

NO. 46497-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

EUGENE LEE KOLB,

Appellant.

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

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
1. No evidence proved Eugene Lee Kolb delivered methamphetamine within 1,000 feet of a school bus stop on December 13, 2013	1
2. No evidence proved Kolb delivered methamphetamine within 1,000 feet of the perimeter of school grounds on December 13, 2013.	1
3. The trial court erred in imposing a sentence for either sentencing enhancement given the insufficiency of the evidence.....	1
4. The State failed to provide an adequate chain of custody for Exhibit 2, the methamphetamine.....	1
5. The trial court abused its discretion in admitting Exhibit 2 when the State failed to establish an adequate chain of custody	1
6. The trial court erred in entering a verdict finding Kolb guilty of delivery of methamphetamine	1
7. After the court sustained defense counsel’s objection to police testimony that Kolb was coming to town on January 15 to deal more methamphetamine, defense counsel’s failure to move to strike the officer’s response denied Kolb effective assistance of counsel ...	1
8. The court abused its discretion when it refused to use its discretion to consider Kolb’s request for an exceptional sentence downward	1
9. The trial court erred in failing to recognize it could impose an exceptional sentence downward.....	2

10. The trial court erred in imposing a condition of community custody requiring Kolb to undergo a substance abuse evaluation and fully comply with treatment	2
11. The trial court erred in imposing a community custody condition that Kolb obtain a substance abuse evaluation without finding substance abuse contributed to the offense	2
12. The trial court erred in imposing a non-crime related condition of community custody prohibiting Kolb from consuming any non-prescribed drug.	2
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
1. Whether there was sufficient evidence to prove Eugene Lee Kolb delivered methamphetamine within 1,000 feet of a school bus stop and/or within 1,000 feet of school grounds when no evidence was admitted to prove either the school bus stop or the school grounds existed on the date of the delivery, December 13, 2013?	2
2. Whether the chain of custody for admission of Exhibit 2 was sufficient to support its admission when the evidence failed to establish an adequate chain of custody to prove it was the baggie and the content of the baggie an informant had given to a police detective?	2
3. Whether, after a successful objection to keep out of evidence testimony that Kolb was coming to town to deal drugs on a date well after the incident date, defense counsel's failure to move to strike the testimony denied Kolb effective assistance of counsel when, without the testimony, it was reasonably possible Kolb would have been acquitted?	3
4. Whether the trial court improperly failed to use its discretion in considering Kolb's request for an exceptional sentence downward when the court stated it had no real discretion to impose an exceptional sentence downward because the Court of Appeals and/or the Supreme Court inevitably reversed all exceptional sentences downward?	3

5. Whether the trial court acted without authority when it ordered Kolb to have a substance abuse evaluation as a condition of community custody even though it did not make the statutory required finding that Kolb had a chemical dependency that contributed to the offense?	3
6. Whether the trial court lacked authority to impose as a condition of Kolb’s community custody that he not possess non-prescribed drugs when the condition was not crime related?.....	3
C. STATEMENT OF THE CASE.....	4
1. Charges and conviction	4
2. Trial testimony	4
3. Sentencing.....	10
D. ARGUMENT.....	13
1. THE EVIDENCE IS INSUFFICIENT TO PROVE THE EXISTENCE OF A SCHOOL BUS STOP OR SCHOOL GROUNDS WITHIN 1,000 FEET OF THE DECEMBER 13, 2013, DELIVERY LOCATION.....	13
a. The State is burdened with proving a school bus stop or school grounds existed on the actual date of the offense.....	13
b. The State failed to prove either the bus stop or the school grounds existed on December 13, 2013	15
c. The enhancements must be stricken from Kolb’s sentence. ..	17
2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXHIBIT 2, THE METHAMPHETAMINE, BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY FOR ITS ADMISSION....	17
a. A sufficient chain of custody must be established before a court may admit drugs into evidence.	18

b. The State failed to establish a sufficient chain of custody for Exhibit 2.....	19
c. Without Exhibit 2, the evidence is insufficient to convict Kolb of delivery of methamphetamine and the conviction must be reversed.....	20
3. DEFENSE COUNSEL’S FAILURE TO MOVE TO STRIKE A POLICE OFFICER’S RESPONSE TO A SUCCESSFUL OBJECTION DENIED KOLB EFFECTIVE ASSISTANCE OF COUNSEL.	21
a. Kolb is entitled to effective representation by trial counsel...	21
b. Trial counsel’s failure to move to strike evidence admitted despite a successful objection to it denied Kolb effective assistance of counsel.....	22
4. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO USE ITS DISCRETION TO CONSIDER KOLB’S MERITED REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.	25
a. A defendant is entitled to appeal a trial court’s refusal to give him an exceptional sentence downward when the court refuses to use its discretion to impose the sentence.....	26
b. Kolb is entitled to appeal his sentence because the trial court refused to use its discretion to consider an exceptional sentence downward.	27
c. The record supported Kolb’s requested exceptional sentence downward.	28
d. Had the trial court believed it had discretion to impose an exceptional sentence downward, it likely would have in Kolb’s case.	30
5. THE SUBSTANCE ABUSE EVALUATION AND TREATMENT CONDITION WAS UNLAWFULLY IMPOSED	31

6. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A PROHIBITION ON KOLB'S USE OF ANY NON-PRESCRIBED DRUGS.....	34
E. CONCLUSION.....	36
CERTIFICATE OF SERVICE	38

TABLE OF AUTHORITIES

Page

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	20
<i>City of Seattle v. Slack</i> , 113 Wn.2d 850, 784 P.2d 494 (1989).....	20
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	21
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	22
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	24
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	35
<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010)....	34
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	20
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	20
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	33
<i>State v. Alvarez</i> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	14
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1982).....	21
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007)	32
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	14
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	32, 35
<i>State v. Barnett</i> , 139 Wn.2d 462, 987 P.2d 626 (1999).....	35

<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 Wn.2d 832 (1999).....	14
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	18
<i>State v. Carlin</i> , 40 Wn. App. 698, 700 P.2d 323 (1985), <i>overruled on other grounds</i> , <i>City of Seattle v. Heatley</i> , 70 App. 573 (1993).....	25
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	14
<i>State v. Fiser</i> , 99 Wn. App. 714, 995 P.2d 107 (2000).....	14
<i>State v. Garcia–Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997)	26
<i>State v. Graham</i> , 337 P.3d 319 (2014).....	28
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	27
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	14, 20
<i>State v. Hennessey</i> , 80 Wn. App. 190, 907 P.3d 331 (1995)	14
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	21
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006), <i>review denied</i> , 162 Wn.2d 1014 (2008).....	22
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972)	14
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	32
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	33
<i>State v. Murray</i> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	35
<i>State v. Osman</i> , 157 Wn.2d 474, 139 P.3d 334 (2006).....	26
<i>State v. Paulson</i> , 131 Wn. App. 579, 128 P.3d 133 (2006).....	35
<i>State v. Pearson</i> , 180 Wn. App. 576, 321 P.3d 1285 (2014).....	16
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.3d 817 (2001)	14

<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	22, 23
<i>State v. Roche</i> , 114 Wn. App. 424, 59 P.3d 682 (2002)	18, 19, 20
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	35
<i>State v. Wilber</i> , 55 Wn. App. 294, 777 P.2d 36 (1989)	25
<i>State v. Williams</i> , 149 Wn.2d 143, 65 P.3d 1214 (2003).....	26
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	22
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995).....	22
<i>United States v. Cardenas</i> , 864 F.2d 1528 (10 th Cir. 1989).....	19

Statutes

RCW 9.94A.030(10).....	32, 34
RCW 9.94A.101.....	28
RCW 9.94A.505.....	31
RCW 9.94A.533(6).....	13
RCW 9.94A.535(1).....	28, 29
RCW 9.94A.585(1).....	26
RCW 9.94A.585(2).....	26
RCW 9.94A.607.....	33
RCW 9.94A.607(1).....	33
RCW 9.94A.702.....	31

RCW 9.94A.703.....	32
RCW 9.94A.703(3)(f).....	32, 34
RCW 69.41.010(9).....	35
RCW 69.50.401	4, 13
RCW 69.50.401(1).....	21
RCW 69.50.401(c).....	13
RCW 69.50.401(d).....	13
RCW 69.50.435	13
RCW 69.50.435(1)(c)	4
RCW 69.50.435(1)(d).....	4
RCW 69.50.435(5).....	16

Other Authorities

Sentencing Reform Act of 1981, chapter 9.94A RCW.....	26
U.S. Const. Amend. VI.....	21
U.S. Const. Amend. XIV	20, 21
Wash. Const. Article I, section 3.	20
Wash. Const. Article I, section 22	22

A. ASSIGNMENTS OF ERROR

1. No evidence proved Eugene Lee Kolb delivered methamphetamine within 1,000 feet of a school bus stop on December 13, 2013.

2. No evidence proved Kolb delivered methamphetamine within 1,000 feet of the perimeter of school grounds on December 13, 2013.

3. The trial court erred in imposing a sentence for either sentencing enhancement given the insufficiency of the evidence.

4. The State failed to provide an adequate chain of custody for Exhibit 2, the methamphetamine.

5. The trial court abused its discretion in admitting Exhibit 2 when the State failed to establish an adequate chain of custody.

6. The trial court erred in entering a verdict finding Kolb guilty of delivery of methamphetamine.

7. After the court sustained defense counsel's objection to police testimony that Kolb was coming to town on January 15 to deal more methamphetamine, defense counsel's failure to move to strike the officer's response denied Kolb effective assistance of counsel.

8. The court abused its discretion when it refused to use its discretion to consider Kolb's request for an exceptional sentence downward .

9. The trial court erred in failing to recognize it could impose an exceptional sentence downward.

10. The trial court erred in imposing a condition of community custody requiring Kolb to undergo a substance abuse evaluation and fully comply with treatment.

11. The trial court erred in imposing a community custody condition that Kolb obtain a substance abuse evaluation without finding substance abuse contributed to the offense.

12. The trial court erred in imposing a non-crime related condition of community custody prohibiting Kolb from consuming any non-prescribed drug.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to prove Eugene Lee Kolb delivered methamphetamine within 1,000 feet of a school bus stop and/or within 1,000 feet of school grounds when no evidence was admitted to prove either the school bus stop or the school grounds existed on the date of the delivery, December 13, 2013?

2. Whether the chain of custody for admission of Exhibit 2 was sufficient to support its admission when the evidence failed to establish an adequate chain of custody to prove it was the baggie and the content of the baggie an informant had given gave a police detective?

3. Whether, after a successful objection to keep out of evidence testimony that Kolb was coming to town to deal drugs on a date well after the incident date, defense counsel's failure to move to strike the testimony denied Kolb effective assistance of counsel when, without the testimony, it was reasonably possible Kolb would have been acquitted?

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5. Whether the trial court acted without authority when it ordered Kolb to have a substance abuse evaluation as a condition of community custody even though it did not make the statutory required finding that Kolb had a chemical dependency that contributed to the offense?

6. Whether the trial court lacked authority to impose as a condition of Kolb's community custody that he not possess non-prescribed drugs when the condition was not crime related?

C. STATEMENT OF THE CASE

1. Charges and conviction

By a Second Amended Information, the State charged Eugene Lee Kolb with Delivery of Methamphetamine. RCW 69.50.401; CP 1-3. Also charged were two sentencing enhancements alleging the delivery took place within 1,000 feet of a school bus stop and/or within 1,000 feet of the perimeter of school grounds. RCW 69.50.435(1)(c); RCW 69.50.435(1)(d); CP 1-3.

A jury heard the case on May 27 and 28, 2014. The jury found Kolb guilty of the delivery charge. CP 4; RP2¹ 187. By special verdict the jury answered “yes” to the delivery occurring both within 1,000 feet of a school bus stop and within 1,000 feet of the perimeter of school grounds. CP 5; RP2 187.

Kolb appeals all portions of his judgment and sentence. CP 16-27.

2. Trial testimony

Greg Gray is an informant for the Centralia Police Department. RP1 80. To have his drug charges reduced, Gray was obliged to target people he assured the police would sell him drugs. RP1 80, 84-85. The

¹ The trial transcript is in two volumes. “RP1” refers to the volume of the first day of trial. “RP2” refers to the transcript of the second day of trial and the two days on which sentencing occurred.

police permitted Gray to identify prospective sellers. Gray would then arrange for the ostensible seller to meet him at a specific time and place in Lewis County to exchange drugs for cash. RP1 84.

Gray told Centralia Police Detective Robin Holt he arranged to meet Eugene Kolb at the Centralia Safeway parking lot late afternoon December 13, 2013. RP1 72, 88. Gray told the police he arranged to pay Kolb \$250 for a quarter ounce of methamphetamine. RP1 72, 85.

Detective Holt solicited help from other Centralia police officers to provide surveillance at Safeway. RP1 46, 52. Before they set up in the parking lot, Detective Holt showed Sergeant Gary Wilson and Officer Jason Roberts a Department of Licensing (DOL) photo of Kolb and gave them a description of the Ford Ranger pickup Gray would likely contact. RP1 46, 53, 89.

Officer Roberts met with Detective Holt and Gray prior to going to Safeway. RP1 53. Roberts followed Gray to Safeway. RP1 54. Gray parked mid lot and Roberts parked about 50 feet from him. RP1 54-55. Within a few minutes, a Ford Ranger pulled up next to Gray's truck. RP1 55-56. The description and license plate of the Ranger matched the information Holt had given him earlier. RP1 56. A man and a woman got out of the Ranger and walked to the driver's side of Gray's truck and stayed there for a few minutes. RP1 57, 59. The Ranger drove past

Roberts as it left the parking lot. Roberts identified Kolb as the man in the Ranger. RP1 56.

Sergeant Wilson also saw the Ranger arrive in the parking lot and park next to Gray's truck. RP1 48. Wilson saw Kolb and a woman get out of the Ranger and went to the front of some parked vehicles. RP1 49. Wilson's view of what happened next was blocked by other cars. RP1 49-50.

Detective Holt also provided surveillance in the parking lot. RP1 90. He saw Kolb and Gray talking on the passenger side of Gray's truck. RP1 91. Lisa Balkwill² drove the Ranger when it left the parking lot. RP1 99-100.

Gray's truck was searched both before Gray drove to Safeway and after he left Safeway. Nothing of interest was found in the truck. RP1 58-59, 79, 89.

Gray testified he was strip searched and given \$250 by the police. RP1 72-73. He had no drugs with him. RP1 73. He drove his truck to the Centralia Safeway parking lot. RP1 73-74. Kolb and his girlfriend Lisa pulled into the lot. RP1 74. Kolb walked up to the driver's door. He handed Kolb \$250. RP1 74. Kolb handed Gray what appeared to be a quarter ounce of methamphetamine. RP1 74. They talked for a few

² There are various spellings of "Balkwill" in the record. I have chosen "Balkwill" because that is how she spells her name in a sentencing letter to the court.

minutes. RP1 75. Kolb got back into his truck and left. RP1 78. Gray drove back to a prearranged location and met Detective Holt. RP1 78. He handed Holt the suspected methamphetamine. RP1 79.

Detective Holt identified Exhibit 2 as the plastic bag containing a crystal substance that Gray gave to him on December 13. RP1 94-95; RP2 122. He placed the bag into the Centralia Police evidence system and filled out a request for crime lab testing. RP2 123.

Washington State Patrol Crime Lab forensic scientist John Dunn tested the contents of a bag he received from his property and evidence custodian. RP2 124. The item he tested was labeled with the name “Eugene Lee Kolb” and a specific Centralia Police agency case number. RP2 118. The item tested positive for methamphetamine. RP2 119, 125. Dunn identified Exhibit 2 as the item he tested. RP2 124. Exhibit 2 appeared to be in the same condition he received it in for testing. RP2 125. Dunn modified the item in the lab by putting blue and white evidence tape on it. RP2 124.

Detective Holt testified to the circumstances of Kolb’s arrest on January 15, 2014. Defense counsel objected when Holt told the jury Kolb was “coming down to the Lewis County area to deliver some more methamphetamine.” RP1 96. The court sustained the objection but defense counsel did not ask the answer be stricken.

During post-arrest questioning, Kolb told Centralia Police Officer Adam Haggerty with respect to the sale of narcotics that he “handled the money but not the narcotics.” RP2 115. Officer Haggerty did nothing to clarify what date, time period, or specific instance Kolb meant. RP2 116.

Detective Holt identified Exhibit 1 as an aerial photo of the Centralia Safeway parking lot and surrounding area. RP1 95. He identified a red mark superimposed on the Safeway parking lot as the place where Gray met Kolb and Balkwill. RP1 93.

Dale Dunham is the Centralia School District assistant superintendent of transportation. RP2 129. In that capacity, he knows where designated bus stops, schools, and school property are located. RP2 129-30. He identified a designated school bus stop and a public middle school within 1,000 feet of the Centralia Safeway parking lot. RP2 131. He was not asked, and did not indicate, how and when the bus stop near Safeway was designated as such and whether it was a designated bus stop on December 13, 2013. RP2 129-36. He also was not asked, and did not volunteer, where the middle school and its premises were located as of December 13, 2013. RP2 129-36. He opined that Exhibit 1 was accurate but did not assign a date to its accuracy. RP2 132.

Matt Hyatt is the Geographic Information System (GIS) manager for Lewis County. RP2 137. GIS is another way of saying “computer

mapping.” RP2 137. Hyatt created Exhibit 1, a map, for use at trial. RP2 138-39, 141. The map consists of three parts overlaid on top of each other: (1) an aerial photo of the Centralia Safeway and immediate vicinity radiating out about one-half mile in all directions; (2) “data” loaded into the GIS mapping program to demark certain locations of significance, i.e., street names; and (3) graphics to denote an item of significance to the case. RP1 93; RP2 139-42.

Hyatt made the map using mapping software that is “pretty much the worldwide industry leader.” RP2 139. The primary purpose of the software is for making accurate measurements. RP2 140-41. Measurements are easy. A user just needs to move a mouse on the software from one point to another and ask the program to compute the distance between the two points. RP2 140. The challenge of the mapping software is developing and putting in accurate data. RP2 140.

Detective Holt provided Hyatt with the point in the Safeway parking lot where Holt believed the delivery took place. RP2 93, 142. Hyatt marked that location on the map with a red circle. RP2 142. Hyatt used blue circles to mark the school bus stop near Safeway and the corner of the middle school property near Safeway. RP2 142. A yellow circle on the map showed the distance of 1,000 feet from the red circle. RP2 142. Using the measuring software, Hyatt specifically calculated the red

circle was 935 feet from the school bus stop and 615 feet from the school grounds. RP2 143.

Hyatt did not testify that the school bus stop or the middle school or its property existed on December 13, 2013.

Nothing in the record indicated when the aerial photo was taken.

Kolb did not testify. RP2 153. Instead, he presented abbreviated testimony from Eric Scovbo. RP2 144-153. Scovbo, a methamphetamine user, was acquainted with Kolb, Lisa Balkwill, and Greg Gray. RP2 145-46. Scovbo attempted to testify about the usual way methamphetamine deliveries were made between himself, Gray, and Balkwill. RP2 146-47. He sought to explain that while Kolb accompanied Balkwill on her deliveries, he did not participate in the actual deliveries. RP2 146-49. The State objected to the testimony. The court held it inadmissible. RP2 147, 153.

3. Sentencing

Kolb had no prior criminal history. His standard range was 12+-24 months on the delivery plus an additional 24 consecutive months for the school bus stop/school premises enhancement. CP 8; RP2 193. The State wanted Kolb sentenced to 40 months in prison. RP2 193.

Kolb requested an exceptional sentence downward. RP2 197-200. He supported his request with a sentencing memorandum and supporting

documents. Kolb has a brain injury and lasting mental health issues related to his Army service in Iraq. He loved Lisa Balkwill, a methamphetamine addict who sold methamphetamine to support her addiction. Kolb's mental disabilities coupled with his emotional connection to Balkwill made him vulnerable. Kolb is not a methamphetamine user and has no predisposition to deal drugs. He simply wanted to keep Balkwill close and happy and get her into a quality drug treatment program. RP2 197-203; Supplemental Designation of Clerk's Papers, Defendant's Sentencing Memorandum (sub. nom. 33); Supp. DCP Declaration of Lisa Balkwill (sub. nom. 34); Excerpts of Defendant's Medical Records (sub. nom. 35); and Letters (sub. nom. 38).

The parties agreed the court had no authority to reduce the 24 month enhancement portion of the sentence. RP2 195, 198. The court was sympathetic with Kolb and seemed willing to consider an exceptional sentence downward on the 12+-24 month standard range portion of the sentence. RP2 205-06. But the court declined to do so. The court articulated that it had no real discretion to impose an exceptional sentence downward because the Court of Appeals or Supreme Court would invariably reverse the downward departure regardless of its merit. RP2 204-06.

The court did sentence Kolb to the 12 months plus one day low end of the standard range plus the 24 months of enhancements for a total of 36 months. RP2 206; CP 9. The court also imposed 12 months of community custody. RP2 206; CP 10. In announcing its sentence, the court made no oral finding that Kolb had a chemical dependency that contributed to the conviction. RP2 206. On the judgment and sentence, the court did not enter a finding that Kolb had a chemical dependency that contributed to the offense. CP 7. Yet, the court did not strike a pre-checked box on the judgment and sentence ordering, as a condition of community custody, that Kolb undergo an evaluation for and fully comply with treatment for substance abuse. CP 11. Also as a pre-marked condition, the court ordered Kolb not consume alcohol or “non-prescribed drugs.” CP 10. Kolb was also ordered to maintain law abiding behavior. CP 11.

Kolb did not object to any of the community custody conditions imposed by the court. RP2 207-08.

D. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO PROVE THE EXISTENCE OF A SCHOOL BUS STOP OR SCHOOL GROUNDS WITHIN 1,000 FEET OF THE DECEMBER 13, 2013, DELIVERY LOCATION.

The evidence is insufficient to support the school bus stop or school grounds enhancement. No evidence proved the existence of a school bus stop or school grounds as of the December 13, 2013, incident date. As the evidence is insufficient, the school bus stop and school grounds enhancements must be reversed and Kolb resentenced without any enhancements.

- a. The State is burdened with proving a school bus stop or school grounds existed on the actual date of the offense.

The school bus stop and school premises penalty is authorized by RCW 69.50.435 which provides in relevant part: “Any person who violates RCW 69.50.401 by...delivering...a controlled substance listed under RCW 69.50.401...(c) Within one thousand feet of a school bus stop route designated by the school district; (d) Within one thousand feet of the perimeter of the school grounds...may be punished by...imprisonment of up to twice the imprisonment otherwise authorized by this chapter[.]” The jury’s affirmative finding of the enhancements added 24 mandatory months to Kolb’s sentence. RCW 9.94A.533(6).

A defendant may raise a sufficiency argument for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). It is the State's burden to prove each element of a sentence enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.3d 331 (1995). Evidence is sufficient to support a verdict on an enhancement only if, when viewed in the light most favorable to the State, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "In determining whether the necessary quantum of proof exists, [we] need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001) (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). In making this determination, both circumstantial evidence and direct evidence are equally reliable. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 Wn.2d 832 (1999); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

- b. The State failed to prove either the bus stop or the school grounds existed on December 13, 2013.

In an effort to provide proof beyond a reasonable doubt of the school bus stop and/or school grounds enhancements, the State relied on the testimony of Centralia School District assistant director of transportation Dale Dunham and Lewis County GIS manager Matt Hyatt. RP2 129-43. Dunham testified to Centralia school's having a designated bus stop at 1221 View Avenue which was located within 1,000 feet of the Centralia Safeway's parking lot. He also testified to Centralia middle school's premises being within 1,000 feet of the Safeway parking lot. Dunham reviewed Exhibit 1 and opined it was accurate. RP2 129-32.

Matt Hyatt explained how he created Exhibit 1, an aerial photo and map of the area surrounding the Centralia Safeway. RP1 93; RP2 139. He used specific information as to where in the Safeway parking lot the meeting between Kolb and informant Gray occurred. RP2 142. He used the mapping program's "very accurate" measuring tools. RP2 140. The school bus stop was 935 feet from the meeting place and the school premises 615 feet from the meeting place. RP2 143. Kolb did not object to the admission of Exhibit 1. RP2 142.

In drug cases with sentencing enhancements, it is increasingly common, as in Kolb's case, for GIS departments to create and use maps to

ensure accurate measurements. *State v. Pearson*, 180 Wn. App. 576, 578, 321 P.3d 1285 (2014); RCW 69.50.435(5) supports this practice.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county...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...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 ... school district...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....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 ...school district...if the map or diagram is otherwise admissible under court rule.

In Kolb's case, the problem is not with the accuracy of Exhibit 1, the GIS-created map. The problem is the purported delivery occurred on December 13, 2013. The trial was held on May 27 and 28, 2014. There was no testimony as to the existence of the school bus stop six months earlier on December 13. Dunham did not explain how bus stops are created or designated, for how long, and what happens if a bus stop no longer serves any children. As for the middle school grounds, Dunham did not testify how long the school had been located near Safeway, if the school grounds always covered the same area, and whether the school grounds were within 1,000 feet of the Safeway parking lot on December 13, 2013.

Exhibit 1, the aerial photo, did not help matters. Hyatt did not tell the jury when the aerial photo was taken or when it was entered into the county's GIS mapping system. He did not tell the jury if the school bus stop existed on December 13, 2013. He did not tell the jury the school grounds were within 1,000 feet of where Kolb and Gray met on December 13, 2013. The court cautioned the jury not to do their own research on the existence of "school grounds or school zones." RP1 24. Thus it would be inappropriate for the jury to rely on a single juror's knowledge, or even a collective knowledge, of the location of the bus stop or the school grounds on December 13, 2013.

- c. The enhancements must be stricken from Kolb's sentence.

The State failed to prove beyond a reasonable doubt that either the school bus stop or the middle school grounds existed as of the December 13, 2013, incident date. As such, this court should reverse and dismiss both enhancements with prejudiced and remand the case for resentencing.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXHIBIT 2, THE METHAMPHETAMINE, BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY FOR ITS ADMISSION.

Drugs, because they are not readily identifiable and are susceptible to alteration by tampering or contamination, should be identified by each

link in the chain of custody before being admitted into evidence. Even though the State failed to link each chain for Exhibit 2, the methamphetamine, the court admitted the exhibit over Kolb's objection. The trial court's abuse of discretion in admitting the methamphetamine is reversible error.

- a. A sufficient chain of custody must be established before a court may admit drugs into evidence.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Factors to be considered include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Id.* On appeal, a trial court's decision to admit evidence is reviewed for abuse of discretion. *Id.*

Drug evidence, which is not readily identifiable and is susceptible to alteration by tampering or contamination, should be identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002) The proponent of the evidence must "establish a chain of custody 'with sufficient completeness to render it improbable that the original item has either been exchanged with another or been

contaminated or tampered with.”” *Id.* (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989)).

b. The State failed to establish a sufficient chain of custody for Exhibit 2.

The State failed to make a sufficient showing that Exhibit 2 was the item tested by forensic scientist John Dunn. Informant Gray testified he received a baggie from Kolb in exchange for \$250. Gray assumed the baggy contained methamphetamine. Gray also testified to handing the baggie over to Detective Holt. RP1 79. Detective Holt later put some identifying information on a tag he attached to the baggie and entered the baggie into Centralia Police Department’s evidence. RP1 94; RP 2 122-23.

At trial, Detective Holt, when shown Exhibit 2, testified it appeared to be the same baggie and in the same condition it had been when he entered it into evidence. RP1 94-95. Forensic scientist John Dunn located his lab tape on Exhibit 2 and testified to testing a small portion of the content of Exhibit 2. RP2 124. The break in the chain is the absence of any testimony of any controls of Exhibit 2 from the time it entered police evidence to the time it was tested by Dunn. No one testified to how it was maintained in evidence, under what controls, and under what controls it made its way from the Centralia police evidence to the Washington State Patrol Crime Lab for testing. Thus, the State failed to “establish a chain of

custody with sufficient completeness to render it improbable that the original item had either been exchanged with another or been contaminated or tampered with.” *Roche*, 114 Wn. App. at 436.

- c. Without Exhibit 2, the evidence is insufficient to convict Kolb of delivery of methamphetamine and the conviction must be reversed.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant’s fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.* U.S. Const Amend. 14; Wash. Const. Art. I, section 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

For Kolb to be guilty as charged, the State had to prove beyond a reasonable doubt that on or about December 13, 2013, Kolb delivered methamphetamine. CP 1-3; Supplemental Designation of Clerk’s Papers,

Court's Instructions to the Jury, Instruction 5; RCW 69.50.401(1). Absent Exhibit 2, there is no evidence that what Kolb delivered was methamphetamine. Therefore, the State failed to meet its burden. Reversal and dismissal of the charge is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

3. DEFENSE COUNSEL'S FAILURE TO MOVE TO STRIKE A POLICE OFFICER'S RESPONSE TO A SUCCESSFUL OBJECTION DENIED KOLB EFFECTIVE ASSISTANCE OF COUNSEL.

The trial court sustained defense counsel's objection to a police officer's testimony that Kolb intended to deliver more methamphetamine in Lewis County on January 15. Yet, defense counsel failed to move to strike the officer's response to the successful objection. Defense counsel's failure denied Kolb effective assistance of counsel.

a. Kolb is entitled to effective representation by trial counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963). Likewise, Article I, section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

- b. Trial counsel’s failure to move to strike evidence admitted despite a successful objection to it denied Kolb effective assistance of counsel.

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “ a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008).

The following exchange occurred during the State's examination of lead officer Detective Holt.

PROSECUTOR: I want to ask you about events that took place January 15. Were you working on that day?

DETECTIVE HOLT: I was.

PROSECUTOR: Do you recall receiving information about the defendant in this case on that date?

DETECTIVE HOLT: Yes.

PROSECUTOR: What was that information?

DETECTIVE HOLT: That he was coming down to the Lewis County area to deliver some more methamphetamine.

DEFENSE COUNSEL: Objection, your Honor.

COURT: That objection is sustained.

RP 1 96.

Thereafter, inexplicably, defense counsel failed to move to strike Detective Holt's inflammatory answer. Given that the court sustained the objection, it would have obviously stricken the testimony if asked. Defense counsel's failure to strike the testimony gave the jury permission to factor in Detective Holt's assurance of Kolb's unchecked drug dealing in their community. Although there is a strong presumption of adequate performance, it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at

130. Any trial strategy “must be based on reasonable decision-making...”
In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

Defense counsel’s failure to move to strike was not reasonable decision making. It might be argued that defense counsel made a strategic decision in failing to move to strike because he did not want to draw attention to the testimony. But that fails to stand to reason because he already chose to draw attention to the testimony by his objection. It is unreasonable to move to object and then not move to exclude the evidence from the jury’s consideration after the court ruled favorably on the objection. To do otherwise, defeats the purpose of the objection in the first place. Defense counsel’s failure to move to strike was not a reasonable trial strategy.

But for the deficient conduct in failing to move to strike the inflammatory evidence, there is a reasonable possibility Kolb would have been found not guilty. The inadmissible testimony left the jury with Detective Holt’s opinion that Kolb was a drug dealer who regularly traveled to Lewis County to do business. That was proven when Kolb appeared in Lewis County on January 15 as Detective Holt knew he would. Because there was no other explanation given for Kolb’s appearance in Lewis County, the jury was left with one conclusion: Detective Holt was right. A police officer’s opinion evidence of an

accused's guilt is powerful evidence and is generally not admissible. *State v. Wilber*, 55 Wn. App. 294, 298–99, 777 P.2d 36 (1989) (testimony defendant lying based on officers' special training to enabled them to tell when a person was being truthful inadmissible opinion evidence); *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds*, *City of Seattle v. Heatley*, 70 App. 573 (1993) (police officer's testimony that police dog tracked a "fresh guilt scent" inadmissible opinion evidence).

Detective Holt's opinion, left unquestioned for the jury's consideration only because of defense counsel's failure to have it stricken, tainted the whole of the trial. Defense counsel should be found ineffective and Kolb's conviction reversed.

4. THE TRIAL COURT ABUSED IT DISCRETION WHEN IT REFUSED TO USE ITS DISCRETION TO CONSIDER KOLB'S MERITED REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

The trial court abused its discretion when it refused to consider giving Kolb an exceptional sentence downward. The basis for the refusal, the trial court's belief that a downward departing sentence would invariably be reversed by an appellate court regardless of its merit, is a failure by the trial court to use its discretion. Kolb's sentence should be reversed and his case remanded for resentencing.

- a. A defendant is entitled to appeal a trial court's refusal to give him an exceptional sentence downward when the court refuses to use its discretion to impose the sentence.

A defendant generally cannot appeal a standard range sentence such as the sentence imposed on Kolb. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a defendant can appeal a failure by the sentencing court “to comply with procedural requirements of the [Sentencing Reform Act³ of 1981, chapter 9.94A RCW,] or constitutional requirements.” *State v. Osman*, 157 Wn.2d 474, 481–82, 139 P.3d 334 (2006); RCW 9.94A.585(2).

Where a defendant appeals a sentencing court's denial of his request for an exceptional sentence below the standard range, “review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia–Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). “A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range.” *Id.* “The failure to consider an exceptional sentence is

³ SRA

reversible error.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

- b. Kolb is entitled to appeal his sentence because the trial court refused to use its discretion to consider an exceptional sentence downward.

The trial court seemed inclined to give Kolb an exceptional sentence downward but expressed feeling hamstrung in doing so to the point it refused to impose a sentence below the standard range for any reason. The court felt its power to impose an exceptional sentence downward was illusory as any such sentence invariably would be reversed by the Court of Appeals or Supreme Court. The court argued its point at length:

Well, when the SRA was originally passed by the legislature, it was modeled on what they had at that time in the State of Minnesota and Minnesota has a comprehensive scheme that allows the trial judge to go either above the standard range or below the standard range.

Of course, since that time we’ve had a number of case law refinements, including some decisions by the U.S. Supreme Court that have somewhat hamstrung the Court, with respect to exceptional sentences, because we now have the specter of all the aggravating factors have to be determined by a jury, not by a trial judge. But the problem in the State of Washington is that from day one the Supreme Court and the Court of Appeals following their lead and have never been willing to give the trial judges discretion to go below the standard range and sustain it.

Almost without exception every case that’s come out, where a trial judge has gone below the standard range for whatever reason, the Supreme Court and the Court of Appeals have reversed the trial judge finding there was no basis whatsoever in the record

for the court to do that, and even if there is a basis in the record, they still haven't sustained it.

I have never understood the basis for the distinction. A lot of commentators have also commented on it and pointed out that the intent of the legislature initially passing the SRA, which I think has been discredited over the years, because it took away all the discretion from the trial judges, such as myself and gave it basically to the prosecutor in what they charge, but nobody has ever been able to explain at least to the satisfaction of most of the trial judges how it is that if we go above the standard range, they say that's fine provided there's a reason for it, but if we go below, it doesn't matter what the reason what it is. Whether it is in the record or not, they don't sustain it. I've never understood it.

RP2 204-05.

- c. The record supported Kolb's requested exceptional sentence downward.

A trial court may impose a sentence outside the standard range if it finds, considering the purposes of the SRA,⁴ that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.101, *State v. Graham*, 337 P.3d 319, 321 (2014). RCW 9.94A.535(1) provides a non-exclusive, "illustrative only" list of mitigating circumstance the court may rely on to impose an exceptional sentence below the standard

⁴(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
(2) Promote respect for the law by providing punishment which is just;
(3) Be commensurate with the punishment imposed on others committing similar offenses;
(4) Protect the public;
(5) Offer the offender an opportunity to improve himself or herself;
(6) Make frugal use of the state's and local governments' resources; and
(7) Reduce the risk of reoffending by offenders in the community.
RCW 9.94A.101

range. RCW 9.94A.535(1). The trial court need only find mitigating circumstances establish a basis for an exceptional sentence by a preponderance of the evidence. RCW 9.94A.535(1).

In support of his request for an exceptional sentence downward, Kolb provided the trial court with a sentencing memorandum providing the necessary information to support two statutory-recognized bases for his requested exceptional sentence downward.

(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.

RCW 9.94.535(1); Supplemental Designation of Clerk's Papers, Defendant's Sentencing Memorandum (sub. nom. 33).

Kolb honorably served this country with the Army from 2001-2005. As a rifleman in Iraq, he was the victim of two improvised explosive device events. His service left him with Traumatic Brain Injury, Post-Traumatic Stress Disorder, and Depression. He received the Army Achievement Medal. After leaving the Army, he worked for the Navy doing submarine repair. Supp. DCP, Defendant's Sentencing Memorandum (sub. nom. 33).

To further support the merit of his request, Kolb provided the court with (1) the declaration of Lisa Balkwill, (2) excerpts from his medical records, and (3) letters of support from people who knew Kolb and his history. Supp. DCP Declaration of Lisa Balkwill (sub. nom. 34); Excerpts of Defendant's Medical Records (sub. nom. 35); and Letters (sub. nom. 38). Kolb had fallen in love with Lisa Balkwill. She was addicted to and sold methamphetamine. Kolb sometimes went with her when she sold methamphetamine but he denied participating as a dealer or encouraging her sales activity. He simply wanted her to be happy because he loved her. He did not approve of methamphetamine use. Instead, he hoped to support Balkwill by being a good partner and, ideally, pay to send her to a treatment facility he had benefited from years earlier. Supp. DCP Declaration of Lisa Balkwill (sub. nom. 34); Excerpts of Defendant's Medical Records (sub. nom. 35); and Letters (sub. nom. 38).

- d. Had the trial court believed it had discretion to impose an exceptional sentence downward, it likely would have in Kolb's case.

The record at sentencing reflected that the trial court was sympathetic with Kolb and his request for an exceptional sentence downward:

In this incident, I think it's a tragedy that Mr. Kolb is facing this situation with the enhancement. I don't know why the case ended up going to trial the way it did with the enhancement as

charged. It seems to me this incident it might have been a better use of discretion to try and do something with the case and get rid of the enhancement, the mandatory 24 months, but I can't do anything about that.

The law requires that a jury having found this crime was committed with the enhancement I have to impose the enhancement and the enhancement has to be served first. Having said that, I also agree with Mr. Greene.⁵ I don't think this case warrants mid-range. I think at the very least that Mr. Kolb deserves nothing more than the bottom of the standard range, so that will be the order: 12 months and a day, credit for time served, plus the 24 months enhancement that I am required by the law to impose.

RP2 205-06.

Mr. Kolb's sentence should be reversed and remanded for a resentencing hearing with the court using its discretion to consider an exceptional sentence downward. Even if the enhancements are not reversed on appeal, the court could reduce Kolb's 12+-24 standard range to one day leaving Kolb to serve 24 months plus 1 day.

5. THE SUBSTANCE ABUSE EVALUATION AND TREATMENT CONDITION WAS UNLAWFULLY IMPOSED.

As a condition of community custody,⁶ the court ordered Kolb to undergo an evaluation for, and fully comply with, treatment for substance abuse. CP 10, 11. Because the condition is not crime-related, and was imposed without a statutory required finding, it should be stricken from Kolb's judgment and sentence.

⁵ Mr. Greene was Kolb's counsel.

⁶ The court appropriately ordered 12 months of community custody. RCW 9.94A.505 and RCW 9.94A.702.

Although Kolb did not object to the substance abuse sentencing condition, sentencing errors may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose a specific community custody condition is a question of law reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)

RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the court may impose. Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.703(3)(f). RCW 9.94A.030(10) defines a “crime-related prohibition” as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”

More specifically, before a court may impose a substance abuse evaluation, it must first find chemical dependency contributed to the offense.

When the court finds that the offender has a chemical dependency, that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitation programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been

convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1).

The goal of statutory construction is to carry out legislative intent. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the Legislature means exactly what it says, giving criminal statutes literal interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The court did not find substance abuse or chemical dependency contributed to Kolb's offense. At Judgment and Sentence Section 2.1, the court did not check the following box:

The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 7. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could order Kolb to obtain a substance abuse evaluation and follow all treatment recommendations.

There was no evidence that substance abuse or chemical dependency played a role in the offense. At sentencing, the prosecutor never asserted his belief that substance abuse contributed to the offense. RP2 193-206. Instead, the Judgment and Sentence Section 4.2 was pre-marked with a checked box:

[X] undergo an evaluation for, and fully comply with, treatment for ... [X] substance abuse.

CP 11. In light of the evidence produced at trial, the sentencing argument, and the lack of a finding of chemical dependency at Section 2.1, the pre-marked “X” before the community custody condition was an oversight. The substance abuse evaluation condition should be stricken from the judgment and sentence.

6. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A PROHIBITION ON KOLB’S USE OF ANY NON-PRESCRIBED DRUGS.

The offense did not involve the use of the world’s inventory of non-prescription drugs. The community custody condition that Kolb not consume non-prescribed drugs must be stricken from the judgment and sentence because it is not crime-related.

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” RCW 9.94A.030(10).

The court’s decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). “A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard.” *Id.* at 375.

Further, a court may impose only a sentence authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “If the trial court exceeds its sentencing authority, its actions are void.” *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

As argued in Issue 5, erroneous sentences may be challenged for the first time on appeal. *Bahl*, 164 Wn.2d at 744. A defendant always has standing to challenge the legality of a community custody conditions even though he has not been charged with violating it. *State v. Valencia*, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). When a sentence has been imposed for which there is no authority of law, appellate courts have the power and the duty to correct the erroneous sentence upon discovery. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

The prohibition on the use of non-prescribed drugs is invalid because it is not directly related to the circumstance of Kolb’s offense.

RCW 69.41.010(9) defines "drug" broadly:

- (a) Substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them;

(b) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals;

(c) Substances (other than food, minerals or vitamins) intended to affect the structure or any function of the body of human beings or animals; and

(d) Substances intended for use as a component of any article specified in (a), (b), or (c) of this subsection. It does not include devices or their components, parts, or accessories.

Kolb violates community custody if, without first obtaining a prescription to do so, he takes an aspirin, puts on medicated lip balm, or applies anti-itch cream to a mosquito bite. There is no evidence of a connection of any of these common uses of routinely non-prescription drugs with Kolb's offense. Any consumption of illegal drugs or prescription drugs without having a lawful prescription could be punished through the conditions that Kolb maintain law abiding behavior. CP 11. The non-consumption of non-prescribed drugs condition must be stricken from the judgment and sentence.

E. CONCLUSION

Kolb's conviction should be reversed with prejudice because the trial court improperly admitted the methamphetamine after the chain of custody failed. Alternatively, Mr. Kolb's conviction should be reversed and remanded for retrial because defense counsel's failure to move to

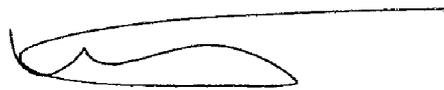
strike prejudicial testimony he successfully objected to denied Kolb effective assistance of counsel.

Absent a dismissal of the delivery charge with prejudice, the school bus stop and school grounds enhancements should be dismissed for insufficient evidence with prejudice and Kolb resentenced without the enhancements.

Even if this court does not dismiss the enhancements for insufficient evidence, resentencing must still occur because of the trial court's refusal to use its discretion to consider Kolb's request for an exceptional sentence downward.

Finally, on remand, the court must strike the drug evaluation and treatment and non-prescribed drug conditions from Kolb's community custody conditions.

Respectfully submitted this 19th day of January 2015.



LISA E. TABBUT/WSBA #21344
Attorney for Eugene Lee Kolb

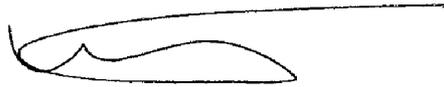
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Opening Brief with: (1) Sara Beigh, Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov; and (2) the Court of Appeals, Division II; and (3) I mailed it to Eugene Lee Kolb, 7614 Shilowood Place NW, Bremerton, WA 98311.

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

Signed January 19, 2015, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Eugene Lee Kolb

COWLITZ COUNTY ASSIGNED COUNSEL

January 19, 2015 - 9:37 PM

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