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No. 51803-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS SCHUETTKE
Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 17-1-01789-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a tactical decision to not object to the testimony of witness when the potentially objectionable statement was easily inferred from other evidence fell below professional standards and prejudiced the defense?

2. Whether failing to make an objection based on unsettled law, when there are tactically reasons for not doing so, falls below professional standards and prejudiced the defense when the video played may have helped the defense theory of the case and added little to the State's case?

3. Whether tampering with a witness domestic violence is a crime of dishonesty and whether a failure to object to the domestic violence designation fell below professional standards and prejudiced the defense given that he was not facing a domestic violence charge?

4. Whether a jury instruction defining knowledge based on WPIC 10.02 constituted manifest constitutional error and if so, whether that error was harmless?

5. Whether a community custody condition that proscribes associating with known users, dealers or manufacturers of

controlled substances is unconstitutionally vague or violates the right to freedom of association?

6. Whether recent legislative changes and case law require that the \$200 filing and \$100 DNA fee ordered as part of the sentence in this case be stricken?

7. Whether any of Schuettke's claimed errors in his Statement of Additional grounds are supported by the trial record or have any merit?

B. STATEMENT OF THE CASE.

1. Procedural History

The State accepts the procedural history contained in the appellant's opening brief with additions included within the argument section below as deemed necessary.

2. Substantive facts

On October 2, 2017, Bradley Hendrickson discovered that his work van had been stolen from Black Lake Resources. 3 RP 46-47.1 Hendrickson reported the theft of the van to law enforcement. 3 RP 32-33. The stolen van was a white, 1989 Ford Econoline club wagon. 3 RP 36-37, 44. On October 7, 2017,

1 For purposes of the brief, the report of proceedings shall be referenced the same as Appellant's brief. 1 RP-2/21/18, 2 RP 3/27/18, 3 RP 3/27-29, 4/26/18.

Hendrickson was on his way to Costco when he noticed what appeared to be his van in the vicinity of Scott Lake. 3 RP 51, 66.

Hendrickson met with law enforcement and proceeded to the location of the van. 3 RP 58. Hendrickson indicated that the appellant, Travis Schuettke was inside the van when he arrived with law enforcement. 3 RP 60. Officer Randall Hedin-Baugh, of the Tumwater Police Department, went to the property of John Clausen, where the van was located with Hendrickson. 3 RP 110, 118. Hedin-Baugh observed that the rear license plate was missing, and could see a pair of legs hanging out the driver's side door and observed Schuettke reaching up underneath the dash and the steering column. 3 RP 122, 124. Officer Hedin-Baugh had to yell three separate times before Schuettke responded to him. 3 RP 123.

While Officer Hedin-Baugh was yelling to Schuettke, John Clausen came around the corner from the tree line and was directed to their location. 3 RP 125. While Schuettke and Clausen were sitting next to each other, Officer Hedin-Baugh observed Schuettke making statements to Clausen that he got there the previous night and the van showed up at 3 a.m., while Clausen nodded his head left to right indicating no. 3 RP 126-127.

Law enforcement confirmed the van was Hendrickson's stolen vehicle. 3 RP 128. After Schuettke was read his *Miranda* warnings, he spoke to Officer Hedin-Baugh. 3 RP 159. Schuettke stated that he had stayed in a trailer on the property and the van had arrived around 3 a.m. and Schuettke after going out to the van that morning after finding it vacant he took apart an access panel under the dash and removed it. 3 RP 130-131. Schuettke said that he did so to look for information regarding the owner. 3 RP 131. He was consistent that he was looking for legal paperwork under the interior hood of the car. 3 RP 131. Schuettke said he did not see who brought the vehicle to the property. 3 RP 132. When asked how he arrived at the property, Schuettke said he "didn't ride in the van," and that someone had dropped him off the previous day. 3 RP 132. Schuettke indicated that he did not remember who had dropped him off, whether they were male or female, what kind of car they drove, the color of the car they drove, or the type of car they drove. 3 RP 133. Schuettke stated that he had stayed the night in the trailer on the property with Lisa Walker. 3 RP 134.

Clausen lives at the property where the van was located. 3 RP 102. Clausen stated that Schuettke had arrived at his property in the white van that the police had showed up and questioned him

about the night before. 3 RP 103. He indicated that Schuettke stayed the night on the property and he believed Schuettke had stayed in the van. 3 RP 103-104. On the evening of October 6, 2017, Schuettke took Clausen to the Scott Lake Store in the van. 3 RP 104.

While the van was at his property, Schuettke was observed burning items from inside the van. 3 RP 105. Hendrickson indicated that the van had been damaged since it was stolen, with damage to the front bumper, driver's front quarter panel, driver's rear quarter panel and interior of the vehicle. 3 RP 62-64. Hendrickson went through the vehicle after it was recovered and observed that the radio was ripped out of the dash with two speakers in a milk crate. 3 RP 64. There were items in the van that did not belong to Hendrickson, including a vinyl pool lounge chair. 3 RP 65. On the property, Hendrickson located his back brace, burning in a pile of garbage. 3 RP 67. Lisa Walker came out of her motor home and showed Hendrickson a bucket of all of his screws that he had organized in containers, though Walker described it as "pot of nails" that she "guess[ed]" came from around the property. 3 RP 67, 180. When she was asked "if there was stolen property from the van that you knew nothing about that was

in your trailer, that had to have come from Mr. Schuettke,” Walker responded, “that’s why I showed them that pot of nails.” 3 RP 189.

A wooden center console that Hendrickson had built between the two seats had been moved to the back of the van. 3 RP 71. The license plate of the vehicle was located laying in the back of the van. 3 RP 73-74. The interior motor cover had also been removed. 3 RP 70.

After law enforcement released the van to Hendrickson, he noticed what he described as a “glass crack pipe” with two torch lighters between the two seats up front. 3 RP 75. Hendrickson took the motor harness and “kicked it back on to cover up the motor” and a pack of camel cigarettes vibrated off and a “bag of methamphetamines fell out of the pack.” 3 RP 75. Hendrickson reported the suspected methamphetamine to law enforcement who sent later sent it to the crime lab. 3 RP 75, 149-150. The crime lab confirmed that the substance was methamphetamine. 3 RP 92, 94.

At trial, Lisa Walker testified on behalf of the defense. 3 RP 178. Walker testified that Schuettke had been dropped off the night before the police came by Erin Johnson. 3 RP 179. On cross examination, she stated that she learned that Johnson had dropped Schuettke off from Schuettke. 3 RP 193. Walker also

acknowledged that she did not tell the police that when they interviewed her on the morning in question. 3 RP 193. She testified that the white van was not on the property the night before when she and Schuettke went to sleep. 3 RP 179. She indicated that she had never seen the white van before the morning that the police came. 3 RP 181.

Erin Johnson testified that during the first week of October, she gave Schuettke several rides and let him borrow her van. 3 RP 197. After he borrowed her van, she stated that she dropped him off. 3 RP 198. Johnson's van was a 1978 silver/primer grey Chevy with no side windows. 3 RP 199. Johnson admitted that she did not have a specific memory of the date of October 7, 2017. 3 RP 204.

Schuettke testified on his own behalf at trial. Schuettke testified that he did not want to tell law enforcement who dropped him off because Johnson had a suspended license and no insurance. 3 RP 212-214. He stated that he was dropped off at the property by Erin Johnson and that he gave Clausen a ride to Scott Lake Store in Johnson's van. 3 RP 215. He indicated the first time that he saw the white Ford van was when he got up to let the dog out on the morning of October 7. 3 RP 216. He stated that he went

out to the van and opened the door and had been there less than five minutes before law enforcement arrived. 3 RP 216-217. During his testimony, Schuettke indicated that the housing unit of the motor was already off when he got to the van and he never entered the van. 3 RP 233. He stated he was only reaching into the van to try to push it out of the driveway. 3 RP 233.

In rebuttal the State recalled Officer Hedin-Baugh. Officer Hedin-Baugh indicated differences between Erin Johnson's van and Hendrickson's van included the fact that windows go all around Hendrickson's van and Johnson's has no side windows, and the fact that Johnson's van is a dark primer that appears black when it is wet. 3 RP 246-247. The State also admitted the audio/video recording from Officer Hedin-Baugh's vehicle and played a brief portion of it, during which Schuettke indicated that "Jesse" had dropped him off. 3 RP 253-254.

This appeal follows Schuettke's convictions for possession of a stolen vehicle and possession of a controlled substance. Additional facts will be included in the argument section as necessary.

C. ARGUMENT.

1. Schuettker Fails to demonstrate that his trial counsel provided 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 him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In 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).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

- a. Schuettker's defense counsel did not fall below prevailing professional norms by failing to object to the testimony of John Clausen, there were tactical reasons for not objecting, and Schuettker fails to

demonstrate that the failure to object had any effect on the outcome of the proceedings.

“The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel.” State v. Madison, 53 Wn.App. 754, 763, 770, *review denied* 113 Wn.2d 1002 (1989). To prove that the failure to object constituted ineffective assistance of counsel, Schuettke must show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 1010 P.3d 1 (2004).

Schuettke argues that his counsel fell below prevailing professional norms by failing to object to the prosecutor’s questioning regarding Clausen regarding whether he provided a written statement to law enforcement. This questioning occurred at the end of Clausen’s direct examination. 3 RP 106. While testimony regarding a witness’ own previously made out of court statement may in fact be hearsay, there are several tactical reasons that counsel may have had for not objecting. ER 801. Defense counsel, no doubt, knew that the defense witnesses would

contradict Clausen's testimony, and could reasonably foresee that law enforcement would later testify that they interviewed witnesses as part of their investigation. In fact, Officer Hedin-Baugh did later testify that he spoke to Clausen about the events. 3 RP 136.

Even if counsel had objected to the prosecutor's questions to Clausen, a reasonable juror likely would have inferred that Clausen had provided a similar version of events based on the fact that his testimony as to what happened was not contradicted in cross examination. It is certainly a legitimate tactical decision to not make an objection that may lead the juror to believe the defense is trying to hide something. This is especially true where it is highly likely that a rational juror would infer the information even without the testimony. A reviewing court presumes that the failure to object was the product of legitimate trial strategy or tactics. State v. Johnston, 141 Wn.App.1, 20, 177 P.3d 1127 (2007); *review denied*, 182 Wn.2d 1002 (2015).

Given that defense counsel, and the prosecutor, knew that both Lisa Walker and Erin Johnson would be called to testify and contradict Clausen's testimony, it was not unreasonable for the State to assume that Clausen's credibility would be attacked. As in State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) and

State v. Hakimi, 124 Wn.App. 15, 98 P.3d 809 (2004), the trial court could have found that it was not unreasonable for the State to “pull the string” on the prior consistent statement because it was implicit that the defense case was attacking Clausen’s version of events.

Regardless of whether an objection would have been granted, the failure to object was not egregious in this instance and counsel clearly had legitimate tactical reasons to not emphasize the testimony and possibly infer that the defense was trying to hide something. Even if the failure to object could be construed as falling below an objective standard of prevailing professional norms, Schuettke fails to meet his burden of demonstrating prejudice. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 1025 (2004).

Clausen’s testimony was corroborated by the facts presented at trial and an objection regarding his written statement to law enforcement, if granted, would not have changed the overall result of the trial. When law enforcement arrived, Schuettke was in the van. 3 RP 122, 124. The owner of the van, Bradley Hendrickson also observed Schuettke inside his van. 3 RP 60. Consistent with Clausen’s testimony that Schuettke was burning items out of the van, Hendrickson testified his back brace was “burning in a pile of garbage.” 3 RP 67. Moreover, Lisa Walker

brought out a “bucket of screws” that had come from the van, contradicting Schuettke’s claim that he had only been in the van for a few moments before law enforcement arrived. 3 RP 67, 3 RP 180, 3 RP 216.

The evidence that Schuettke had possession of the stolen van was overwhelming. On the record before this Court it is clear that Schuettke cannot show prejudice based on his counsel failing to object to Clausen’s testimony.

- b. Schuettke’s counsel did not fall below prevailing professional norms by not objecting to a portion of the in car camera and audio being played to the jury; there were strategic reasons that counsel may have had for not objecting; and Schuettke fails to demonstrate any prejudice caused by failing to object.

Schuettke argues that his defense counsel was ineffective for failing to object to the admissibility of Exhibit 22 based on RCW 9.73.090(1)(b). Such an objection would not likely have been granted because the audio that was admitted is a recording that corresponds to video images recorded by video cameras in a law enforcement vehicle. Such recordings are not subject to the provisions of the Washington Privacy Act if the law enforcement officer informs the person that a sound recording is being made and

the statement informing the person is included in the sound recording. RCW 9.73.090(1)(c).

The Privacy Act generally prohibits a person from recording private communications without first obtaining the consent of all participants. RCW 9.73.030(1). Any information obtained in violation of RCW 9.73.030 is generally inadmissible. RCW 9.73.050. However, these general provisions of the statute do not apply to police under the circumstances described in RCW 9.73.090, because they are not private. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 465, 139P.3d 1078 (2006).

Although police-recorded statements of an arrested person are not private, the statute requires that the arrested person be informed that the recording is being made, that the recording begin and end with an indication of the time, and that the person be advised of his or her constitutional rights. RCW 9.73.090(1)(b). Our Supreme Court has referred to this subsection as the "custodial interrogation proviso." Lewis, 157 Wn.2d at 447.

Another provision of RCW 9.73.090 specifically addresses sound recordings that correspond to video recordings in in car cameras. RCW. 9.73.090(1)(c). In that circumstance, the statute requires that the recording include the officer telling the person that

a sound recording is being made. Id. This subsection of the statute contains no requirement to advise the subject of their constitutional rights. Id. Officers must strictly comply with this provision. Lewis. 157 Wn.2d at 467. However, if the provision is violated, only the recording itself is inadmissible; officers may still testify to what they heard and observed. State v. Courtney, 137 Wn.App. 376, 383, 153 P.3d 238 (2007), *review denied*, 163 Wn.2d 1010 (2008).

The specific question of which provision applies when a person is placed under arrest but the audio and video are of the type governed under subsection (1)(c) does not appear to have been answered by this Court or the Supreme Court. The substance of subsection (1)(b) was enacted in 1970, soon after Miranda and before patrol cars were equipped with video cameras. LAWS of 1970, Ex. Sess., ch. 48, § 1. The Supreme Court acknowledged that the provision “is specifically aimed at the specialized activity of police taking recorded statements from arrested persons who are in custody, a situation in which consent alone was deemed insufficient. State v. Cunningham, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980). The phrase “taking recorded statements” suggest a situation that is more like the taking of a

formal interview than continued investigation by the side and in the back of a patrol car. The requirement that “the recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof,” also suggest that the provisions is designed to address a more formal tape recorded interrogation. RCW 9.73.090(1)(c)(ii).

By contrast, the legislature added subsection (1)(c) in 2000 to “help ensure officer safety, provide an important evidentiary tool, and create a checks and balances system for officer conduct.” Wash H.B. Rep., 2000 Reg. Sess. H.B. 2903, February 3, 2000. While there is clearly some overlap between the subsections of the RCW, the exact question of which provision applies in a situation as existed in this case has not been answered.

In an unpublished decision, State v. Bell, No. 73062-2-1, 2016 Wash.App. LEXIS 1174, Division I of this Court discussed the particular issue and noted that it was undisputed that the recordings at issue corresponded to video images by cameras mounted in patrol cars and that Bell was arrested during the first recording. Id. at 12-13.² Division I ultimately decided that it did not need to

² Pursuant to GR 14.1, the State offers this unpublished opinion as persuasive, acknowledging that the decision has no precedential value and is not binding on any court.

resolve the issue because any error would have been harmless. Id. at 13.

The State's research has uncovered no case that specifically addresses the issue of which provision is applicable in this situation. A failure of counsel to object pursuant to an issue of unsettled law is not ineffective assistance of counsel. In re Pers. Restraint of Theders, 130 Wn.App. 422, 435, 123 P.3d 489 (2005). Like Division I in State v. Bell, this Court does not have to answer the overall question of which provision of the Privacy Act applies to the in car video and audio admitted in this case.

As noted above, in order to demonstrate ineffective assistance of counsel based on a failure to object, Schuettke must show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. Davis, 152 Wn.2d at 714, 1010 P.3d 1 (2004)

The video at issue here clearly complied with RCW 9.73.090(1)(c); Ex. 22. The exhibit was introduced during rebuttal testimony. 3 RP 253. While the entire video was admitted, with two sections, on section I-200 appears to have been played to the jury, and only to time stamp 11:25:45. 3 RP 254. Officer Hedin-

Baugh informed Schuettke that the camera in front of him was audio and video recording him. EX. 22 at 11:21:44-48. Officer Hedin-Baugh again informed Schuettke that he was “still being audio and video recorded” in the back of the patrol car. EX 22 at 11:27:25-28. The audio clearly corresponds to the cameras mounted in the patrol car and is recorded by Afterwards the conversation between Schuettke and the Officer is mostly Schuettke arguing with the Officers about why he was arrested.

The I-200 portion of the video does not clearly show images of Schuettke on the hood of the vehicle as it is from the rear camera of the car. EX. 22. Schuettke states that he was dropped off by “Jesse.” EX 22, at 11:25:40. The prosecutor indicated that the portion played to the jury was stopped at 11:25:45. 3 RP 254.

As argued above, the law as to which provision of the Privacy Act applies to this video has not been settled. Schuettke’s counsel could not have fallen below prevailing professional norms by not objecting to an issue of law that is not clearly settled. Moreover, there was a strategic reason for counsel not to object to the short portion of the video that was played. During the video, Schuettke continuously indicates that he did not steal the van and Officer Hedin-Baugh speaks in a raised voice. It may have been a

strategic decision not to object because prior to the admission of the video, Schuettke had testified “he was pretty rude to me actually,” while discussing Officer Hedin-Baugh and stated that Hedin-Baugh was yelling at him. 3 RP 213.

Given the fact that Schuettke admitted that he did not tell Officer Hedin-Baugh that Erin Johnson had dropped him off, 3 RP 213-214, and Officer Hedin-Baugh had already testified Schuettke initially did not comply with him at the van, 3 RP 123, and that when asked how he got to the residence, Schuettke stated he did not remember who brought, whether it was a male or a female, what kind of car it was, or what color of car it was, 3 RP 133, the video added very little to the State’s case. It may have been a legitimate strategy to allow some of the video to show the verbal sparring that occurred between the Officer and Schuettke in an effort to lend some basis as to why Schuettke was not forthcoming.

Additionally, Schuettke cannot show any prejudice from the playing of the video. It appears that only a short portion of the video was actually played. Officer Hedin-Baugh had already advised Schuettke of his Miranda rights, though those rights were not shown on the video. 3 RP 130, EX 22. Even if the video was erroneously admitted, there was no prejudice because only the

recording would have been inadmissible, not the Officer's observations. Courtney, 137 Wn.App. at 383. Officer Hedin-Baugh had already testified to most of the conversation that occurs on the video and Schuettke did not contest that he had not told Officer Hedin-Baugh that he had been dropped off by Erin Johnson. Given the overwhelming evidence which included Officer Hedin-Baugh's testimony, Schuettke's testimony, and Clausen's testimony, Schuettke cannot demonstrate that the verdict would have been any different if the video had not been played.

Schuettke fails to demonstrate that his counsel was ineffective and that counsel's performance prejudiced him.

- c. Defense counsel was not ineffective for failing to object to Schuettke's prior conviction because tampering with a witness/domestic violence is a crime of dishonesty, tactical reasons existed for not objecting and Schuettke has not demonstrated prejudice.

Prior to this case, Schuettke had a conviction for tampering a witness/domestic violence. CP 36. While cross examining Schuettke, the prosecutor asked Schuettke if he had ever been convicted of tampering with a witness. 3 RP 226. The prosecutor then asked, "and that was in relationship to a domestic violence case?" Id. Schuettke responded, "I told my mom, please don't go

to court without me.” Id. The prosecutor then stopped Schuettke and stated, “I didn’t ask you what it was about. I asked whether you were convicted of tampering with a witness in a domestic violence case.” 3 RP 226-227. Schuettke now argues that his defense attorney should have objected and that the failure to object prejudiced his case.

ER 609(a)(2) allows for cross examination of witness for the purpose of attacking their credibility regarding evidence that they have previously been convicted of a crime of dishonesty or false statement. Tampering with a witness is a crime of dishonesty and the trial court was required to admit the evidence showing a conviction pursuant to ER 609(a)(2). State v. Bankston, 99 Wn.App. 266, 268-269, 992 P.2d 1041 (2000); *see also*, State v. Delker, 35 Wn.App. 346, 349-350, 666 P.2d 296, *review denied*, 100 Wn.2d 1016 (1983)(the gravamen of the offense of intimidating a witness is illegally attempting to change the testimony of that witness or prevent the witness from testifying at all and clearly involves dishonesty and false statement).

It is clear that there was no basis to object to the cross examination for the offense of tampering with a witness; however, Schuettke argues that his counsel should have objected to the

domestic violence designation of the offense he previously committed. In general, cross examination about the conviction under ER 609 is limited to “the fact of the conviction, the type of the crime, and the punishment.” State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). Here, the type of crime that Schuettke was convicted of was tampering with a witness/domestic violence, and the prosecutor limited his questioning to the type of the crime. 3 RP 226-227.

The State agrees that details of the conduct that lead to the offense are generally not admissible pursuant to ER 609. State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984). Here, the prosecutor did not ask for details. In fact, it was Schuettke who offered details in an attempt to minimize the conduct that led to his conviction. 3 RP 226. Because the prosecutor’s questioning was limited to the type of offense, Schuettke’s counsel was not obligated to object.

Schuettke relies on two unpublished cases out of the Ohio Court of Appeals for the proposition that the crime of domestic violence is not a crime of dishonesty. State v. Bradford, 2010-Ohio-6429, 2010 WL 5508718 (Ct. App. 2010); State v. McCrackin,

2002-Ohio- 3166, 2002 WL 1358669 (Ct. App. 2002).³ While the State agrees that crimes of violence are not per se crimes of dishonesty, the Ohio cases miss the mark on this issue. Under Ohio law, Domestic Violence is the name given to the crime. ORC 2919.25. The language of the statute would be similar to the Washington offenses of Assault, RCW 9A.36, and Harassment, RCW 9A.46. This statutory scheme is unlike our RCW chapter 10.99, which allows for the designation of domestic violence on certain offenses which involve domestic violence. Unlike the charges in the Ohio cases that Schuettke cites, Schuettke was convicted of tampering with a witness/domestic violence, which does involve dishonesty.

State v. Hagler, 150 Wn.App. 196, 208 P.3d 32 (2009), which Schuettke also relies upon, is distinguishable from this case because it did not involve the application of ER 609 or a crime of dishonesty. In Hagler, the defendant argued that the jury should not be informed that the charges he was currently facing had been designated a domestic violence offenses. Division I of this Court noted, “the designation does not itself alter the elements of the underlying offense; rather it signals the court that the law is to be

³ These unpublished cases have no precedential value. GR 14.1(b).

equitably and vigorously enforced.” Id. at 201. The Court stated, “we can see no reason to inform the jury of such a designation, and we believe prejudice may result in some cases.” Id. at 202.

The distinction between that case and the case before this court is the designation was related to the charges that the jury was actively considering. Here, Schuettke was not charged with a domestic violence offense. The designation was part of the type of crime that he had previously been convicted of. Defense counsel did not fall below an objective professional standard by not objecting.

“The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel.” State v. Madison, 53 Wn.App. at 763, 770. Even if an objection would have been granted, the decision to not object created the strategic advantage of allowing Schuettke to minimize the tampering with a witness conviction by stating that all he did was tell his mom not to come to court. 3 RP 226. As Schuettke was not charged with a current domestic violence offense, the designation had no likelihood of affecting the jury’s verdict. The tampering with a witness conviction, without more, had a much greater likelihood of affecting

the jury's consideration of Schuettke's credibility. The lack of an objection to the domestic violence designation in the title of the offense allowed an attempt to minimize that affect.

As alluded to above, Schuettke cannot show prejudice from the lack of an objection. There is no likelihood that the jury concluded that the jury inferred a propensity to commit an offense because Schuettke was not charged with a domestic violence offense. Schuettke cannot demonstrate that the prosecutor's very limited questioning regarding the domestic violence designation in his prior conviction had any effect on the jury's verdict.

2. The trial court properly instructed the jury as to the definition of knowledge.

A person is guilty of possession of a stolen vehicle if he possesses as stolen vehicle. RCW 9A.56.068. Possessing stolen property means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). In this case, the State properly charged Schuettke by alleging that he "did knowingly possess a stolen motor vehicle knowing it was

stolen, and appropriated such motor vehicle to the use of a person other than the person entitled to such property.” CP 5.

The trial court properly instructed the jury regarding the definition of possession of a stolen motor vehicle. CP 16. The court also instructed the jury as to the definition of knowledge in instruction 10. CP 17. This instruction comes directly from 11 Washington Practice: Washington Pattern Jury Instructs: Criminal 10.02 (3d ed 2008)(WPIC). Schuettke now argues, for the first time on appeal, that the jury instruction violates due process by allowing the jury to convict without finding that he had actual, subjective knowledge.

- a. This court is not required to consider this issue because it was not raised at the trial court level.

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). This general rule has specific applicability to claimed errors in jury instructions. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In fact, CrR 6.15(c) establishes a procedure for objecting to proposed instructions in a criminal trial.

Pursuant to Rap 2.5(a)(3) a party may raise an issue for the first time on appeal if there has been “manifest error affecting a

constitutional right.” To meet the requirement and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

In analyzing the asserted constitutional interest, the appellate court does not assume the alleged error is of constitutional magnitude. Scott, 110 Wn.2d at 687. The test is to look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of error. Id. at 689-91. Here, Schuettke alleges that the inclusion of paragraph two of WPIC 10.02, “if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact,” impermissibly relieves the state of its burden to prove knowledge.

In Scott, our State Supreme Court noted that the exception in RAP 2.5(a)(3) is actually a narrow one. 110 Wn.2d at 687. The Court in that case held that failing to define knowledge was not constitutional error and could not be raised for the first time on appeal. Id. at 691. Schuettke points to State v. Allen, 101 Wn.2d 355, 356, 678 P.2d 798 (1984) to argue that this issue can be

raised for the first time on appeal, however, in Scott, the Court distinguished Allen stating “The *Allen* opinion neither mentions the constitution, nor implies reliance on it. Indeed, the constitutionality of the asserted error was not in issue because the instruction was properly excepted to in the trial court.” Scott, 110 Wn.2d at 689-690.

Schuettker correctly notes that omitting an element of the crime from the jury instructions, so as to fail to require proof of that element is constitutional error. State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756, 763 (2009). But Schuettker does not allege that any element of the offense of possession of stolen vehicle was omitted. As in Scott, an alleged error in the definition of Knowledge does not rise to a constitutional error.

Even if the alleged error were deemed constitutional error, it is not manifest. Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice. Kirkman, 159 Wn.2d at 935. To demonstrate actual prejudice, there must be a plausible showing that the asserted error had practical and identifiable consequences in the case. Id.

Here, the evidence overwhelming supported that Schuettker knowingly possessed the stolen van. Clausen indicated that

Schuettker arrived at his property in the van, stayed the night in the van, and was driving the van around the previous day. 3 RP 103, 104. Hendrickson described the condition of the van and noted that the license plate had been removed and was in the vehicle. 3 RP 60-64, 3 RP 73-74. When law enforcement arrived, Schuettker was in the vehicle, reaching under the steering column. 3 RP 122. The definitional instruction that the trial court provided, even if it had been incorrect, likely had no effect on the outcome of the case. There was no manifest constitutional error that this Court should consider.

- b. RAP 2.5 notwithstanding, the trial court properly instructed the jury as to the definition of knowledge and there was no error committed.

If this Court does review the issue raised regarding Instruction 10, there was no error. Schuettker relies on State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015), to argue that the jury instruction reduces the knowledge requirement to a mere negligent ignorance standard. Brief of Appellant, at 21. In Allen, the State Supreme Court found that the prosecuting attorney's arguments that the jury convict if the defendant "should have known" and that "if an ordinary person in the defendant's situation would have known" were erroneous. 182 Wn.2d at 374-375. The Court noted

a subtle distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant “should have known.” Id. Importantly, the case was not about WPIC 10.02. The error was with the prosecutor’s arguments.

The Allen Court noted that “Washington’s culpability statute provides that a person has actual knowledge when he or she has information which would lead a reasonable person in the same situation to believe that he was promoting or facilitating the crime eventually charged. Id. at 374; RCW 9A.08.010(1)(b)(ii). Indeed, the legislature has specifically defined knowledge, and the language included in the second paragraph of WPIC 10.02 mimics the statutory language.

RCW 9A.08.010(1)(b) defines the knowledge requirement for culpability. RCW 10.02 merely permits the jury to follow the standard set forth by the legislature. As such, the jury instruction does not minimize the State’s burden. The statute, like the jury instruction, “allows the inference that a defendant has knowledge in situations where a reasonable person would have knowledge, rather than creating a mandatory presumption that the defendant had such knowledge.” State v. Shipp, 93 Wn.2d 510, 512, 610 P.2d 1322 (1980).

In fact, our Supreme Court has noted that WPIC 10.02 corrected the problem identified in Shipp that the jury could conclude that the RCW creates a mandatory inference of knowledge, while only a permissive inference is constitutionally permissible. State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), *Superseded by statute on other grounds*, 147 Wn.2d 602 (2002). The modified language of WPIC 10.02 has consistently been approved by Washington State courts. State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009); State v. Davis, 39 Wn.App. 916, 919-920, 696 P.2d 627; State v. Goglin, 45 Wn.App. 640, 647, 727 P.2d 683 (1986); State v. Kees, 48 Wn.App. 76, 82, 737 P.2d 1038 (1987); State v. Rivas, 49 Wn.App. 677, 689, 746 P.2d 312 (1987); State v. Barrington, 52 Wn.App. 478, 485, 761 P.2d 632 (1988), *review denied*, 111 Wn.2d 1033 (1989); State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992).

In Johnson, the Court acknowledge that the jury is permitted to infer subjective knowledge if it finds that a reasonable person under the same circumstances would have subjective knowledge. 119 Wn.2d at 174. WPIC 10.02 complies with the state statute and the precedence set forth by the Courts of this State. The trial court did not err by giving an instruction based on WPIC 10.02.

The law allows for a permissive inference. Such an inference does not violate due process. State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995); County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979). Permissive inferences generally do not run afoul of the constitution. State v. Deal, 128 Wn.2d 693, 697, 911 P.2d 996 (1996); State v. Drum, 168 Wn.2d 23, 36, 225 P.3d 237 (2010). The trial court did not commit error by giving Instruction 10.

- c. Even if this Court goes against decades old precedent to find error in Instruction 10, any error would be harmless.

If this Court finds that a manifest constitutional error has occurred, such an error would be subject to a constitutional harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Cases that were affected by the holding in Shipp are instructive in the application of harmless error if this Court were to find that the knowledge instruction given was erroneous. Following

Shipp, Division I of this Court acknowledged that “the giving of the knowledge instruction in the language of the statute does not require reversal in every case. Where the jury must have found that a defendant had actual knowledge the conviction will not be disturbed.” State v. Russell, 27 Wn.App. 309, 312, 617 P.2d 467.

In this case, it is clear beyond a reasonable doubt that a reasonable jury would have reached the same result even without the inclusion of the second paragraph of Instruction 10. The defense relied on an assertion that Schuettke had only looked at the vehicle for moments prior to law enforcement arriving. 3 RP 216. It is clear that the jury did not find the defense argument that Schuettke had only just had contact with the vehicle credible. The other evidence presented demonstrated that Schuettke arrived at his property in the stolen van, stayed the night in the van, and was driving the van around the previous day. 3 RP 103, 104. Hendrickson described the condition of the van and noted that the license plate had been removed and was in the vehicle. 3 RP 60-64, 3 RP 73-74. When law enforcement arrived, Schuettke was in the vehicle, reaching under the steering column. 3 RP 122. The van was reported stolen on October 2, 2017, and located in Schuettke’s possession on October 7, 2017. 3 RP 32, 47, 66. The

owner of the vehicle located his back brace in a burn pile at the property and Clausen indicated that Schuettke was burning property from the van. 3 RP 67, 105. Hendrickson was also shown property from his van that Lisa Walker brought out. 3 RP 67.

Simply put, if the jury believed Schuettke's version of events, they would have found that he was not possessing the stolen van. They would not have needed to consider whether or not he knew it was stolen. Absent Schuettke's story that he had only just found the van, there was no indication whatsoever that he wouldn't have known it was stolen. To the contrary, the evidence presented at trial clearly showed beyond a reasonable doubt that he knew it was stolen.

3. The Community Custody Condition Directing Schuettke not to associate with "known users, dealers, or manufacturers of controlled substances is not unconstitutionally vague.

As a condition of Schuettke's sentence, the trial court ordered that Schuettke "not associate with known users, dealers, or manufacturers of controlled substances." CP 38. Courts are authorized to impose community custody conditions prohibiting contact with a "specified class of individuals." RCW 9.94A.703(b). They may also impose conditions of affirmative conduct reasonably

related to the circumstances of the offense, including the defendant's risk of reoffending or the safety of the community. RCW 9.94A.703(d).

Constitutional due process requires fair warning of proscribed behavior in community custody conditions. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The conditions must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" and "provide ascertainable standards of guilt to protect against arbitrary enforcement." Id. "If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite." Id. at 754. Impossible standards of specificity are not required, since language always involves some degree of vagueness. State v. Halstein, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

Here, Schuettke argues that the condition of community custody that he not associate with "known users, dealers, or manufacturers of controlled substances" is impermissibly vague because the terms "known" and "controlled substances" are not clear. The term "known" has consistently found to pass

constitutional muster when attacked for vagueness. In United States v. Vega, 545 F.3d 743, 750 (9th Cir. 2008), the court upheld a community custody condition that stated, “The defendant shall not associate with any known member of any criminal street gang...as directed by the probation officer.” The Court stated that it is well established precedent to presume that prohibited criminal acts require an element of mens rea and construed the condition to prohibit only knowing association. Id., *citing* Staples v. United States, 511 U.S. 600, 605-606, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

The Ninth Circuit Court of Appeals also upheld a condition that proscribed associating with “any known member of any criminal street gang.” United States v. Solero, 510 F.3d 858 (9th Cir. 2007). The Court held that “known” and “associate” in context clearly conveyed that the defendant would be liable only for deliberately being with persons he knew to be gang members. Id.

In State v. Llamas-Villa, 67 Wn.App. 448, 454-456, 836 P.2d 239 (1992), Division I of this Court considered a challenge a community custody condition that he “not associate with persons using, possessing, or dealing with controlled substances.” Specifically, Llamas argued that the term should have been limited

to individuals who Llamas “knows” to be engaged in such activity. Id. at 455. The Court noted that “if Llamas is arrested for violating the condition, he will have an opportunity to assert that he was not aware that the individuals with whom had associated were using, possessing, or dealing drugs” and held “that the condition imposed provides adequate notice of what conduct is prohibited and is neither overbroad nor vague.” Id. at 455-456.

Very recently, Division I of this Court considered a similar community custody condition that proscribed “associating with known users or sellers of illegal drugs.” In re Pers. Restraint of Bretell, No. 76384-9-1, 2018 Wash.App. LEXIS 2620 (Slip Op.) (Nov. 19, 2018). The Court specifically rejected Bretell’s claim that the term “known” was vague. Id. at 7. The Court also address a contention that the term “illegal drugs” would also include users of Marijuana in Washington State because such use is still against Federal Law. Id. at 8. The Court held “the complication of different state and federal drug enforcement policies does not excuse a person from knowing that for marijuana, it is still illegal.” Id.

The Bretell Court briefly addressed dicta from its own unpublished opinion in State v. Brown, No. 75458-1-I, 2018

Wash.App. LEXIS 535 (Slip. Op. at 25). Id. at 9.⁴ In Brown, the Court spoke somewhat favorably regarding the trial court's ruling that the condition that Brown "not associate with known drug users" was vague. Brown, at 25. However, that statement was dicta and made in the context of accepting the State's concession that a prohibition of going to "drug areas" as determined by his CCO was impermissible. Id. at 24. The Court in Bretell distinguished Brown because the prohibition in Bretell involved the term "illegal" drugs, which is more specific than just drugs, concluding that the term "users and sellers of illegal drugs" is not impermissibly vague. Bretell, at 9.

Here, the community custody term at issue involves the term "controlled substance." This is even more specific than illegal drugs and is in fact defined by statute. RCW 69.50.101(f). The community custody term imposed in this case is not impermissibly vague.

Schuettker further argues that the prohibition impermissibly infringes on his freedom of association because "known users, dealers or manufacturers of controlled substances" could include

⁴ The reference to State v. Brown is pursuant to GR 14.1 and is not offered as precedent. In fact the Bretell Court acknowledged that it was not bound by dicta from an unpublished opinion.

legal users of controlled substances. Restrictions on association implicate the First Amendment. When a condition involves a protected right, is language must be clear and necessary. State v. Bahl, 164 Wn.2d at 757-758. A court may restrict a convicted offenders association rights if “reasonably necessary to accomplish the essential needs of the state and public order.” State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1995); *see also*, State v. Letourneau, 100 Wn.App. 424, 438, 997 P.2d 436 (2000).

In State v. Hearn, 131 Wn.App. 601, 609, 128 P.3d 139 (2006), the Court acknowledged that “recurring illegal drug use is a problem that logically can be discouraged by limiting contact with known drug offenders.” “Discouraging further criminal conduct is a goal of community placement.” Id. at 608. Here, Schuettke was convicted of possession of a stolen motor vehicle and possession of a controlled substance. Prohibiting his access to controlled substances, from either illegal or legal users, is a valid goad of community placement.

Further community custody conditions are not looked at in a vacuum. The challenged community custody provision must be read with the other conditions of community custody that he not unlawfully possess controlled substances and that he not consume

controlled substances except pursuant to a valid lawfully issued prescription. CP 38. Read as a whole, the prohibitions would not prohibit Schuetkke from obtaining lawfully prescribed medication.

Looking at all of Schuetkke's community custody provisions, it is clear that an individual of ordinary intelligence can plainly understand the community custody condition at issue here. The prohibition is also tailored to the goals of community custody and the specific offenses that Schuetkke was convicted of.

4. The State does not oppose an order striking the \$200 filing fee and \$100 DNA fee pursuant to the holding of *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).

Here, the trial court did not enter specific findings in the Judgment and Sentence indicating that Schuettke was indigent at the time of sentencing. CP 39. However, given that the trial court did enter an order of indigency on the same day of the sentencing hearing, the State does not oppose an order striking the \$200 filing fee. CP 29-30.

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

5. Schuettke's claims in his Statement of Additional Grounds are without merit.

Schuettke filed his pro se Statement of Additional Grounds (SAG) on November 26, 2018. This Court indicated that response is not required unless the court asks for a response, but if the State chooses to respond, the State must do so within 30 days. Rather than filing an additional response, the State will briefly address the issues raised in the SAG here. If the Court requires an additional response, the State respectfully requests that the Court ask.

- a. Sufficient evidence demonstrated that Schuettke knowingly possessed a stolen motor vehicle.

Schuettke argues that, at worst, he was guilty of “operating a motor vehicle without the owners” permission. In effect, Schuettke appears to argue the evidence was insufficient to convict him of possession of a stolen vehicle. 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). As argued above, the evidence presented at trial overwhelming supported the jury’s finding that Schuettke knowingly possessed a stolen motor vehicle. Schuettke’s counsel was not ineffective for failing to convince them otherwise. Schuettke’s right to effective assistance of counsel is not a guarantee for successful assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

- b. The record does not support Schuettke’s claims in regard to Juror number 9.

Schuettke argues that his trial counsel was ineffective for failing to object to Juror number 9 remaining on the panel. During trial, the trial court indicated that the bailiff had informed him that Juror No. 9 had stated

“that his son-in-law works for the Tumwater Police Department and that there was a possibility that he would have been on duty the day in question, but he has no reason to believe he was or wasn’t involved in this case in any way shape or form.”

3 RP 81-82. The Court further explained

“this wasn’t responsive necessarily to any questions that were raised during voir dire. And so given that there is no indication that he has any direct relationship to this case, I don’t believe anything is necessary to be done, but given that I received information about this from the bailiff about a juror, I felt it was my obligation to bring this and put it on the record.”

3 RP 82. Neither party objected. *Id.* The record fails to demonstrate that defense counsel’s performance was inadequate or that Schuettke was prejudiced in any way. In fact, the trial court asked the venire if anyone knew any of the witnesses, and Juror No. 9 did not respond. 2 RP 17-20⁵ Schuettke’s claim of error is unsupported by the record.

c. Defense counsel was not ineffective in regard to the charge of possession of a controlled substance.

Schuettke next argues that defense counsel was somehow ineffective because he was convicted of possession of a controlled substance and the drugs were found after he had been arrested. Schuettke does not specify exactly how he claims that his counsel

⁵ Juror No. 9 wore badge number 13 during voir dire. 2 RP 77.

was ineffective. The record does not support his claim. The jury was aware that Hendrickson found the methamphetamine after the van had been returned to him. 3 RP 76. The trial court instructed the jury regarding constructive possession. CP 23. Schuettke's trial counsel focused his closing argument on the notion that the van was not at the property when Schuettke went to bed, indicating that Schuettke was not in possession of the van. 3 RP 295. Schuettke's counsel was not ineffective.

- d. The record does not demonstrate that defense counsel failed to investigate.

Schuettke finally argues that his defense counsel was ineffective because he failed to investigate the case. Counsel has the latitude to "formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Harrington v. Richter, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011). It is clear that defense counsel contacted witnesses and arranged for Lisa Walker and Erin Johnson to testify on his behalf. Schuettke fails to demonstrate deficient performance or any prejudice.

D. CONCLUSION.

Schuettke's trial counsel did not provide ineffective assistance of counsel. None of the claims of error amount to a deviation from prevailing professional norms and are either matters of legitimate trial tactic or issues of unsettled law. Further, Schuettke has not demonstrated that he was prejudiced by his counsel's performance. The jury instruction defining knowledge was not erroneous. Even if there was some error in regard to that instruction, any error was certainly not manifest constitutional error and would have been harmless given the overwhelming evidence of Schuettke's guilt. The community custody provision to not associate with known users, dealers, or manufacturers of controlled substances is sufficiently clear for a person of ordinary intelligence to understand what it proscribes. Given the goals of community custody, the condition is tailored to protect the community and assist Schuettke in not committing additional offenses; therefore, the condition does not violate Schuettke's right to freedom of association. The claims in Schuettke's statement of additional grounds are not supported by the record and should be denied. For the reasons noted in this brief, the State does not oppose an order striking the \$200 filing fee and \$100 DNA fee; however, the

State respectfully requests that this Court affirm Schuettke's convictions in all other regards.

Respectfully submitted this 10 day of December, 2018.

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Attorney for Respondent

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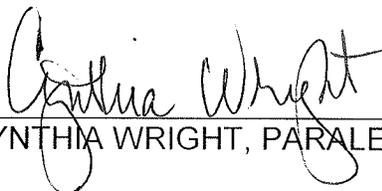
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of December, 2018, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

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