

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33280-2-III

FILED
FEB 22, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ERIC ALLEN HAGGIN,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. An objection to opinion testimony cannot be raised for the first time on appeal as it is not a manifest error affecting a constitutional right; regardless an officer can give an opinion based on his experience and training about whether a quantity of drugs possessed was consistent with personal use.
- b. The conviction for witness tampering is supported by sufficient evidence when the defendant makes a recorded phone call to a third party and asks them to call the victim and offers to compensate her for “dropping the charges.”
- c. Defense waived objection to the jury instructions at trial and the instructions given to the jury on the firearm enhancements were legally correct and supported by the facts even without an instruction given defining an “accomplice.”
- d. The trial court imposed a legal sentence under RCW 9.94A.589 (1) (c) for two counts of unlawful possession of a firearm in giving consecutive sentences for those counts because two different firearms supported the counts.

- e. Because the defendant has a prior conviction for VUCSA under RCW 69.50.408, the statutory maximum is doubled from 120 months to 240 months and his sentence of 120 months and twelve months community custody is beneath the statutory maximum of 240 months.
- f. The legal and financial obligations (“LFO”) repayment begins pursuant to the Judgment and Sentence consistent with the Judge’s oral judgment, any indicated in an appendix that differs should be treated as a scrivener’s error.

B. ISSUES PRESENTED

- a. Can an officer testify based on his training and experience that a certain quantity of a controlled substance is more than typical for personal use?
- b. Is there sufficient evidence of witness tampering with a defendant makes a recorded phone call from the jail where he asks another person to contact the victim who is a stranger to him and ask the victim if they can be compensated for “dropping the charges” even when no contact is actually made with the victim?

- c. Are the WPICs sufficient regarding instructing the jury for the firearm enhancement when they directly state the law from the RCW even when the jury is not instructed on the definition of an accomplice or accomplice liability separately?
- d. Are consecutive sentences proper when a defendant is convicted of two counts of unlawful possession of a firearm?
- e. Can a defendant be sentenced to one hundred and twenty months for possession of a controlled substance with intent to deliver and an additional twelve months of community custody when the defendant has two prior convictions for VUCSA offenses so the actual maximum sentence is doubled to 240 months, even when the statutory maximum is incorrectly stated in the Judgment and Sentence?
- f. If language in an appendix to a Judgment and Sentence conflicts with the actual court order, can information in a preprinted appendix that conflicts with the judge's order be treated as a scrivener's error?

C. STATEMENT OF THE CASE

Eric Haggin was charged via amended Information with two counts of Unlawful Possession of a Firearm in the First Degree, Possession of a Stolen Firearm, Possession of Methamphetamine with Intent to distribute with a Firearm Enhancement, Possession of Heroin with Intent to Distribute with a Firearm Enhancement, two counts of Use of Drug Paraphernalia, Theft in the Second Degree, and Witness Tampering. (CP 40).

In late August, 2014, Christy Stransky and her boyfriend Cordra Gill came to Ellensburg so Mr. Gill could compete as a team roper in the Ellensburg Rodeo. (RP at 14 -15 (Trial I)). During the few days they stayed in Ellensburg, they took their clothes to wash in a laundromat. (RP at 15 (Trial I)). Included in the laundry were his sponsored apparel from his rodeo sponsors “Roper” and “Stetson” which are very unique and distinctive and other regular clothes and unique monogramed towels (with Mr. Gill’s cattle and ranch brand). (RP at 16, 24 (Trial I)). They left their clothes washing at the laundromat in the morning and when they came back, the clothes were not there. (RP at 17 -18 (Trial I)). They attempted to contact the owner of the laundromat and also left a note on the door in case someone took the clothes accidentally and returned them. (RP at 18 (Trial I)). They were

able to view the surveillance video and saw a strange man take their clothes who did not have permission to take them. (RP at 18 – 19 (Trial I)). They waited a several days in case it was an accident and someone returned the clothes, but when they did not hear anything from anyone or the owner of the laundromat, they called the police. (RP at 19 -20 (Trial I)). Ms. Stransky made a list of all the missing clothes that valued in total \$1400.00 and gave it to the police (RP at 21 – 22 (Trial I)). Eventually the police gave back Ms. Stransky about 90 -95 percent of her clothes (RP at 22 – 23 (Trial I); Id. at 28 -61, 65 – 66).

Officer Josh Ingraham testified that he took the report of the stolen clothes from Ms. Stransky and did the initial investigation of the case. (RP at 48 -49 (Trial I)). When Officer Ingraham watched the surveillance video from the laundromat, he recognized the person who took the clothes as the defendant, Eric Haggin (RP at 49 (Trial I)).

Officer Ingraham got a search warrant to search Mr. Haggin's known residence for the victims' clothes. (Id. at 53, 67). During the search, almost all of the victims' clothing was found. (RP at 58 -61, 65 – 66 (Trial I)).

During the search of Mr. Haggin's apartment, police also found a tray of what they believed to be methamphetamine, heroin, and drug paraphernalia. (Id. at 61, 62). They also found a loaded gun in a backpack and a second gun in a basket on the dresser in the bedroom. (Id. at 65 -66,105 – 106).

A second search warrant was obtained to search for the guns and any controlled substances, paraphernalia, and documentation about who lived at the residence (RP at 93 -94 (Trial I). During the second search, Detective Caillier found a "50-cent" piece size of tar heroin that was frozen in the freezer. (RP at 96). He located a second tin that also contained heroin in the freezer (Id.). He estimated the tin to have approximately 50 grams of heroin in it, but could not be exact because he had measured the heroin inside the tin, so the total weight included both the container and the heroin (RP at 99).

The police found additional amounts of methamphetamine in the house, including more methamphetamine on a tray in the closet (RP at 101). There was numerous items of paraphernalia located including a torch, several glass pipes, tubes, lighter, a meth bong, scales, ledgers indicative of sales, and \$800.00 in cash in the defendant's wallet in mostly \$20.00 denominations indicative also

of drug sales (RP at 101 – 103 (Trial I), 130 – 131, 134, 135 – 136, 137, 191 -192 (Trial II)). Detective Caillier testified that a digital scale can be used to break apart larger quantities of methamphetamine for sale (Id at 130). He also testified that at least two of the scales they found appeared used as one had heroin residue on it and another appeared to have methamphetamine residue on it. (RP at 131).

Inside a backpack in the bedroom where the semiautomatic pistol was found, was a black garbage bag that had numerous bags that contained heroin and a large quantity of methamphetamine in rock form (RP at 126 (Trial I)). Inside that same backpack were several baggies also containing methamphetamine (Id.). Detective Caillier testified that in his experience, the baggies contained methamphetamine on a larger scale than what he recognized as personal use. (Id.) He explained that typically a user amount of methamphetamine was one gram, which was tiny shards very small quantities of crystals, usually broken down instead, not in the rock form he found in the defendant's bedroom (Id. at 128)¹. He also testified in his experience, he had never seen this amount of methamphetamine (Id.) He testified the overall quantity of all the

¹ The methamphetamine that was seized in this case was entered into evidence at trial and was a rock consistent in size and shape to a tennis ball.

drugs in the house was quite substantial. (RP at 139 -140, 149 (Trial II)). The overall weight of methamphetamine in its packaging was 107 grams and 213 grams of heroin, also in its packaging. (RP at 141 (Trial II)). Based on the buying and selling of drugs Ellensburg Police Department had done in 2013 and 2014 the estimated street value of the drugs found inside the defendant's house was \$39,000 – \$40,000. (Id.). There was no objection from defense on any of this testimony.

Officer Josh Ingraham testified for the state that he had seven years of experience in law enforcement including extensive experience working investigating drug and property crimes. (RP at 41 -42 (Trial I)). He testified that he has experience recognizing methamphetamine (Id. at 62). He further testified he has been involved in cases involving the sale of methamphetamine, including quantities typically purchased and sold (RP at 43 (Trial I)). He testified the term “personal use” means a quantity associated with someone who is trying to maintain their habit and is not usually selling drugs and that a gram of methamphetamine is a reasonable amount to purchase for personal use (RP at 44 (Trial I)). He indicated that depending on quality, generally you can purchase methamphetamine in Ellensburg for about \$100.00 per

gram (Id.) The only objection raised by defense to this testimony was an objection to relevancy regarding the price paid per ounce for methamphetamine (Id.) That objection was overruled. (Id.)

The defense did cross examine Officer Ingraham about drug users doing “hot rails”: using a tube or pipe to smoke methamphetamine. (RP at 71 – 72 (Trial I)). On redirect Officer Ingraham testified that those who deal drugs also might be personal users (Id. at 83).

He also testified people typically buy a “point of a gram,” or one tenth of a gram of heroin in Ellensburg for \$10.00 per point, but that can also depend on the quality of the heroin (Id. at 45). He testified that a gram of heroin is not an unreasonable amount for personal use. (Id. at 46). There were no additional objections made by defense.

He also testified about his experience investigating drug sales cases including looking to quantity possessed, large quantities of cash, paraphernalia including scales, packing material, tin foil, pen tube, digital scales, and small baggies called “bindles.” (RP at 46 -47 (Trial I)). He testified that people who deal drugs also keep “ledgers” or notebooks with people’s names

who they are selling drugs and amounts owed and firearms. (Id. at 47). There were no defense objections to this testimony.

Detective Caillier testified that he also had specialized training in investigating drug cases. (Id. at 87 – 88). He testified that he has investigated drug sales cases involving both methamphetamine and heroin. (Id. at 88). He testified that recently three tenths of a gram of methamphetamine could be purchased for \$20.00 and approximately \$100.00 for a little more than a gram. (Id. at 88 – 89). He testified that while working on patrol, he investigated many cases involving possession of drugs for personal use and that typically those cases involved a small amount of drugs, typically a gram or less of methamphetamine and usually less than a gram or a half of a gram of heroin (Id. at 89). He clarified that looking at heroin, typical personal use possession amount would be similar in appearance to a squished down flat raisin (in size, shape, and appearance) and that would typically be between one half to one gram (Id. at 90). He indicated that based on his training and experience possession of 100 or more grams of methamphetamine indicates a quantity greater than used for personal use (Id. at 89). There was no objection by the defense regarding this testimony.

Dr. Edward Suzuki from the Washington State Crime Lab testified as an expert for the state (RP at 194 - 196). He indicated he had worked with the crime for 35 and a half years and testified over 750 times (Id. at 194 -195). He testified that the amount of drugs he received to test from Detective Caillier was a pretty large amount. (Id. at 203). He testified that one rock of methamphetamine he tested weighed 26.68 grams and that this was above average regarding the amount he normally tested. (Id. at 206). He testified that typically he sees a few grams. (Id.) A second rock weighed 50.88 grams (Id. at 206).

Dr. Suzuki testified that regarding the heroin he tested, it was well above the average amounts he typically sees and tests (Id. at 208). He said a typical amount for heroin is tenths of a gram. (Id.) The amount contained in this case was a fairly large amount (Id.) The two packages of heroin he tested in this case weighed 17.25 grams and 24.36 grams (Id. at 208 -209). Defense did make a relevance objection at one point during Dr. Suzuki's testimony regarding a questions asked by the state about whether the methamphetamine was a large quantity (RP at 206). It was overruled (Id.). Otherwise, there were no additional objections by defense to this testimony.

Detective Caillier also testified that there is a secured phone system at the jail that records inmates' calls out from the jail called "SECURIS" (RP at 161 (Trial II)). The system informs the callers that the phone calls are recorded (Id. at 162). Detective Caillier listened to a phone call made by Eric Haggin on September 29 to an unknown female (Id. at 163). He asks the female to contact the owner of the clothes from the laundromat, Christy Stransky. (Id at 163, 164 – 165). On the recorded call that was played for the jury, the defendant asks the unidentified female to find the victim on Facebook and ask her "what she wants for the inconvenience" (Id. at 165). He additionally says, "If she'll drop charges or if – she don't have to drop charges but if she'd be interested in being compensated whatever she wants." (Id. at 166). Additionally he tells the female that time is of the essence (Id.). He says later in the phone call, "Get ahold of Christy Stransky if you can and see if she's willing to, you know what I mean." (Id. at 167). Ms. Stransky told the jury that no one aside from law enforcement and the prosecutor's office ever contacted Ms. Stransky. (RP at 31 (Trial I)).

There was extensive discussion before Mr. Haggin testified about his criminal history and the state provided certified copies of

the judgment and sentences to defense and to the court regarding his prior convictions including two VUCSA convictions (from 2007 and 2009). (RP at 248 – 263).

Ms. Asenet Diaz testified for the defendant. (RP at 231 (Trial II)). She was a charged co-defendant in the original INFORMATION filed by the state (CP at 4). She testified that she plead guilty to amended charges of possession of a stolen firearm and solicitation of possession with intent that stemmed out of the search warrant conducted on the apartment she shared with the defendant (RP at 232 (Trial II)). She testified that the revolver found on the dresser was hers (Id at 234). She also testified that the backpack where the majority of the drugs and the semiautomatic handgun were found was also hers. (Id.)

Defense did not object to the instruction regarding the special verdict (RP at 319). Instruction 38 given to the jury on the special verdict was the standard WPIC instruction. (RP at 336). The instruction included the phrase, “If one participant in the crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed even if only one deadly weapon is involved.” (RP at 336 – 337) The only objection defense made to the verdict form regarding the firearm enhancement was the order

of the words “yes” and “no” on the line for the jury to fill out, but otherwise approved the verdict form. (Id. at 319 -320).

The jury did send a question to the court regarding the special verdict. (RP at 370 (Trial III)). The question was, “For Special Verdict, does -- since Diaz pled guilty to possession with intent to distribute and claimed firearm were hers is Haggin considered an accomplice for person [sic] of Instruction 38, lines 14 through 15.” The court declined to give the jury any further instructions, including any accomplice instruction and referred the jury to the previously given instructions (Id. at 374).

The defendant was found guilty of: two counts of unlawful possession of a firearm in the first degree; possession of methamphetamine with intent to deliver; possession of heroin with intent to deliver; two counts of use of drug paraphernalia; theft in the second degree; and witness tampering. (RP at 375 – 376; CP at 66, 68 - 76) He was found not guilty of possession of a stolen firearm (RP at 375; CP at 67).

At sentencing, defense argued that RCW 9.94A.589 (1) (c) did not require consecutive sentences for two counts of unlawful possession of a firearm in the first degree (RP at 2 (Sentencing)). The court sentenced the defendant to 120 months on Counts three

and four (both of the possession with intent counts). (Id. at 8) Counts three through seven and nine were all ordered to run concurrently to each other (Id.). Counts one and eight were ordered to be consecutive pursuant to RCW 9.94A.589 (1) (c). (Id.) The court imposed the sentencing enhancements for the firearms on counts three and four also consecutively (Id.).² The court also imposed twelve months community custody on both counts three and four (Id.). Within the Judgment and Sentence were included Mr. Haggin's prior criminal felonies that included two separate prior VUCSA convictions, one from 2007 and one from 2009. (CP at 85).³ There was also an addendum to the Judgment and Sentence that included terms regarding the payment of LFOs. (Id.).

D. ARGUMENT

- a. Can a defendant raise an objection about an opinion testimony for the first time on appeal?

Per RAP 2.5 (a), an error cannot be raised on appeal for the first time unless it relates to trial court jurisdiction,

²At the sentencing hearing, the court incorrectly imposed sixty months for the firearm enhancements. (RP at 7 (Sentencing)). This was later corrected via amended judgment and sentence to 36 months for the firearm enhancement (CP at 117).

³ Another amendment to the judgment and sentence was also made where the statutory maximum for counts three and four was changed from fifteen years to ten years. (CP at 117)

involves a failure to establish facts upon which relief can be granted, or is a manifest error affecting a constitutional right. RAP 2.5(a).

The court has developed a four step approach to analyzing whether an alleged constitutional error can be raised for the first time on appeal. State v. Lynn 67 Wash. App. 339, 835 P.2d 251 (1992). Accordingly:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Id.

Some issues the court has found that do involve manifest errors affecting a constitutional right are: incorrect jury instructions regarding unanimity required to answer “no” on special verdict form for sentencing enhancement (State v. Reyers-Brooks, 165 Wn. App. 193,

267 P.3d 465 (2011)); and ineffective assistance of counsel (State v. Brown, 159 Wn. App. 1, 248 P.3d 518 (2010)).

The decision to admit or exclude opinion testimony involves the routine exercise of discretion by the trial court under, among other rules, ER 401, 403, 701, 702 and 704. City of Seattle v. Heatley, 70 Wn. App. 573, 585-586, 854 P.2d 658, 665 (1993). These rules govern evidentiary questions that do not necessarily implicate constitutional rights. See State v. Trader, 54 Wash. App. 479, 484, 774 P.2d 522 (contention that admission of polygraph evidence violated defendant's "right to a fair trial" insufficient to invoke RAP 2.5(a)(3)), review denied, 113 Wash. 2d 1027, 782 P.2d 1071 (1989); see also Wilber, 55 Wash. App. at 299 (erroneous admission of expert testimony under ER 702 is not of constitutional magnitude); State v. Chase, 59 Wash. App. 501, 508, 799 P.2d 272 (1990) (errors under ER 403 are not of constitutional magnitude and cannot be raised under RAP 2.5(a)).

In this case, the defense raises the issue of the officer's testimony for the first time on appeal. Because this is an issue about whether or not "expert" testimony

should be allowed, it is not an issue of constitutional magnitude as already decided by this court and therefore cannot be raised for the first time on appeal. The defense waived any objection to this testimony at trial.

- b. Can an officer testify based on his training and experience that a certain quantity of a controlled substance is more than typical for personal use and is more likely associated with drug sales?

“Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant ‘because it “invad[es] the exclusive province of the [jury].” ’ ” State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (alterations in original) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987))); see also ER 608 cmt. (noting, “drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction”). Thus, neither a lay nor an expert witness

“may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” Black, 109 Wn.2d at 348.

In State v. King, 167 Wn.2d 324, 332-333, 219 P.3d 642, 647 (2009), the court set up this test to determine whether statements are impermissible opinion testimony: “(1) “the type of witness involved,” (2) “the specific nature of the testimony,” (3) “the nature of the charges,” (4) “the type of defense,” and (5) “the other evidence before the trier of fact.” ’ ’ [Kirkman] at 928 (quoting Demery, 144 Wn.2d at 759 (quoting Heatley, 70 Wn. App. at 579)). Ultimately, if the court concludes that there is a right to review, the court conducts a harmless error analysis.

Here, there were two officers who testified that the quantity of drugs was quite substantial. There was also a forensic scientist from the crime lab who testified that both the heroin and the methamphetamine from this case was a larger amount than that he normally tests. Additionally, the jury was able to view the actual drugs which were admitted into evidence. There were also drug ledgers, packaging, paraphernalia, pipes, and scales that were introduced into

evidence. The defendant was charged with possession with intent to distribute. Looking at these factors, if the objection can be raised for the first time on appeal, it was not error for the officer to testify consistent with his training and experience that the quantity of drugs that were found were more than usually involved in personal use cases and investigations. If this testimony was improper, it was harmless error for the judge to admit the testimony, especially given no objection by the defense.

There is also an argument for the court to consider regarding what common and regular jurors know about drug dosing and whether testimony from the officers is helpful to a juror in deciding the ultimate issue at fact: is the amount the person possessed more likely for personal use or is it greater than that. Everyone CAN make assumptions about therapeutic or common doses of many over the counter medicines (like Tylenol or Sudafed), and even in some cases prescription medications. There street drugs are not like that. The average juror is not going to know how much methamphetamine is typical to use, keep, store, or buy. The officers' testimony is helpful to jurors in

this regard. Specifically, Detective Caillier's testimony about the quantity of heroin. He used a visual example: typically he sees a tenth of a gram which in size and shape is comparable to a squished up raisin. This case involved substantially more than that amount. His testimony did not dictate the jury had to find the quantity possessed was only indicative of sales, but instead assisted them in making that determination by giving them a comparison: how much heroin does someone typically use or buy? This is a question only someone with particularized knowledge: someone like the officer and or the criminalist could tell them.

- c. Is there sufficient evidence of witness tampering with a defendant makes a recorded phone call from the jail where he asks another person to contact the victim who is a stranger to him and ask the victim if they can be compensated for "dropping the charges" even when no contact is actually made with the victim?

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could

have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); accord, e.g., State v. Aver, 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987); State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). When the charge is tampering with a witness, the conduct must involve more than a lay person's belief that the complaining witness can induce a prosecutor to dismiss a case. State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990).

In Rempel, the defendant called the victim after he was arrested on more than one occasion and apologized, told the victim the case was going to ruin his life and asked her to "drop charges." Id. at 81 – 82. He never offered the victim any incentive or made any threats towards her. Id. This distinction was very important to the court. Id. They clearly held that many people have an erroneous belief that lay people can "drop charges," and a defendant's own

erroneous belief in that regard is not enough to show witness tampering. Id.

In this case, the defendant's actions were not directed at the victim (because the victim was actually unknown to him except through the discovery provided to him) but to a friend of his who was not currently incarcerated. He directed the friend to find the victim on a social media website. He asked the friend to inquire what compensation he could provide for her to "drop the charges" or "whatever." His repetition of his request indicating time was of the essence at the end of the call alluded to him wanting to do more than request the victim drop the charges based on an erroneous belief she would be able to do that. Unlike Rempel, this case involves a direct attempt by the defendant to confer an implied benefit on the victim, "compensation", for her agreement to drop the charges. There is sufficient evidence to support the jury's guilty verdict on the tampering charge.

- d. Are the WPICs sufficient regarding instructing the jury for the firearm enhancement when they directly state the law from the RCW even without defining the word

“accomplice” or instructing the jury on accomplice liability?

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wash. 2d 682, 686-87, 757 P.2d 492 (1988). Constitutional errors receive special treatment under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. State v. McFarland, 127 Wash. 2d 322, 333, 899 P.2d 1251 (1995) (citing Scott, 110 Wash. 2d at 686-87). The exception is construed narrowly, and requires defendants to assert that the error is (1) manifest and (2) truly of constitutional magnitude. State v. WWJ Corp., 138 Wash. 2d 595, 980 P.2d 1257, 1261 (1999) (citations omitted). In State v. Lynn, 67 Wash. App. 339, 346, 835 P.2d 251 (1992), the court clarified that "some reasonable showing of a likelihood of actual prejudice is what makes a 'manifest error affecting a constitutional right.'"

Here the defense did not object to the giving of the instruction, did not submit their own instructions, and did not ask for additional accomplice liability or accomplice definition instruction be given to the jury. Based on these actions, they have waived this issue.

Defendant's brief indicates there were no accomplices charged in this case, which is incorrect. Ms. Asenet Diaz and Mr. Haggin were charged together on the Information in this case filed September 3, 2014. Ms. Diaz entered into a plea agreement to a reduced charge prior to trial, the information was amended⁴ to add additional charges for Mr. Haggin and the enhancements after Ms. Diaz plead guilty and therefore the cases were not consolidated for trial, but they were originally charged as codefendants. Regardless, the language of the WPIC is that if one "participant" is armed, all accomplices to that participant are also deemed armed.⁵ The word

⁴ In the Amended Information, although the language for Counts three and four do not use the accomplice language, the language for the sentencing enhancement does include the accomplice language: "And furthermore, at the time of the commission of the crime, the Defendant or an accomplice was armed with a firearm; contrary to Revised Code of Washington 9.94A.825.

⁵ The entire WPIC 2.07.02 which was given in this case reads:

"For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the

“participant” has a meaning that is generally known to a jury and can be inferred. The term “accomplice” while it has a legal definition, in the context of this instruction, it is a term that the jury can infer from and understand even without an accomplice instruction.

Additionally, defense argues that the instruction could be misleading to the jury. This argument is only persuasive if the jury chose to ignore the rest of the instruction that instructs the jury that the weapon must be easily accessible and readily available and that there must be a connection between the weapon and the crime as well as the weapon and the defendant. Taking the one sentence regarding accomplice liability alone could be confusing to a jury, but when given as a part of the whole instruction, it is clear what the state must prove.

crime in Counts three and four (Possession with Intent to Deliver Controlled Substances). A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon. If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved. A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.”

The facts of this particular case are that the defendant and his girlfriend shared a very small apartment. Additionally they both slept in the only bedroom, which was also very small. In that bedroom the police found two weapons. One of the weapons was a loaded gun that was inside a backpack with a large amount of methamphetamine and heroin along with paraphernalia. The second gun was found in a basket on the dresser in the small bedroom, directly next to where the defendant's phone was placed. The state's theory that the defendant and his girlfriend were both in possession of the drugs and the firearms was supported by the evidence and the jury was properly instructed. Based on the facts of this particular case, there is an argument to be made that each defendant was in fact a principle and neither was an accomplice; that they were both liable for the possessions inside their apartment. The co-defendant's plea of guilty to reduced charges in agreement for dismissal of other charges does not negate the fact that she was, in fact, a participant in this crime. The question becomes, could the jury understand this without being instructed about what an

accomplice is or what accomplice liability requires. In the context of this instruction, it is clear they do not need additional instructions; the dangers proposed by the defense are just not supported when you look at the instruction as a whole.

- e. Are consecutive sentences proper when a defendant is convicted of two counts of unlawful possession of a firearm?

RCW 9.94A.589 (1) (c) reads in relevant part, “The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1) (c), and for each firearm unlawfully possessed.” (emphasis added).

The defendant was charged in Count One with unlawfully possessing one firearm, the Glock handgun that was found in his bedroom in a backpack along with many of the drugs. Additionally, the defendant was charged in Count eight with unlawfully possessing a second firearm, the .38 special pistol that was found in the basket on the dresser. The jury found the defendant guilty of two firearm offenses: two counts of unlawful possession.

Defense argues that in order for the last sentence of the statute to apply, the first sentence must also apply, but this does not accord with a plain reading of the statute. Because the defendant was found guilty of multiple weapons offenses, in that there were two weapons that were found, even though both offenses were unlawful possession counts, the last sentence of the statute does apply: there were two firearms. Both the language of the statute, and the legislative history cited by defense shows the concern here is both multiple weapons offense as well as multiple weapons. Authorizing consecutive sentences when there is more than one firearm involved is precisely what the statute authorizes under a clear and plain reading.

- f. Can a defendant be sentenced to one hundred and twenty months for possession of a controlled substance with intent to deliver and an additional twelve months of community custody when the defendant has a prior conviction for VUCSA so the actual maximum sentence is doubled to two hundred and forty months, even when the statutory maximum is incorrectly stated in the Judgment and Sentence?

RCW 69.50.408 explicitly doubles the statutory maximum for second or subsequent drug offenses. Section (1) reads, “Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized or both.”⁶

In this case, the defendant has two prior VUCSA convictions as stated in his Judgment and Sentence.⁷ The court correctly imposed 120 months confinement (each count to run concurrently) and then an additional 12 months of community custody which is below the statutory maximum of 240 months.

- g. If language in an appendix to a Judgment and Sentence conflicts with the actual court order, should the appendix be stricken?

The orders of a court are commemorated in a Judgment and Sentence and the language in that document control, over any conflict in any appendix.

⁶ In this case, the Judgment and Sentence document does not accurately reflect the correct statutory maximum of 240 months, but this scrivener’s error is a harmless error and does not affect the reality of the law authorizing a statutory maximum of up to 240 months for subsequent drug offenses.

⁷ VUCSA from 2007 (convicted in 2008) in Kittitas County case 07-1-00254-4 and VUCSA from 2009 in Kittitas County case 09-1-00123-4.

E. CONCLUSION

For the reasons stated, the judgment and sentence should be affirmed; appellant's requests must be denied.

Respectfully submitted February 22, 2016,

/s/
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