the Uniform Controlled Substances Act.
9. The convictions were not same criminal conduct, so trial counsel was not ineffective during the sentencing phase.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts, with a few additions.

As to the controlled buy that occurred on September 28th, 2010, the State would note that the record reflects that the confidential informant, Miller, called Appellant. RP 28. He was told by the Appellant to call her son. RP 28. He was unable to contact her son and so called Appellant back. RP 28. Appellant then told Miller that she, herself, would re-contact her son. She then told Miller to try and call her son again. RP 29.

As to the controlled buy that occurred on October 5th, 2010, which serves as the basis for Count III, Appellant was personally observed at the buy location. RP 169.

As to the controlled buy that occurred on October 28th, 2010, the basis for Count IV, Detective Streissguth listened in to Miller arranging the drug transaction with Appellant. RP 41. Appellant was heard telling Miller, the informant, that her son "Franko" would deliver the drugs. RP 41. Frank Arce Jr. was seen leaving the Appellant's house on an orange BMX bike and deliver drugs to the informant. RP 42, RP 97.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT COUNT I, II, IV, V, and VI

There was sufficient evidence to support the convictions for Count I and Count IV. The standard of review for a challenge to the sufficiency of the evidence is whether, after viewing the evidence in

the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), citing *State v. Green*, 95 Wn.2d 216, 221, 616 P.2d 628 (1980). When the Appellant challenges the sufficiency of the evidence, they admit “the truth of the State’s evidence and all inferences that can reasonably be drawn from that evidence.” *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). This is an intentionally generous standard, emphasizing that deference that should be shown to a jury verdict.

1. COUNT I

First, the State argued accomplice liability as the basis for liability. RP 305. This was supported by the accomplice liability instruction. Jury Instruction #7, CP 27. Under an accomplice theory, Appellant is not required to own or even direct a transaction. Appellant’s actions to connect Miller with her son, Derrick Malone, by giving him his phone number and then shepherding the transaction, was sufficient.

The Appellant is a bit generous in her interpretation of the facts when she suggests that all she did was direct Mr. Miller to contact Derrick Malone. The record shows that not only did she connect Miller with Derrick Malone, when initial attempts at contact

failed, she herself contacted Derrick to ensure the connection was made.

Secondly, even assuming constructive delivery applied as a standard of proof, there was sufficient evidence for a jury to find that Appellant directed Derrick Malone to provide cocaine to Miller. The jury heard that Miller called Appellant, who gave him Derrick Malone's number. Then when Miller could not contact Derrick Malone, Appellant herself called Derrick Malone to ensure the transaction proceeded. The court accepts all reasonable inferences when determining the question of sufficiency of the evidence and a reasonable inference exists that Appellant directed Derrick Malone. There was sufficient evidence to support Count I.

2. COUNT II

There was sufficient evidence to show that Derrick Malone was under the age of 18 at the time of the drug transaction. Hearsay statements aside, Detective Sawyer's testimony was sufficient to support the conviction.

Detective Sawyer testified that he booked Derrick Malone into juvenile custody. RP 118. Sawyer also testified that he knew how old Malone was and that he was fifteen or sixteen at the time of his arrest. RP 118. This would necessarily have made him fifteen or sixteen at the time of the alleged transaction. Sawyer further testified that he

would not have been able to be booked into custody at the Juvenile facility if he was eighteen or older. RP 118.

This case is fundamentally different than *State v. Duran-Davila*, 77 Wn.App. 701, 892 P.2d 1125 (1995). Unlike that case, where the officer only testified that he saw Duran-Davila at a remand hearing in juvenile court, Detective Sawyer booked Derrick Malone into the juvenile detention center. He testified that it would be impossible to book someone 18 or older at the juvenile detention center. They would have been refused and Sawyer would have had to take Derrick Malone to the adult detention facility.

Where it is conceivably possible that someone 18 years or older could appear in juvenile court, Sawyer's uncontroverted testimony that he would have been denied at the juvenile detention center provides enough information to support the inference that Derrick Malone was under 18 at the time of the crime. The difference is one of probability (someone appearing in Juvenile Court while older than 18) vs. impossibility (someone over 18 being booked into juvenile detention). It is reasonable to infer that someone booked into juvenile detention was actually a juvenile, and under the age of eighteen, especially when considered in light of the fact that Detective Sawyer was personally familiar with Malone and knew him to be fifteen or sixteen at the time of the transaction.

3. COUNT IV

There was sufficient and specific evidence to support the jury's finding for Count IV. All facts are construed in the light most favorable to the State in a sufficiency claim. Unfortunately for the Appellant, the principle fact upon which the Appellant relies is that Mr. Arce testified that he was not directed by Appellant, but by another person (his girlfriend). Because all factual contradictions or inconsistencies resolve in favor of the State, this court, like the jury at trial, is not required to believe Mr. Arce. The evidence was clear, Malone told Miller that "Franko" would be delivering the cocaine and would meet him at the target location. RP 41. Frank Arce Jr. was observed leaving what the jury later learned was Appellant's residence and riding a bicycle to the target location, where he delivered cocaine. RP 41, RP 97. There is no doubt and can be no dispute about these facts, because of the nature of review on a sufficiency claim. There was sufficient evidence under both an accomplice liability theory, as well as a "constructive delivery" theory to support the conviction.

4. COUNT V

There was sufficient evidence for a rational trier of fact to find that the cocaine was possessed with the intent to deliver. Generally, to prove possession with intent to deliver there must be at least one additional factor, other than the presence of narcotics, to suggest the intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995). In this case, the jury heard that on three previous occasions

Appellant was involved in controlled buy operations. On one occasion she personally delivered cocaine and on another it was observed leaving her house. Each of the controlled buys involved cocaine, the same substance found at her home. The police did not find any traditional packaging materials when they executed the search warrant, but that is unsurprising given that on all three occasions, the crack cocaine was delivered as rocks rolled in a paper towel.

Finally, the jury had the luxury of visually comparing the amount involved in each of the deliveries, so they could make inferences based on the visual differences that there was an amount that showed the “intent” to deliver or sell in the future. Specifically, exhibits 2A, 3A, and 4A were the amounts purchased during the various controlled buys, compared to the amount contained in 1A, the crack cocaine seized during the search warrant execution. Further the presence of the crack cocaine in the house while Appellant was gone suggests the stash was not for personal use, especially since it was Appellant’s practice to have people that stayed at her house deliver narcotics when she was not physically at home. This inference is also supported by the fact that Vargas was present at the time the search warrant was executed. RP 50. So was the bicycle that Frank Arce Jr. rode to the October 28th controlled buy. RP 51. There was sufficient evidence to support Possession with the Intent to Deliver.

5. COUNT VI

There was sufficient evidence to support the conviction for Leading Organized Crime. As stated above, all inferences and factual disputes fall in favor of the State.

i. FRANK ARCE JR. (DELIVERY COUNT IV)

There was sufficient evidence to show that Appellant directed, managed or supervised Frank Arce Jr. Specifically, Juston Miller, the informant, testified that he called Appellant, who told him that “Franko” would meeting him at the park with the crack cocaine. That is exactly what happened. While Arce testified at trial that he was directed by his girlfriend, not the Appellant, the jury was not required to believe him. Where the court construes any factual dispute in favor of the State, the court must necessarily believe the testimony of both Detective Streisguth and Miller, which indicated that Appellant was sending Arce to do the delivery. It is reasonable to infer from the fact that Appellant told Miller that “Franko” would be delivering the crack cocaine, the Appellant directed Frank Arce Jr. to do the delivery. There was sufficient evidence to show that Appellant directed Arce in the course of engaging in a pattern of criminal profiteering.

ii. CARLOS VARGAS (DELIVERY COUNT III)

There was sufficient evidence to show that Appellant directed, managed, or supervised Carlos Vargas as she engaged in a pattern of criminal profiteering. It is irrelevant whether Vargas was intending to drive Appellant to the Dollar Tree before she set up the buy. The

informant's testimony was clear that he approached Malone, then had to leave after making initial contact because he had no money. He returned and completed the purchase, with Vargas sitting in driver's seat and Appellant sitting in the front passenger seat. That means that Appellant would have had to reach into the back to hand Miller the crack cocaine. It is reasonable to infer that Vargas was aware of the drug transaction and was waiting at the location at the direction of Appellant so she could complete the drug transaction.

There is no requirement that the State prove that Vargas knew he was acting in support of a criminal enterprise, just that Appellant used him in the course of such enterprise. Appellant had Vargas drive, and when the informant had to leave in the middle of the transaction, had Vargas wait. Or she could have merely supervised him while she engaged in the pattern of criminal conduct. It is clear that Vargas was driving Appellant around and in the course of that he was aiding her in her criminal enterprise. The intentionally expansive language of the Leading Organized Crime statute captures this conduct. There was sufficient evidence to show that Appellant directed Vargas in the course of engaging in a pattern of criminal profiteering.

iii. FINANCIAL GAIN

There was sufficient evidence to show that the acts committed for the purpose of the Leading Organized Crime charge were for

financial gain. In the two transactions where Appellant was not involved in-person, it is reasonable to infer that she was getting the profit from the transaction. In each of the transactions the informant called Appellant, who either designated someone to deliver, or appeared herself. Derrick Malone was Appellant's son and was picked by Appellant to handle the transaction. It is reasonable to infer that Appellant was the financial beneficiary. The same holds true for the Frank Arce Jr. transaction, in particular there because Appellant set all the details of the transaction and Arce was observed leaving her house. There was sufficient evidence to support the conviction.

B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SCHOOL BUS ENHANCEMENTS

There was sufficient evidence to support the school bus enhancements. Again, in a sufficiency claim, the Appellant admits all facts and reasonable inferences in favor of the State. The comparison by the Appellant to *Hennessey* is completely inappropriate. In that case, the only distances admitted were "guesstimates." *State v. Hennessey*, 80 Wn.App. 190, 195, 907 P.2d 331 (1995). Moreover, when the one map that had a scale was examined by the appellate court, the court determined that the distances were greater than 1,000 feet. *Id.* Unlike the maps at issue in *Hennessey*, here the State produced maps created by a Geographic Information Systems technician that contained a precise measurement of the area within 1,000 feet of each of the school bus stops at issue. The GIS

technician testified that she received the locations of the bus stops from school personnel. RP 218. The buffer was accurate to within inches. RP 217. Detective Streissguth testified about the specific location, on the map, for each of the three charges at issue. RP 221-222. In each case, he indicated that the location was within the 1,000 foot barrier, while pointing out the location to the jury on the map created by the GIS technician. RP 221-222. This is absolutely nothing like the “guesstimates” at issue in *Hennessey*. The maps were Exhibits 10-12. There was sufficient evidence to show that in each case of enhancement, the location was within 1,000 feet of a school bus stop.

C. THE SCHOOL BUS STOP ENHANCEMENT FOR COUNT III WAS NOT BASED ON ACCOMPLICE LIABILITY

It is unclear why the Appellant even made this argument because Appellant herself was found to be physically present and delivered, hand-to-hand, the crack cocaine at issue. The enhancement was not based on accomplice liability. The Appellant’s request to dismiss the enhancement should be denied.

D. THE SCHOOL BUS ENHANCEMENT FOR COUNT IV WAS LAWFUL AND APPROPRIATE

The school bus enhancement can and should attach to an accomplice, when that accomplice directs the conduct prohibited by the enhancement. This case is unlike *Pineda-Pineda* because the issue here is whether the person who sets up a drug transaction within 1,000 feet of a school should be accountable for the enhancement, not,

as the *Pineda-Pineda* court noted, where a person “can be held strictly liable for a participant’s decision to conduct the transaction in the school zone.” *State v. Pineda-Pineda*, 154 Wn.App. 653, 660, 226 P.3d 164 (2010). The situation is completely different and this court should affirm the school zone enhancement.

It makes complete sense, logically, why a school zone enhancement would not apply to an accomplice who did not determine the location of the transaction. The whole point of a school zone enhancement is to discourage “the development of the violent and destructive drug culture in areas where there are children.” *State v. Silva-Baltazar*, 125 Wn.2d 472, 483, 886 P.2d 138 (1994), quoting *State v. Coria*, 120 Wn.2d 156, 172-73, 839 P.2d 890 (1992). If the person who arranged the transaction had no knowledge where the transaction was to take place, applying the enhancement to them would do nothing to further the stated legislative ends of the statute. It is a completely different situation here, where Appellant chose the location of the buy and then SENT the drugs to that location, within 1,000 feet of a school bus stop. There is a distinction, subtle though it may be, between someone who sends out drugs that incidentally end up within 1,000 feet of a school bus stop and the person who chose the location, which was within 1,000 feet of a school bus stop.

The Appellant correctly points out the key language in this court’s holding in *Pineda-Pineda*, which states that “where there is no

explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendant's own acts must form the basis for the enhancement." *Pineda-Pineda*, 154 Wn.App. at 664, 226 P.3d 164. This statement echoes the analysis in *McKim*, which this court quoted in the *Pineda-Pineda* case, "any sentence enhancement must depend on the accused's own conduct." *Id.*, quoting *State v. McKim*, 98 Wn.2d 111, 117, 653 P.2d 1040(1982). Moreover, it makes logical sense to draw a distinction between a person who is involved in a drug transaction, where the location is either incidental or chosen for them, and from the person who chooses the location in the prohibited zone. The former would require application of an enhancement to someone for another's acts in relation to the enhancement. The latter penalizes the person only for the acts they committed, in this case sending drugs to a specific location, which itself was in a prohibited zone.

The Appellant incorrectly states the facts of *Pineda-Pineda*, suggesting that the appellant in that case directed the accomplices to the location. This court was clear in setting up the factual circumstances in that case by noting specifically the question before the court was "where there is no evidence either that Pineda-Pineda determined the precise location of the delivery or that he was physically present in the school zone when the delivery occurred..." *Id.* at 660. There was no evidence in that case that Pineda-Pineda

determined the precise location for the delivery. There **WAS** evidence presented to the jury that Appellant told the informant to meet her son Franco at Bailey Park, on Oak and 34th Ave. RP 41-42. RP 170-171. The entirety of Bailey Park is within 1,000 feet of the school bus stop. RP 221-222. This court should not vacate the enhancement, because in this case, the Appellant is being held responsible for her own actions, not those of an accomplice.

Pineda-Pineda aside, the plain language of RCW 69.50.435 applies to the conduct at issue here. The statute, in pertinent part, reads, “any person who violates RCW 69.50.401 by ... delivering ... a controlled substance... within 1,000 feet of a school bus route stop designated by the school district...” RCW 69.50.435 (1). A person violates RCW 69.50.401 by “deliver[ing] ... a controlled substance.” Delivery can be actual or constructive. RCW 69.50.101 (f). Constructive delivery means the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant. *State v. Campbell*, 59 Wn.App. 61, 63, 795 P.2d 750 (1990). Applying these facts to Count IV, the October 28th, 2010 controlled buy, Appellant took a phone call from informant Miller and told him that “Franko” would deliver crack cocaine, a controlled substance, to him at Bailey Park, contained entirely within a prohibited zone. Frank Arce Jr., presumably at the direction of

Appellant, then delivered crack cocaine at the specific location, presumably as instructed. Appellant violated RCW 69.50.401 by engaging in a constructive delivery within 1,000 feet of a school bus stop. The “constructive delivery” happens at the point of the “transfer,” so Appellant, by the plain language of the statute without any interpretation necessary, is subject to the school bus stop enhancement.

It makes logical, rational sense to apply the school bus stop enhancement where an individual directs that the transaction take place at a location, which is 1,000 feet from a school bus stop. It meets the legislative “end” of the enhancement statute and enhances sentences only for those actions actually committed by the person at issue. Such an interpretation is consistent with *McKim, Silva-Baltazar* and progeny. The outcome in *Pineda-Pineda* would remain the same, since there was no evidence in that case that appellant determined the location of the controlled buy. This court should affirm the application of the school bus stop enhancement for Count IV.

E. RCW 9.94A.535(3)(e) IS CONSTITUTIONAL

RCW 9.94A.535(3)(e) is not unconstitutionally vague. Appellant completely fails to provide any actual analysis on this argument. Appellant incorrectly makes a facial challenge to the validity of the statute, which is only applicable in cases which involve First Amendment rights. *State v. Halstein*, 122 Wn.2d 109, 117, 857

P.2d 270 (1993), *citing State v. Sigman*, 118 Wn.2d 442, 445, 826 P.2d 144 (1992). Appellant must show why the statute is unconstitutionally vague as applied to the specific facts of this case. *Id.* Statutes are presumed constitutional. *Id.* at 118. Appellant must show, beyond a reasonable doubt, that the statutes, as applied to her conduct, are unconstitutional. *Id.* To make such a showing, she must establish that a person of reasonable understanding would be required to guess at the meaning of the statute. *State v. Branch*, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996). Appellant made no such showing, relying instead on a discussion in the WPICs regarding possible interpretations of the statute.

As applied to Appellant's case, no reasonable person would be required to guess at the meaning of the statute, thus it is not unconstitutionally vague. In this case, Appellant was accused of a Major Violation of the Uniform Controlled Substances Act, specifically, that she was involved in three separate transactions in which controlled substances were transferred. There was little or no room for confusion.

F. THE AGGRAVATOR INSTRUCTIONS DID NOT MISSTATE THE LAW, BUT IF SO, THE ERROR WAS HARMLESS

The instructions did not misstate the law. Jury instruction number 31 appropriately used the word "case" instead of "offense," because the statute was intended to encompass cases involving at least three separate transactions. This court has used this

interpretation of this particular aggravator in the past. In *State v. Reynolds*, this court interpreted then RCW 9.94A.390(2)(d)(i), since recodified as RCW 9.94A.535(3)(e), to apply when there were three separate transactions involved in a case. *State v. Reynolds*, 80 Wn.App. 851, 856, 912 P.2d 494 (1996). The court determined the aggravator did not apply because only two of the three deliveries involved an actual controlled substance. *Id.* There was no charge of Leading Organize Crime, or Conspiracy, or other “offense” that might possible include three separate transactions involving drugs. Rather, the court looked at the case as a whole and determined that the aggravator could apply so long as there were three separate transactions. This interpretation of the statute is logical, appropriate, and should continue to be applied. As such, the instruction accurately stated the law.

Even if such an interpretation was an error, it was harmless beyond a reasonable doubt. The jury was given only one factor to consider for determining whether an aggravator existed. That factor was whether or not the current case involved at least three separate transactions. Since the jury found Appellant guilty of all charged counts, as well as Leading Organized Crime, which in and of itself was predicated on the jury finding the Appellant guilty of at least three separate transactions, any error contained within the instruction is harmless.

While it is possible the jury looked at the one of the deliveries for a relatively small amount of crack cocaine and determined that it was a “major trafficking violation,” it is not reasonable to think so, in light of all the rest of the evidence. Even under such a significant burden as beyond a reasonable doubt, any error was harmless.

G. COUNT VI AND COUNT I, III AND IV ARE NOT THE SAME CRIMINAL CONDUCT

Count VI and Count I, III, and IV are not the same criminal conduct. Count VI, Leading Organized Crime, involves some of the same elements as Counts I, III, and IV, but they are not identical. The Appellant makes the only real argument necessary to show why these crimes do NOT constitute the same criminal conduct. Appellant points out that “her intent, objectively viewed, was to sell and profit from the sale of cocaine.” APP. BRF. 41. Profit is not an element, nor does it represent the intent or *mens rea* involved in delivery of a controlled substance. The intent to profit is however represented in the *mens rea* for Leading Organized Crime, in that the deliveries must be part of a pattern of criminal profiteering. Nor is Leading Organized Crime proven simply by proving Count I, Count III, OR Count IV. Each of those counts must be proven, in addition to the fact that the State must show that she supervised, managed, directed, etc. three different individuals in the course of that criminal profiteering.

Over and above proving the transaction, Leading Organized Crime requires the State to prove a different *mens rea*, the identities of at least three individuals who may not necessarily have committed a crime, and their relationship to the principal. The State was required to show Appellant's position in a hierarchy, not just her participation. Finally, Leading Organized Crime requires only that the State prove three persons and three predicate acts, but those acts need not be committed by the three persons. *State v. Barnes*, 85 Wn.App. 638, 665-666, 932 P.2d 669 (1997).

These crimes do not constitute the same criminal conduct. The offender score was correctly calculated.

H. COUNTS I AND II ARE NOT THE SAME CRIMINAL CONDUCT

These counts do not merge and are not the same criminal conduct. Count II required the State to show that Appellant involved a minor in a drug transaction. The victim was not the "State," but rather the minor. The "victim" in Count I was the State. While the two acts were near in time, the intent and elements were different. These cases should not be counted as same criminal conduct.

IV. CONCLUSION

The appellant raises a number of issues, but none should compel this court to reverse any of the convictions or enhancements. There was sufficient evidence to support each count and sentencing enhancement. The various sentencing enhancements were

appropriately applied and the statute authorizing the exceptional sentence was not unconstitutionally vague as applied to the Appellant. Nor did any of the counts merge with one another, or count as same-criminal-conduct.

This court should affirm the verdicts of the jury and the decisions of the lower court on the various issues raised by the Appellant.

Respectfully submitted this 26th day of August, 2013 .

SUSAN I. BAUR
Prosecuting Attorney

By:

DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX

RCW 69.50.101

Definitions (as amended by 2012 c 8).

Unless the context clearly requires otherwise, definitions of terms shall be as indicated where used in this chapter:

(a) "Administer" means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(1) a practitioner authorized to prescribe (or, by the practitioner's authorized agent); or

(2) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseperson, or employee of the carrier or warehouseperson. (c) "Board" means the state board of pharmacy.

(d) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules.

(e)(1) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II and:

(i) that has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or

(ii) with respect to a particular individual, that the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II.

(2) The term does not include:

(i) a controlled substance;

(ii) a substance for which there is an approved new drug application;

(iii) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the federal Food, Drug and Cosmetic Act, 21 U.S.C. Sec. 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(iv) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(f) "Deliver" or "delivery," means the actual or constructive transfer from one person to another of

a substance, whether or not there is an agency relationship.

(g) "Department" means the department of health.

(h) "Dispense" means the interpretation of a prescription or order for a controlled substance and, pursuant to that prescription or order, the proper selection, measuring, compounding, labeling, or packaging necessary to prepare that prescription or order for delivery.

(i) "Dispenser" means a practitioner who dispenses.

(j) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(k) "Distributor" means a person who distributes.

(l) "Drug" means (1) a controlled substance recognized as a drug in the official United States pharmacopoeia/national formulary or the official homeopathic pharmacopoeia of the United States, or any supplement to them; (2) controlled substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals; (3) controlled substances (other than food) intended to affect the structure or any function of the body of individuals or animals; and (4) controlled substances intended for use as a component of any article specified in (1), (2), or (3) of this subsection. The term does not include devices or their components, parts, or accessories.

(m) "Drug enforcement administration" means the drug enforcement administration in the United States Department of Justice, or its successor agency.

(n) "Immediate precursor" means a substance:

(1) that the state board of pharmacy has found to be and by rule designates as being the principal compound commonly used, or produced primarily for use, in the manufacture of a controlled substance;

(2) that is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance; and

(3) the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(o) "Isomer" means an optical isomer, but in RCW 69.50.101(r)(5), 69.50.204(a) (12) and (34), and 69.50.206(b)(4), the term includes any geometrical isomer; in RCW 69.50.204(a) (8) and (42), and 69.50.210(c) the term includes any positional isomer; and in RCW 69.50.204(a)(35), 69.50.204(c), and 69.50.208 (a) the term includes any positional or geometric isomer.

(p) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance: (1) by a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of

the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(q) "Marijuana" or "marihuana" means all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

(r) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium, opium derivative, and any derivative of opium or opium derivative, including their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation. The term does not include the isoquinoline alkaloids of opium.

(2) Synthetic opiate and any derivative of synthetic opiate, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation.

(3) Poppy straw and concentrate of poppy straw.

(4) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed.

(5) Cocaine, or any salt, isomer, or salt of isomer thereof.

(6) Cocaine base.

(7) Ecgonine, or any derivative, salt, isomer, or salt of isomer thereof.

(8) Any compound, mixture, or preparation containing any quantity of any substance referred to in subparagraphs (1) through (7).

(s) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term includes opium, substances derived from opium (opium derivatives), and synthetic opiates. The term does not include, unless specifically designated as controlled under RCW [69.50.201](#), the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). The term includes the racemic and levorotatory forms of dextromethorphan.

(t) "Opium poppy" means the plant of the species *Papaver somniferum* L., except its seeds.

(u) "Person" means individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(v) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(w) "Practitioner" means:

(1) A physician under chapter 18.71 RCW; a physician assistant under chapter 18.71A RCW; an osteopathic physician and surgeon under chapter 18.57 RCW; an osteopathic physician assistant under chapter 18.57A RCW who is licensed under RCW 18.57A.020 subject to any limitations in RCW 18.57A.040; an optometrist licensed under chapter 18.53 RCW who is certified by the optometry board under RCW 18.53.010 subject to any limitations in RCW 18.53.010; a dentist under chapter 18.32 RCW; a podiatric physician and surgeon under chapter 18.22 RCW; a veterinarian under chapter 18.92 RCW; a registered nurse, advanced registered nurse practitioner, or licensed practical nurse under chapter 18.79 RCW; a naturopathic physician under chapter 18.36A RCW who is licensed under RCW 18.36A.030 subject to any limitations in RCW 18.36A.040; a pharmacist under chapter 18.64 RCW or a scientific investigator under this chapter, licensed, registered or otherwise permitted insofar as is consistent with those licensing laws to distribute, dispense, conduct research with respect to or administer a controlled substance in the course of their professional practice or research in this state.

(2) A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

(3) A physician licensed to practice medicine and surgery, a physician licensed to practice osteopathic medicine and surgery, a dentist licensed to practice dentistry, a podiatric physician and surgeon licensed to practice podiatric medicine and surgery, an advanced registered nurse practitioner licensed to prescribe controlled substances, or a veterinarian licensed to practice veterinary medicine in any state of the United States.

(x) "Prescription" means an order for controlled substances issued by a practitioner duly authorized by law or rule in the state of Washington to prescribe controlled substances within the scope of his or her professional practice for a legitimate medical purpose.

(y) "Production" includes the manufacturing, planting, cultivating, growing, or harvesting of a controlled substance.

(z) "Secretary" means the secretary of health or the secretary's designee.

(aa) "State," unless the context otherwise requires, means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(bb) "Ultimate user" means an individual who lawfully possesses a controlled substance for the individual's own use or for the use of a member of the individual's household or for administering to an animal owned by the individual or by a member of the individual's household.

(cc) "Electronic communication of prescription information" means the communication of

prescription information by computer, or the transmission of an exact visual image of a prescription by facsimile, or other electronic means for original prescription information or prescription refill information for a Schedule III-V controlled substance between an authorized practitioner and a pharmacy or the transfer of prescription information for a controlled substance from one pharmacy to another pharmacy.

RCW 69.50.401

Prohibited acts: A — Penalties.

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

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

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

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

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

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

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

(3) The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with the terms set forth in RCW 69.50.360, 69.50.363, or 69.50.366 shall not constitute a violation of this section, this chapter, or any other provision of Washington state law.

RCW 69.50.435

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

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

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) In a public park;
- (f) In a public housing project designated by a local governing authority as a drug-free zone;
- (g) On a public transit vehicle;
- (h) In a public transit stop shelter;
- (i) At a civic center designated as a drug-free zone by the local governing authority; or
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

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

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

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

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

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

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

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

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

transportation system;

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

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

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

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

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

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

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

RCW 9.94A.535

Departures from the guidelines.

*** CHANGE IN 2013 *** (SEE 5484.SL) ***

*** CHANGE IN 2013 *** (SEE 1383-S.SL) ***

*** CHANGE IN 2013 *** (SEE 5912-S2.SL) ***

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter ~~69.50~~ RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim

or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

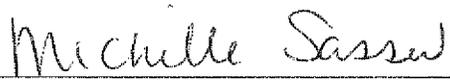
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mitch Harrison
Harrison Law
101 Warren Ave., N.
Seattle, WA 98109-4928
mitch@mitchharrisonlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 27th, 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 27, 2013 - 10:39 AM

Transmittal Letter

Document Uploaded: 438232-Respondent's Brief.pdf

Case Name: State of Washington v. Steponey L. Malone

Court of Appeals Case Number: 43823-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:
mitch@mitchharrisonlaw.com