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No. 51540-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHELSEA K. HAYES
Appellant.

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

The Honorable John C. Skinder, Judge
Cause No. 16-1-01652-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether an appellant can demonstrate ineffective assistance of counsel when the claimed deficiencies are either not included in the record, or not supported by the record, and whether a school bus route stop enhancement applies to an unranked offense.

2. Whether an agreement to sell methamphetamine to a confidential informant followed by obtaining methamphetamine from a third-party supplier and attempting to weigh the correct amount constitutes sufficient evidence for the charge of conspiracy to deliver a controlled substance.

3. Whether testimony from a school district employee that a school bus route stop existed at the location of the crime, an officer viewing the school bus dropping off the defendant's son during the search of the residence, and a geodata witness demonstrating that the route stop was within 1000 feet of the residence constitutes sufficient evidence to support a school bus route stop enhancement.

4. Whether evidence that the appellant resided in the house and specifically the room where the drugs were located, that the defendant's mail and player's club card were located near the drugs, and that family photos and other items indicated that the appellant resided in the room was sufficient to show constructive possession of methamphetamine and oxycodone.

5. Whether the recent holding in State v. Ramirez requires an order striking the $200 filing fee and the $100 DNA fee.

B. STATEMENT OF THE CASE.

The State generally accepts the appellant's statement of the case with additions as included in the argument below.

C. ARGUMENT.

1. The record does not support Hayes' contention that she received ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced her. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. at 687. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland at 689; *See also* State v. McFarland, 127 Wn.2d at 335. Further,

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 694-95.

a. The trial record does not show that counsel failed to investigate a potential defense. To the contrary, the record demonstrates several opportunities for Hayes to discuss a defense with her trial counsel.

Hayes argues that her trial counsel, James Foley, failed to investigate whether she had an affirmative defense to the charge of possession of a controlled substance, oxycodone. Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. McFarland, 127 Wn.2d at 335. Where a claim of ineffective assistance of counsel is brought on direct appeal, the reviewing court will not consider matters outside the trial record.

State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 115 L.Ed. 2d 1033, 111 S.Ct. 2867 (1991).

Hayes did not mention the possibility that she had a prescription for oxycodone until her allocution at sentencing. 3 RP 558.[1] Hayes stated that she gave Foley a copy at trial. 3 RP 558. She indicated that she did not have a chance to meet with Foley until the day before sentencing. 3 RP 558. However, this contention is unsupported by the record at trial.

Right from the beginning of trial, the trial court gave additional time so that Hayes could speak with Foley. 1 RP 19. At the start of trial, Hayes asked the trial court for a new attorney and made several arguments regarding her communication with him. 1 RP 21. Interestingly, she did not mention a prescription for oxycodone at that time. Foley responded to her claims, stating:

> "Ms. Hayes has been in my office at least once if not twice. I've spoken with her numerous times. She has my e-mail. We've exchanged e-mails. She does call me directly, but I've been calling her back for several months and her voicemail is full so I can't return it or leave a message for her. All she can do is see that I called her. I explained - - I asked her to clear off her voicemail. It hasn't happened. And we've had extensive conversations about motions to suppress and search warrants and confidential informants."

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1 For purposes of consistency, the State will cite to the record consistent with the designation in the Brief of Appellant, at 2 n.1.

1 RP 22.

Haye's first attorney, Charles Lane, was allowed to withdraw on March 2, 2017. CP 12. Trial began on February 13, 2018. 1 RP 19. This fact supports Foley's position that he had been calling her back for several months. Even during trial, Haye's contradicted her contention. The trial court engaged in a brief colloquy with Hayes regarding her right to either testify or not testify. 3 RP 468. The Court specifically stated, "I want to ask you do you feel you had enough time to discuss that decision with Mr. Foley and get all of your questions answered?" 3 RP 468. Hayes responded, "yes, Your Honor." 3 RP 468.

On the record before this Court, Hayes does not demonstrate that Foley failed to investigate a defense, nor does she demonstrate that his performance fell below professional norms. Even more significant, there is absolutely nothing in the record, other than Hayes' comment at sentencing, which indicates that Hayes had a valid prescription. Without some record that the outcome of the proceedings would have differed, Hayes cannot demonstrate prejudice. McFarland, 127 Wn.2d at 337-338. More than a bare assertion of prejudice is required for a showing of actual prejudice in the context of an ineffective assistance of

counsel claim. State v. Buckman, 190 Wn.2d 51, 62, 409 P.3d 193 (2018).

Hayes cannot overcome the strong presumption that her counsel's performance was adequate. Without some evidence in the record that she actually possessed a valid prescription for oxycodone on May 24, 2016, she cannot demonstrate actual prejudice. No such evidence exists in the record. Hayes' claim fails on both prongs of the Strickland test.

b. The record does not support that counsel was ineffective by failing to investigate whether a school bus stop was in effect at 7250 14th Ave. SE on May 16 and May 24, 2016.

During her right of allocution, Hayes attempted to tell the Court that she was in possession of documents which demonstrated that there was no school bus stop in effect at her house in June. 3 RP 558-559. She specifically stated that, "It came from the prosecutor." 3 RP 559.

During trial, the State presented overwhelming evidence that there was in fact a school bus stop in effect at her residence on May 16 and May 24, 2016. Lisa Niendorf, the lead dispatcher for North Thurston Public Schools, is responsible for creating, maintaining, and updating the bus routes. 2 RP 238-239. She

testified at trial that there was "one bus stop" in the vicinity of 7250 14th Avenue Southeast in May of 2016. 2 RP 242-243. In fact, Niendorf testified that the bus stop was "actually at that address." 2 RP 243. The bus stop was served by a yellow school bus with the eight-way red lights, the four-way ambers, the cross paddle, two-way radio," with a capacity of "21." 2 RP 252.

Detective Parker testified,

> "During the execution of the warrant or the search of the warrant while we were standing in the driveway a school bus pulled up to the driveway of the residence and dropped Mrs. Hayes' son for – after school there in the driveway."

2 RP 219. In addition, the State presented testimony from Elizabeth Donovan, a former Thurston Geodata Center employee, which demonstrated that the residence was within a 1000-foot radius of the stop. 2 RP 281, 282, 290-291; Exhibit 33.

The record does not support Haye's assertion that Foley conducted an inadequate investigation regarding the school bus stop location. Moreover, the evidence overwhelming demonstrated that there was in fact a school bus stop within 1000 feet of the residence. It is difficult to imagine how additional investigation would have changed the school district employee's testimony that the bus stop was in existence. Hayes shows neither deficient

performance nor prejudice, this claim fails both prongs of the Strickland test.

c. Defense counsel was not ineffective for not providing authority that the trial court was clearly aware of; however, there was error in the sentence imposed.

Hayes argues that defense attorney Foley's performance at sentencing fell below objective professional norms because defense counsel failed to argue that the trial court could run the school bus enhancements on Counts I and II concurrently pursuant to State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015). However, the record clearly demonstrated that trial court was aware of the law. 3 RP 564.

In Conover, the Washington State Supreme Court specifically addressed whether the school bus route stop enhancement statute, RCW 9.94A.533(6), requires the trial court to run such an enhancement consecutive to other enhancements on different counts. 183 Wn.2d at 707. The Court concluded "the language did not require trial courts to run those enhancements consecutively to each other." Id. at 708. The Court stated,

> "RCW 9.94A.533(6) does not require trial courts to run school bus route stop enhancements on different counts consecutively to each other; instead, when two or more offenses each carry school bus route stop

> enhancements, the determination of whether those enhancements are to run concurrently or consecutively is also determined by resort to the rules in RCW 9.94A.589(1)(a)."

Id.

RCW 9.94A.589(1)(a) states "sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provision of RCW 9.94A.535." The Judgment and Sentence entered in this case does not reflect a finding for an exceptional sentence. CP 152.

During the sentencing hearing, in his recommendation regarding the school bus stop enhancements, Foley stated

> "we would ask that they merge, that only one school bus enhancement occurred, that while there was initially a drug buy solicitation conspiracy count, that had – nothing really changed before the search warrant, and so I don't know why you would get two sentencing enhancements out of the same conduct, the same house, the same people. So I would ask that- - if the court's going to order an enhancement, it order one or else ask that both of them merge for the purposes of running their time together."

3 RP 555. While Foley did not specifically mention Conover, his argument was not entirely off the mark because RCW 9.94A.589(1)(a) does contain an analysis of same criminal conduct in the context of the offender score calculation. Specifically, the

statute states, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). Foley's argument was a legitimate tactical approach to addressing the enhancements.

Even if Foley's argument could have been more artfully crafted, Hayes cannot demonstrate prejudice from the specific error that she alleges, i.e., Foley failed to argue the law of State v. Conover, because the trial court specifically considered Conover. The trial court stated:

> "So the court had remembered that there was a recent case that had come out of Division II which is the Court of Appeals division that governs this court. It's an unpublished case. And I'll talk about that in a minute. But the case law that controls this issue of a school bus route stop enhancement running concurrently or consecutively is important obviously to this case. The controlling case is a Washington State Supreme Court case, *State or Washington v. Conover*, and *Conover* stands for the proposition that the statute that controls school bus route bus stops does not require trial courts to run school bus route stop enhancements on different counts consecutively to each other. Instead when two or more offenses each carry a school bus route stop enhancement, the determination of whether those enhancements are to run concurrently or consecutively is also determined by looking to RCW 9.94A.589(1)(a)."

3 RP 564. The Court then noted, "that statute is what both attorneys were making reference to, Ms. Hayes, when they were discussing same criminal conduct." 3 RP 564. The trial court was very clearly aware of the holding of Conover, additional argument from Foley would not have changed the result of the proceedings.

Hayes' specific assignment of error fails because she cannot demonstrate the prejudice prong of the Strickland test. Importantly, Hayes does not assign error to the trial court's ultimate application of Conover and conclusion that the trial court had discretion to run the enhancements consecutively. Again noting that the rule is governed by RCW 9.94A.589(1)(a), the trial court found that the enhancements "occurred on two separate occasions," and ran "the two school bus route stops consecutively." 3 RP 574-575. Foley's failure to specifically argue the holding of Conover had no effect on the Court's decision because the Court relied on Conover.

Despite the fact that Hayes' original assignment of error must fail, the State concedes the issue raised in Hayes' Supplemental brief regarding the school bus stop enhancement on the conspiracy charge. The charge in count one, conspiracy to deliver a controlled substance, is an unranked felony offense. CP 23; CP 145; RCW 69.50.407; RCW 9.94A.505(2)(b); State v.

Mendoza, 63 Wn.App. 373, 819 P.2d 387 (1991); State v. Hebert, 67 Wn.App. 836, 837, 841 P.2d 54 (1992). The enhancement statute, RCW 9.94A.533(6) specifically states, "an additional twenty-four months shall be added to the standard sentence range for any *ranked* offense involving a violation of chapter 69.50 RCW." (emphasis added).

Division III of this Court has looked at RCW 9.94A.533 and determined that the enhancement included therein do not apply to unranked offenses. State v. Vasquez, 200 Wn.App. 220, 402 P.3d 276 (2017); review denied, 189 Wn.2d 1040, 409 P.3d 1070 (2018); State v. Soto, 177 Wn.App. 706, 309 P.3d 596 (2013). In Vasquez, the Court stated, "the prefatory language, set forth at RCW 9.94A.533(1), limits application of the statute to ranked offenses, punishable under either the standard sentencing grid or the drug offense sentencing grid." 200 Wn.App. at 226. A similar statement is included in Soto. 177 Wn.App. at 714. Soto and Vasquez were specifically addressing firearm enhancements under RCW 9.94A.533(3), which does not include the same limitation to "ranked offenses" as RCW 9.94A.533(6).

This Division cited to Soto on a different issue in State v. Moen, 4 Wn.App.2d 589, 603, 422 P.3d 930 (2018) (A trial court's

discretion to impose a sentence is limited to that granted by the legislature). The State is unaware of any decision, published or unpublished, from this Division that specifically addresses the application of RCW 9.94A.533 to unranked offenses. In an unpublished opinion, Division I addressed the issue in the context of a deadly weapon enhancement. State v. Winchester, No. 68906-1-I; 2014 Wash.App.LEXIS 2270.[2] In that case, the Court did not disagree with the analysis of Soto, but distinguished the specific charge because any felony offense under RCW 69.50 with a deadly weapon special verdict becomes a level III drug offense pursuant to RCW 9.94A.518 and is therefore ranked. Id. at 32.

Given the specific language included in RCW 9.94A.533(6) limiting its application to "ranked offenses," it appears that the inclusion of the enhancement on the unranked offense in count one was in error, regardless of whether or not State v. Conover was properly applied. It does not appear that any party recognized this distinction at sentencing.

d. Defense counsel was not ineffective for failing to propose a limiting instruction based on evidence related to the investigation of Aguero.

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2 Citations to unpublished opinions are governed by GR 14.1 and have no precedential value. This citation is included as illustrative of the issue, not as precedential authority.

To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Where a defendant claims that her counsel was ineffective for failing to make a particular motion, "absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice." McFarland, 127 Wn.2d at 337.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, except as limited by law. ER 402. Here, Hayes argues that her counsel should have proposed a limiting instruction to prevent the jury from considering the drugs, money and other items found in the Aguero search for any purpose other than evidence of the conspiracy alleged in Count I. Corrected Brief of Appellant, at 27.

Hayes does not address why that information would not be admissible for consideration of the charge of count II, Possession with Intent to Deliver. The State's theory of the case revolved

around showing that Hayes was a middle dealer of narcotics. Evidence that days before the search of her home where narcotics were located, Hayes contacted Aquero and obtained methamphetamine from his car, and the fact that a large quantity of methamphetamine was located when officers searched the car, was certainly relevant to the State's theory regarding her intent to deliver.

It is unlikely that a limiting instruction, limiting the evidence from the Aguero search for consideration on only the conspiracy charge, would have been granted. The evidence was relevant to demonstrate Hayes' intent to deliver. Even if the fruits of the search were somehow considered a prior bad act, the evidence would have been admissible as evidence of intent under ER 404(b). Hayes has made no showing that a limiting instruction would have been granted if requested.

Moreover, when an attorney does not request a limiting instruction regarding such evidence, the action can be reasonably characterized as trial strategy or tactics, and this court should presume that counsel did not request a limiting instruction so as not to emphasize the damaging evidence to the jury. State v. Humphries, 181 Wn.2d 708, 720-721, 336 P.3d 1121 (2014) (failure

to request a limiting instruction following a stipulation that the defendant had committed a previous serious offense was presumed to be a reasonable defense tactic). Hayes has failed to carry her burden in demonstrating that her counsel's performance was deficient, or that her counsel's performance prejudiced her defense. Her claim of ineffective assistance of counsel must fail.

e. There was no cumulative error caused by defense counsel's performance. Hayes has not met her burden of demonstrating deficient performance or prejudice.

As stated above, in order to demonstrate ineffective assistance of counsel an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d at 225-226. With regard to her counsel's performance at trial, the record does not support Hayes' claims. Hayes incorrectly argues that the State has the burden is on the State to demonstrate harmless error, but that is not the correct standard for reviewing a claim of ineffective assistance of counsel. It is Hayes' burden, and she has failed to demonstrate that her counsel's performance was deficient at trial or that her counsel's performance prejudiced her defense. The only error that can be shown in the record was the inclusion of a school

bus stop enhancement on the conspiracy charge at sentencing, the proper remedy for which is to remand to remove that enhancement. Hayes' cannot support her contention that her counsel committed numerous errors which cumulatively prejudiced her defense.

2. In a light most favorable to the State, sufficient evidence was presented to support the charge of conspiracy to deliver methamphetamine.

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

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

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

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to prove that a person is guilty of a criminal conspiracy, the State must demonstrate that,

> "with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in the pursuance of such agreement."

RCW 9A.28.040(1). An agreement can be shown by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." State v. Casarez-Gastelum, 48 Wn.App. 112, 116, 738 P.2d 303 (1987).

The evidence presented at trial demonstrated that Readel had arranged to buy $1000 worth of methamphetamine from Hayes. 1 RP 165, 170. The controlled buy that was set up was observed by Officer Parker, Captain Johnson, Detective Johnstone, and Detective McIver. 1 RP 171-172. Hayes informed Readel that

she needed to wait for a third person to bring the drugs to her residence. 2 RP 347. Officers observed a BMW arrive at the house. 1 RP 174, 2 RP 298. Hayes told Readel that "her guy was here." 2 RP 348. Hayes got into the passenger side of the vehicle. 1 RP 174. Hayes then returned in the residence with a sandwich bag containing what Readel identified as methamphetamine. 2 RP 350.

The evidence clearly demonstrated that Hayes had conspired with a third party to deliver methamphetamine to Readel. When police eventually searched the BMW that had delivered the methamphetamine to Hayes, they located methamphetamine, a digital scale, cash and a cell phone with Haye's name and number entered in it. 1 RP 188, 2 RP 215, 216. The evidence demonstrated that Hayes conspired with "her guy," to obtain methamphetamine to deliver it to the controlled buyer.

Hayes argues that the evidence does not demonstrate that she conspired to deliver the methamphetamine because she did not in fact give the drugs to Readel. However, an inference can be made that she intended to deliver the methamphetamine when she took $1000 from Readel, got the drugs from her supplier and then attempted to use multiple scales to measure out the proper

quantity. State v. Hagler, 74 Wn.App. 232, 237, 872 P.2d 85 (1994); 2 RP 348, 350, 352, 353.

The evidence also demonstrated that Readel was familiar with Hayes, and had purchased methamphetamine from her previously. 2 RP 342. When Readel asked Hayes if she could come up with "two ounces" of methamphetamine, she told him to come over. 2 RP 344. Readel testified that Hayes explicitly agreed to provide him with two ounces for "a thousand dollars." 2 RP 345. She then said that she had to "call somebody" to get it for him. 2 RP 345. The testimony of Readel regarding her statements directly demonstrated her intent to conspire with another person to deliver methamphetamine to Readel.

Additionally, Readel and the officers testified about her obtaining a bag of methamphetamine from her supplier, she took the funds, returned with drugs, and attempted to weigh them out for Readel in her house. 1 RP 174, 2 RP 348, 349, 350, 351. Readel testified that the sandwich bag most likely contained more than two ounces of methamphetamine and that it is common for a user to purchase just one or two points, or approximately two tenths of a gram. 2 RP 358-359. The scales, amount of drugs in the bag and circumstances of Hayes attempting to weigh out the drugs is all

circumstantial evidence of her intent to actually deliver the drugs to Readel. Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances as a matter of logical probability. State v. Zamora, 63 Wn.App. 220, 223, 817 P.2d 880 (1991).

The facts, when taken in a light most favorable to the State and taking all rational inferences in favor of the State were sufficient to demonstrate that Hayes conspired to deliver a controlled substance and had the actual intent of delivering the controlled substance.

3. Sufficient evidence supported the school bus stop enhancements that were found by the jury.

During trial, the State presented overwhelming evidence that there was in fact a school bus stop in effect at her residence on May 16 and May 24, 2016. Lisa Niendorf, the lead dispatcher for North Thurston Public Schools, is responsible for creating, maintaining, and updating the bus routes. 2 RP 238-239. She testified at trial that there was "one bus stop" in the vicinity of 7250 14th Avenue Southeast in May of 2016. 2 RP 242-243. In fact, Niendorf testified that the bus stop was "actually at that address." 2 RP 243. The bus stop was served by a yellow school bus with the

eight-way red lights, the four-way ambers, the cross paddle, two-way radio," with a capacity of "21." 2 RP 252.

Detective Parker testified,

> "During the execution of the warrant or the search of the warrant while we were standing in the driveway a school bus pulled up to the driveway of the residence and dropped Mrs. Haye's son for – after school there in the driveway."

2 RP 219. In addition, the State presented testimony from Elizabeth Donovan, a former Thurston Geodata Center employee, which demonstrated that the residence was within a 1000-foot radius of the stop. 2 RP 281, 282, 290-291; Exhibit 33.

In a light most favorable to the State, there was sufficient evidence presented at trial to support the jury's findings that these offenses occurred within 1000 feet of a school bus route stop. The school district clearly designated the stop as a school bus route stop.

The standard of review for matters of statutory interpretation is de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P. 3d 318 (2003). The court's primary objective in construing a statute is to determine and carry out the intent of the Legislature. State v. Wilbur, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). To determine legislative intent the court first looks to the language of the statute, if it is plain

and unambiguous, it need go no further. State v. Von Thiele, 47 Wn.App. 558, 562, 736 P. 2d 297 (1987), review denied, 108 Wn.2d 1029 (1987). The Washington State Legislature enacted a sentence enhancement for, "Any person who ... possess[es] with intent ... to deliver a controlled substance... within one thousand feet of a school bus route stop 7 designated by the school district...." RCW 69.50.435(1)(c). This enhancement also applies separately to such possessions in a school (1)(a) or on a school bus (1)(b). A "school bus route stop" is defined as, "a school bus stop as designated by a school district." RCW 69.50.435(6)(c). The State submits this statute is plain on its face and we need go no further to determine the legislature's intent. The statute clearly indicates the only requirement to meeting the definition of a "school bus route stop" is that it be designated as such by a school district. Id.

Hayes claims in her opening brief that the term "school bus stop" is not further defined by statute, and therefore we must turn to a " plain meaning" definition. (Appellant's Br. at 34). She proposes this definition include not only that the stop be designated by the superintendent, but also where a school bus regularly stops." (Id. 34-35) A "school bus" he points out is defined in part as a bus

"regularly used to transport students to and from school or in connection with school activities..." WAC 392-143-010(1).

Hayes goes on to argue that there was insufficient evidence that the bus was regularly used because the school bus route stop was put in place due to an Individualized Education Program (IEP).

Hayes' proposed definition is strained and works directly against the identified purpose of RCW 69.50.435 which is to discourage the "development of the violent and destructive drug culture in areas where there are children." State v. Coria, 120 Wn.2d 156, 172- 173, 839 P. 2d 890 (1992). The intent to protect not just students, but children becomes more apparent by looking at the other protected zones encompassed in RCW 69. 50.435(1): "(e) in a public park..., (f) in a public housing project..., (g) a civic center..." all areas that are frequented by children. The legislature did not intend to limit a school bus route stop to only stops which serve children who are not on an IEP.

Tying the definition of "school bus route stop" to the definition for "school bus" has also been explicitly rejected by this court in State v. Davis, 93 Wn. App. 648, 970 P. 2d 336 (1999); *review denied*, 137 Wn.2d 1037, 980 P.2d 1285 (1999). In Davis, the Bremerton School District contracted with Kitsap transit to

supply school transportation on its regular public buses. Id. at 652. These public buses did not meet the definition of a "school bus" as buses operated by common carriers such as a municipal transportation system are explicitly excluded from the definition of "school bus." See RCW 69.50.435(6)(b). Despite this fact this Court still found the "bus route stop" serviced by these buses qualified as a "school bus route stop" for the statutory enhancement. Davis, 93 Wn. App. 648. The Court noted, referencing the definition of a school bus stop, that it was the fact it was "designated by a school district" as a bus route stop that was the determining factor. Id. at 653. The Court stated,

> "it is of no import that the defendant was unaware of the existence of a school bus stop. And therefore, it is irrelevant that Davis did not realize that (1) the nearby public bus stop was also a designated school bus stop; (2) a public bus was used to transport school children, or that the bus was not standard school bus yellow."

Id. The Court continued, "anyone could discover the stop's location using an objective method, such as observing school children or contacting the school district's direct or transportation." Id.

There was clear evidence that the crimes committed by Hayes occurred within 1000 feet of a school bus route stop designated by the North Thurston School District. Moreover, the

evidence demonstrated, and Hayes acknowledges in her opening brief, that the particular stop was for Hayes' son, who was on an IEP. (Appellant's Br. at 35); 2 RP 219. Hayes' sufficiency of the evidence argument must fail.

4. Sufficient evidence demonstrated that Hayes constructively possessed the methamphetamine and oxycodone.

Possession may be actual or constructive. State v. Reichert, 158 Wn.App. 374, 390, 242 P.3d 44 (2010), *review denied*, 171 Wn.2d 1006 (2011). Actual possession involves physical custody of the item, while constructive possession occurs if the defendant has dominion and control over the item. Id. Someone has dominion and control over an item if he or she can immediately convert it to actual possession. Id. Constructive possession need not be exclusive—more than one person may constructively possess the same prohibited item. State v. George, 146 Wn.App. 906, 920, 193 P.3d 693 (2008). Mere proximity to drugs alone is insufficient to prove constructive possession. Id. However, proof that a person had dominion and control over premises creates a rebuttable presumption that the person exercised dominion and control over items on the premises. Reichert, 158 Wn.App. at 390.

The confidential informant, Readel, had known Hayes for "about three summers." 2 RP 341. He provided the Narcotics Task Force with Hayes' name. 2 RP 341. When the buy was arranged, Hayes told Readel to "come over" to her house, which he was familiar with. 2 RP 344. During the buy, Readel testified that they went back to "her" bedroom, and stated he knew it was her room because she had "stuff in there." 2 RP 349. Readel observed her with a bag of methamphetamine in the bedroom. 2 RP 351.

During the controlled buy, Hayes' son and daughter were in the residence and she indicated that she needed to take her son to basketball practice. 2 RP 352, 379, 3 RP 405. During the search of the residence, the school bus dropped Hayes' son off at the residence. 2 RP 219. During the search of bedroom number 2 on May 24, 2016, officers located a sandwich bag with methamphetamine in the top dresser drawer, a mirror with crystalline substance on it, a notebook documenting drug transactions, a digital scale, packaging material, and an oxycodone pill. 1 RP 184,185, 2 RP 264, 265, 268, 302, 3 RP 415, 416. Officer Parker noted that the officers were able to determine that the bedroom belong to Hayes "based on female clothing," "personal pictures and things of that nature on the wall, as well as mail and

things located within the room." 2 RP 208. A photograph was admitted demonstrating the observations. Exhibit 11, 2 RP 208.

In addition, Detective Clark testified that mail from the Washington Department of Social and Health Services addressed to Chelsea Parnell was located in the room and a Little Creek Casino Player's card in the name of Chelsea Hayes was also found there. 3 RP 418. The name "Chelsea" appeared written on top of the dresser in the bedroom. 3 RP 425.

To determine whether a defendant had constructive possession of an object, courts look to the totality of the circumstances. State v. Chavez, 138 Wn.App.29, 35, 156 P.3d 246 (2007). Taken the totality of the circumstances, in a light most favorable to the State, the evidence demonstrates that Hayes had dominion and control of the location where the drugs were found. She resided at the residence. Her children resided at the residence. Her mail and player's club card were in the room along with clothing and family photos. The evidence was sufficient for her convictions.

Hayes' argument that there was less evidence in this case of dominion and control then there was in State v. Callahan, 71 Wn.2d 27, 459 P.2d 400 (1969) and State v. Spruell, 57 Wn.App. 383, 788

P.2d 21 (1990) is simply incorrect. In Callahan, the defendant had stayed at the searched houseboat for 2-3 days, but was not a tenant, therefore, the Court found that he did not have dominion and control of the houseboat and noted that another individual claimed ownership of the drugs and testified that he had sole ownership of them. 71 Wn.2d at 31. In Spruell, the Court noted that showing dominion and control over the premises where the drugs are found is a means by which constructive possession is often established, "however, the State does not argue the existence of evidence that would show hill was an occupant of the premises or had dominion and control over the premises or any portion thereof." 57 Wn.App. at 387.

Contrary to Callahan and Spruell, the evidence presented in Hayes' trial overwhelming demonstrated that she was an occupant of the residence and resided in the bedroom where the drugs were found. In State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977), *overruled on other grounds* State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012), the State Supreme Court found that the question of constructive possession was appropriately sent to the jury in a case where the defendant was the vice-president of club, and had

stepped forward to assume control over the clubhouse when law enforcement arrived and found marijuana. 88 Wn.2d at 907-908.

The Partin Court noted, "we look to the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs." Id. at 906. With that standard in guide, the Court reviewed the record, "keeping in mind the rule that when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor to the State and interpreted most strongly against the defendant," and affirmed Partin's conviction. Id. at 906-907, 908.

Given the totality of the situation demonstrated at trial, and keeping in mind the standards for when sufficiency of the evidence has been challenged in a criminal case, this Court should likewise affirm Hayes' convictions for possession with intent to deliver methamphetamine and possession of oxycodone.

5. The State does not oppose an order striking the $200 filing fee and the $100 DNA fee pursuant to *State v. Ramirez.*

Legislative amendments to RCW 43.43.7541 and RCW 36.18.020(2)(h), which took effect on June 7, 2018, require that

costs as described in RCW 10.01.160, which include the $200 filing fee, "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c), and that the $100 DNA fee not be collected if the State has previously collected the offender's DNA as a result of a prior conviction. Laws of 2018, ch. 269, § 17.

The amendments apply prospectively to defendants whose appeals were pending when the amendment was enacted. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018). However, the "crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours." RCW 10.01.180(5).

No specific findings regarding Hayes' indigence were included in the Judgment and Sentence. CP 149-160. On the same day, however, the trial court entered an order finding Hayes indigent for purposes of this appeal. CP 141-142.

The record is silent in regard to whether or not Hayes has previously submitted a sample of his DNA to the State crime lab. Barnard argues that because he has prior felony convictions, the State clearly must have previously collected his DNA, however, defendants do not always submit to DNA collection despite being

ordered to do so. Supp. Brief of Appellant, at 8; State v. Thornton, 188 Wn.App. 317, 372, 353 P.3d 642 (2015). In State v. Thibodeaux, no. 76818-2-1, (Slip. Op.)(November 26, 2018), Division I of this Court rejected a similar argument as that made by Barnard regarding the DNA fee, stating, "the existing record does not establish that the State has already collected Thibodeaux's DNA." Id. at 7. The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. State v. Lewis, 194 Wn.App. 709, 379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016).

Claims of error on direct appeal must be supported by the existing record on review. RAP 9.1. However, the State has checked its records and noticed that there is an indication that Barnard has previously provided a DNA sample. While the State does not concede error based on the record, in the interest of expedient justice, the State does not oppose a remand for a ministerial order striking the $100 DNA-collection fee.

In future cases, where the State's records show the appellant had not previously submitted a sample, the State reserves the ability to object pursuant to Thibodeaux, Thornton and Lewis.

It is clear that the trial court properly ordered the $200 filing fee and the $100 DNA fee prior to the legislative amendments which took effect in June of last year. Based on the holding in Ramirez that those amendments apply prospectively to cases which were on appeal at the time the amendments took effect, the State does not oppose an order striking the $200 filing fee and $100 DNA fee.

D. CONCLUSION.

Hayes has failed to meet her burden of demonstrating that her trial counsel's performance was deficient or that it prejudiced her defense. Hayes correctly notes in her Supplemental Brief, that the crime in count 1, conspiracy to deliver a controlled substance is unranked, therefore the 24-month school bus stop enhancement on that count should be stricken. Sufficient and overwhelming evidence supported Hayes' convictions for conspiracy to deliver a controlled substance, possession with intent to deliver methamphetamine and possession of oxycodone. There was also sufficient evidence to demonstrate that the offenses occurred within 1000 feet of a designated school bus route stop. The State does not oppose an order striking the $200 filing fee and the $100 DNA

fee. With the exception of those fees and the enhancement on Count 1, all other aspects of Hayes' convictions and sentence should be affirmed.

Respectfully submitted this 5th day of February, 2019.

JON TUNHEIM
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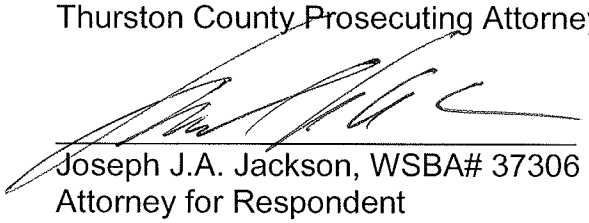

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of February, 2019, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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