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Division III
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No. 36308-2-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JAMIE L. WALTARI, Appellant.

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. ASSIGNMENT OF ERROR ON CROSS APPEAL

1. THE TRIAL COURT ERRED WHEN IT FOUND THE APPELLANT ELIGIBLE FOR AND IMPOSED A SENTENCE UNDER THE DRUG OFFENDER SENTENCING ALTERNATIVE.

II. SUMMARY OF ISSUES

1. DID THE COURT PROPERLY ALLOW PRETRIAL AMENDMENT OF THE INFORMATION WHERE SUCH AMENDMENT OCCURRED NINE MONTHS PRIOR TO TRIAL AND NO PREJUDICE WAS SHOWN?
2. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGE IN COUNT 4?
3. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGES IN COUNT 1, 2, AND 3?
4. DID THE SENTENCING COURT ERR IN FINDING THAT THE APPELLANT WAS LEGALLY ELIGIBLE FOR A DOSA SENTENCE PURSUANT TO RCW 9.94A.660?

III. SUMMARY OF ARGUMENT

1. THE COURT PROPERLY ALLOWED PRETRIAL AMENDMENT OF THE INFORMATION WHERE SUCH AMENDMENT OCCURRED NINE MONTHS PRIOR TO TRIAL AND NO PREJUDICE WAS SHOWN.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGE IN COUNT 4.

3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGES IN COUNT 1, 2, AND 3.

4. THE SENTENCING COURT ERRED IN FINDING THAT THE APPELLANT WAS LEGALLY ELIGIBLE FOR A DOSA SENTENCE PURSUANT TO RCW 9.94A.660.

IV. STATEMENT OF THE CASE

In September of 2016, Detective Bryson Aase of the Whitman County Sheriff's Office, assigned to the Quad Cities Drug Task Force,¹ obtained information that the Appellant, Jamie L. Waltari, was involved in narcotics activities including sales of methamphetamine. Report of Proceedings, (*hereinafter* RP), 74, 81. This information came from a confidential informant² (*hereinafter* CI), who stated that she could purchase methamphetamine from the Appellant. RP 81. The CI had agreed to cooperate in exchange for consideration on pending drug charges. RP 82.

The CI stated that she had lived with the Appellant for a period of time and that he would be willing to sell her methamphetamine. RP 84. The CI had purchased methamphetamine from the Appellant on multiple previous occasions. RP 177.

On September 15, 2016, Det. Aase arranged with other detectives to conduct a controlled purchase of methamphetamine from the Appellant. RP 84, 85. The CI contacted the Appellant and arranged to meet at Mr. K's, which is a vacant business in the

¹The Quad Cities Drug Task Force is made up of detectives assigned from various area law enforcement agencies, including Whitman and Asotin County Sheriff's Offices and local police departments. The primary focus is the detection and investigation of narcotics trafficking and sales in the areas of Whitman and Asotin Counties in Washington and Latah and Nez Perce Counties in Idaho.

²The State will refer to the cooperating witness as CI so as to avoid potential retaliation, which is common in narcotics culture.

Clarkston Heights on Appleside Boulevard, but the Appellant later told her to meet him at his residence on 13th Street, in Clarkston, Washington. RP 85-6. Prior to meeting with the Appellant, detectives searched her person and her vehicle to confirm the absence of contraband or cash. RP 85-87. The CI was provided with two hundred dollars (\$200.00) in U.S. currency with recorded serial numbers, and she was fitted with a covert recording/transmitting device (body wire). RP 85-87. The body wire allowed officers to audibly monitor conversations. RP 87. The CI was requested to purchase three and a half (3.5) grams of methamphetamine from the Appellant. RP 103.

The CI was followed and observed going to and from the location of the meeting with the Appellant. RP 85-87. During the meeting between the CI and the Appellant, Det. Aase was able to hear and recognize both the CI's and the Appellant's voices on the bodywire. RP 88. Upon completion of the transaction, the CI was followed to a meeting location where she provided the officers with seven (7) grams of methamphetamine that she purchased from the Appellant. RP 89. She and her vehicle were again searched to confirm that she didn't have any more money or contraband. RP 89, 107. During the recording, the CI could be heard asking for a "ball" which is slang for one eighth of one ounce of methamphetamine. RP

97-8. An eighth of an ounce is approximately three and one half (3.5) grams. RP 97-8. The recorded conversation with the Appellant confirmed that the amount the Appellant provided was more than was originally requested. RP 100, 102, 104.

On September 20, 2016, the CI was instructed to contact the Appellant to see if he would again sell her methamphetamine. RP 107-8. The CI and her vehicle were again searched, she was provided with two hundred dollars (\$200.00) of pre-recorded U.S. currency, and fitted with a body wire. RP 108, 109-10. One hundred dollars (\$100.00) was for the additional 3.5 grams that the Appellant had advanced, or "fronted," the CI on September 16, 2016. RP 109.

The CI was again followed to the Appellant's residence and monitored over the body wire. RP 110. During the meeting, the Appellant could be heard telling the CI that he didn't have any methamphetamine for sale at that time. RP 112. The Appellant discussed at length available options for him to obtain more drugs for sale. RP 112-14. He extensively discussed how he would usually purchase a pound of methamphetamine and then break it into smaller quantities. RP 115-16. The Appellant could be heard telling the CI that he makes approximately twenty-five dollars (\$25.00) profit per

“ball”³ he sells. The Appellant did not sell the CI any methamphetamine but did take the one hundred dollars (\$100.00) from her for the extra three and a half (3.5) grams he provided to her during the first buy. RP 122, 193. The CI later admitted that she used methamphetamine inside the residence during this operation, and that the methamphetamine she used was provided by the Appellant. RP 184, 270.

On September 28, 2016, Det. Aase conducted another controlled buy operation with the assistance of the CI. RP 122-3. The CI and her vehicle were again searched, she was provided with one hundred fifty dollars (\$150.00) in pre-recorded U.S. currency, and was fitted with a body wire. RP 123. The CI then went to Mr. K’s store where she was to meet the Appellant. RP 124. The Appellant arrived later and provided the CI with methamphetamine. RP 125. On the audio, prior to the transaction, the two spoke for a bit and the Appellant was then heard asking her what she wanted. RP 125. The CI responded, “I want dope.” RP 125. Immediately thereafter, Det. Aase heard the sound of cellophane crinkling, which, based upon his training and experience, was likely the Appellant obtaining methamphetamine from a baggie and weighing it out for sale. RP

³With eight (8) “balls” per ounce and sixteen (16) ounces per pound, the Appellant business model resulted in a net profit of three thousand two hundred dollars (\$3,200.00) per pound of methamphetamine.

137. The CI later provided the methamphetamine to the officers and it was packaged in a cigarette cellophane wrapper. RP 137. The CI was again searched and debriefed as before. RP 140.

On October 5, 2016, Det. Aase conducted the last of the three controlled buy operations herein. RP 142. The CI contacted the Appellant ahead of time and arranged to purchase methamphetamine. RP 186. The CI and her vehicle were again searched, and she was given one hundred forty dollars (\$140.00) in pre-recorded U.S. currency. RP 142-3. She was again fitted with a body wire and followed to the location where the CI was to meet the Appellant. RP 142-3. The CI went to the Appellant's residence on 13th Street and he was outside the residence. RP 186. The CI went inside the house and met with the Appellant's girlfriend who took her to the Appellant's bedroom. RP 186-7. The Appellant had left a quantity of methamphetamine on his bed and the CI weighed out the agreed-to amount, put the money on the bed, and left the residence. RP 187. As the CI was leaving, the Appellant contacted her and asked if she had gotten what she came for, referring to the methamphetamine. RP 187. This interaction could be heard on the recording. RP 151. The CI was again followed to a meeting location where she turned over the methamphetamine, was searched, and debriefed. RP 152-3.

On October 11, 2016, the CI told Det. Aase that the Appellant was leaving town to procure methamphetamine for sale. RP 154. The Appellant was subsequently located in Lewiston, Idaho, after returning to the Lewiston-Clarkston Valley.⁴ RP 154-5. His vehicle was stopped by police at a gas station in Lewiston, Idaho and, on the basis of the information obtained to that point, a search warrant was executed on the Appellant's person and the vehicle. RP 156. In the pocket of his flannel shirt, police found a small quantity of methamphetamine. RP 156. Police also found a baggy containing approximately two ounces of methamphetamine inside the Appellant's underwear. RP 156-7.

On January 25, 2017, Deputy Joseph Snyder of the Asotin County Sheriff's Office observed the Appellant's vehicle traveling in the area of 15th and Elm Streets. RP 218-20. Deputy Snyder observed that the vehicle had a broken tail light. RP 218. Deputy Snyder turned around to follow and the Appellant's vehicle turned onto Van Arsdol Street. RP 218-20. Deputy Snyder attempted to catch up and passed the Appellant who had pulled into a parking lot and turned off his lights. RP 218-20. Deputy Snyder again turned around and pulled into the parking lot and began to run the license

⁴Lewiston, Idaho and Clarkston, Washington are separated only by the Snake River which forms the border between the two states and Asotin and Nez Perce Counties.

plate on the Appellant's vehicle. RP 219. The Appellant turned the vehicle lights on and began to drive out onto Sycamore Street. RP 221. Deputy Snyder activated his emergency lights and the Appellant pulled over in front of a shop directly across the street. RP 221, P-18. The Appellant's driver's license was suspended at that time and he was arrested for Driving While Suspended. RP 223-4. A second deputy who arrived as a cover unit searched the Appellant incident to his arrest and located a piece of folded waxed paper in his pocket that contained a small quantity of methamphetamine. RP 224, 226-7. The Appellant also had two cell phones and two-hundred forty dollars (\$240.00) in cash wadded in his pocket. RP 225.

Deputy Snyder contacted Det. Jesse Carpenter to advise him of his findings. RP 227. Det. Carpenter is a deputy with the Asotin County Sheriff's Office and was, at that time, assigned to the Quad Cities Drug Task Force. RP 227, 231. Deputy Snyder deployed his certified K-9 partner Oley, and the K-9 alerted to the presence of narcotics. RP 227-9. The Appellant's vehicle was secured and a search warrant was obtained by Det. Carpenter. RP 229. RP

Det. Carpenter executed the search warrant the next day. RP 235. During search of the vehicle, Det. Carpenter located a baggy containing five and four tenths (5.4) grams of methamphetamine, concealed under the seat cover of the bench seat. RP 239-40.

The Appellant was charged initially with two counts of Delivery of a Controlled Substance (Methamphetamine) and one count of Possession of a Controlled Substance (Methamphetamine), based upon the first two successful controlled buys and the methamphetamine found in his pocket after his arrest by Deputy Snyder. Clerk's Papers (*hereinafter* CP) 13-15.

Subsequently, on September 29, 2017, the State sought leave to amend the Information to add a charge of Delivery of a Controlled Substance (Methamphetamine) and Possession of a Controlled Substance with Intent to Deliver (Methamphetamine), based upon the last controlled buy and the drugs found under the seat cover of his vehicle. CP 17-23. The State also sought to add enhancements based upon proximity to school bus stops for the three delivery charges. CP 17, 23. This motion was granted on October 6, 2017. CP 156, 24-28.

Thereafter, the State sought to further amend the Information by adding an enhancement concerning proximity to school bus stops for the charge in Count 4 of Possession of a Controlled Substance with Intent to Deliver (Methamphetamine). CP 62-63. This motion was granted without objection on March 5, 2018. CP 64, 65-69, RP 51-2. The Information was again amended on May 15, 2018, to

correct an scrivener's error⁵ in the enhancement on Count 4, again without objection by the Appellant. CP 70, 76, 157-161, RP 55-56.

The matter proceeded to bench trial. CP 162, RP 62 - 313. In addition to testimony from Det. Aase and the CI concerning the controlled buys, as described above, the court heard from witnesses concerning the locations of school bus stops and their proximity to the locations of the deliveries and the location of the Appellant's arrest by Deputy Snyder. RP 196 - 215. Det. Carpenter testified to his training and experience in narcotics investigations. RP 232-3, 243. Det. Carpenter testified that the fact that personal use amounts of drugs are often found on the person of the user. RP 243. He further testified that when larger amounts are found hidden in other locations, not on the suspect's person, this was indicative of trafficking activities. RP 243. He further testified that separately packaged quantities also indicate that the larger amounts are for delivery to others. RP 243. Det. Carpenter testified that five and four tenths (5.4) grams is not usually considered a personal use quantity and is indicative of possession with intent to deliver. RP 249-50. He testified that an addict purchasing solely for their own use would most commonly purchase no more than a gram. RP 250. Det. Carpenter clarified

⁵The scrivener's error involved the statement that "such *delivery* occurred within one thousand feet of a school bus route stop" and was corrected to clarify, in light of the underlying charge, that "such *possession* occurred within one thousand feet of a school bus route stop. CP 70 (*emphasis added*).

that if a person buys a baggy of methamphetamine, they aren't likely to separate it out unless they intend to sell a portion. RP 250-1. Det. Aase also testified that separately packaged and separately concealed quantities of narcotics was indicative of possession with intent to deliver. RP 161. Det. Aase also testified that, in conjunction with the methamphetamine and how it was packaged, it was significant that the Appellant had more than one cell phone and wadded cash in his pocket at the time of his arrest. RP 257-8. Det. Aase testified that these facts indicate that the Appellant was trafficking methamphetamine at the time of his arrest on January 25, 2017. RP 257-8.

At the conclusion of the trial, the court found the Appellant guilty of all five charges and further found that the State had proven each of the enhancements beyond a reasonable doubt. CP 82-85, 100-107. At sentencing, the Appellant argued for and the Court granted a sentenced to fifty-seven (57) months incarceration under the Drug Offender Sentencing Alternative (Prison Option)(*hereinafter* DOSA) pursuant to RCW 9.94A.660. CP 138-147. The Appellant has now filed an appeal herein claiming that the court improperly allowed the State to amend the information and otherwise challenging the sufficiency of the evidence. The State has cross appealed the court's decision to grant a DOSA sentence.

V. DISCUSSION

1. THE COURT PROPERLY ALLOWED PRETRIAL AMENDMENT OF THE INFORMATION WHERE SUCH AMENDMENT OCCURRED NINE MONTHS PRIOR TO TRIAL AND NO PREJUDICE WAS SHOWN.

The Appellant first claims that the court abused its discretion in allowing Amendment of the Information. To begin, the State would point out that the Appellant fails to show that the claim of error was preserved. The Appellate Court ordinarily will not review a claim of error raised for the first time on review unless one of three exceptions exist. RAP 2.5(a). One exception is if the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). The Appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." See State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Here, there is nothing in the record submitted on appeal which indicates that the Appellant preserved the error of which he complains. The Information was amended on October 6, 2017, to add two charges and three enhancements. It was subsequently amended two more times without objection. The Appellant failed to preserve the issue. While amendment of a criminal information may affect the accused's constitutional rights, this is not enough, standing alone to necessitate review under RAP 2.5. As this Court noted in State v. Torres, 198 Wn. App. 864, 397 P.3d 900 (Div. III, 2017):

Washington courts and even decisions internally have announced differing formulations for "manifest error." First, a manifest error is one "truly of constitutional magnitude." Second, perhaps perverting the term "manifest," some decisions emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. A third and important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in the record on appeal. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.

Torres, 198 Wn. App. at 876.*(Internal citations omitted)*. Here, the Appellant relies on the mere fact of the amendment of the Information as proof of a manifest constitutional violation. As discussed below, the State is allowed to amend the Information and the fact of amendment, standing alone, cannot constitute a manifest constitutional error. Omitted from the Appellant's brief is any discussion of the requirement that the error be "manifest" and the Appellant has failed to so demonstrate. This Court should decline to review this unpreserved claim.

Moving to the merits or lack thereof, the standards expounded by the Appellant are simply not correct statements of the law. The Appellant claims that, once filed, the Information cannot be amended, absent some change in circumstances. Brief of Appellant, p. 19. In

support thereof, the Appellant misquotes the rulings in two Washington Supreme Court cases. First, claiming it to be dispositive, the Appellant cites State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951) for the above proposition. However, the Olds Court made no such broad proclamation. Instead, the Olds case actually involved an issue regarding an improper jury instruction with regard to an uncharged alternative means of committing the crime, in that case, theft. *Id.* at 260. No amendment actually occurred. *Id.* The State argued therein that, when the evidence supporting the uncharged alternative came in without objection, the information was “automatically amended” to include the uncharged alternative. *Id.* at 261. This argument was rightly rejected by the Olds Court, but the Court did not rule that the information could not be amended after filing. The Supreme Court later spoke on the Olds case, stating:

The cases cited by the appellant do not hold that a complaint may not be amended in superior court to charge a different crime, but that a person may not be convicted of a crime different from that with which he was charged in the complaint. In State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951), relied upon by the appellant, the evidence tended to show a crime different from that charged in the information. Seeking to sustain the conviction, the prosecutor argued that the information should be deemed amended to conform to the proof. This court held that such an amendment would be deemed only as to the evidence introduced in support of the crime substantially charged in the information.

State v. La Pierre, 71 Wn.2d 385, 387–88, 428 P.2d 579 (1967). The Appellant wholly misstates the Court’s ruling which has no application to the case at bar.

The Appellant likewise misconstrues the Court’s ruling in State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993), as standing for the same preposterous proposition that the State may not amend the information without substantial and unforeseen changes in circumstances. In Schaffer, the State moved during trial and prior to resting to amend the Information to conform with the evidence. *Id.* at 617. Contrary to the intimation of the Appellant, the Schaffer Court affirmed the amendment mid-trial and rejected the Appellant’s argument that the State cannot amend the Information mid-trial. *Id.* at 623. In any event, the facts of the current case are clearly distinguishable from either Olds or Schaffer where the amendment was allowed well in advance of trial, not during the trial. The Appellant’s reliance on these cases is concerningly misplaced.

Pursuant to CrR 2.1(e) amendment may be allowed at any time up to verdict. See State v. Alvarado, 73 Wn. App. 874, 878, 871 P.2d 663, 665 (Div. III, 1994). Further, amendment may include new charges if accomplished pretrial and no specific prejudice accrues. See *id.* The rule permits the liberal amendment of an information before trial, but Washington’s Constitution requires that a defendant

be adequately informed of charges he is to face at trial. See State v. Pelkey, 109 Wn.2d 484, 487–90, 745 P.2d 854 (1987); State v. Hull, 83 Wn.App. 786, 799–800, 924 P.2d 375 (Div. III, 1996), *review denied*, 131 Wn.2d 1016, 936 P.2d 416 (1997). A trial court's decision to allow the State to amend the charge is reviewed for an abuse of discretion. See State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

In Alvarado, the State amended the Information on the morning of trial. *Id.* at 664. On appeal, the Court affirmed amendment of the Information to include additional charges. *Id.* at 665. Therein, the Court summarized the argument:

Mr. Alvarado contends that the criminal rules do not allow for amendment of an information in a manner so as to allege new charges on the first day of trial.

Alvarado, 73 Wn. App. at 877. The Court further set forth the burden of the party appealing the grant of an amendment:

When reversal is sought because of a late amendment, the burden is on the accused to demonstrate “specific prejudice resulting from the information amendment.”

Id. (Quoting State v. James, 108 Wn.2d 483, 489, 739 P.2d 699 (1987)).

Here, the trial court allowed the amendment *nine months* before the Appellant actually proceeded to trial. Here, as in Alvarado,

the amendment was accomplished pretrial and the Appellant has demonstrated no prejudice. This Court should hold that the amendment of the information on October 6, 2017, and the amendments subsequent thereto, were proper and did not constitute a manifest abuse of discretion.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGE IN COUNT 4.

The Appellant next complains that there was insufficient evidence introduced at trial to support the trial court's guilty verdict on Count 4. The Appellant attempts to couch the issue as one of statutory interpretation, thereby attempting to avail himself of the *de novo* standard of review. Brief of Appellant, p. 20-21. This is not the correct standard of review for questions of sufficiency of the evidence. The standard is substantially more deferential to the finder of fact.

In reviewing the sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the State, *any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most

strongly against the Appellant. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This inquiry does not require the reviewing court to determine whether it believes the evidence introduced at trial established guilt beyond a reasonable doubt. See Green, at 221. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Specifically, with regard to the charge of Possession of a Controlled Substance with Intent to Deliver, the State must demonstrate not only possession of a controlled substance, but also evidence suggesting an intent to deliver independent of the evidence of possession. See State v. Campos, 100 Wn.App. 218, 222, 998 P.2d 893 (Div. III, 2000); State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Cases generally require at least one additional factor to establish intent to deliver. See State v. Hagler, 74 Wn.App. 232, 236, 872 P.2d 85 (Div. I, 1994). Here, the Appellant not only the 5.4 grams (nearly a quarter ounce) of methamphetamine, he had a smaller personal use quantity on his person, and the larger quantity separately packaged and hidden in a separate location. Both

detectives testified that this was significant because a person possessing for personal use would not ordinarily break up the quantities. Separate packaging has been considered to be indicative of intent to deliver. See State v. Simpson, 22 Wn.App. 572, 575, 590 P.2d 1276 (Div. I, 1979). Additionally, the Appellant had two cell phones, and a significant amount of cash. The presence of these items has been held to be sufficient evidence of intent to deliver to sustain a conviction. See Hagler, 74 Wn.App. at 236; State v. Campos, 100 Wn.App. at 226. The detective testified at trial about the purpose of two cell phones, and how one would be a “burner” phone used to conduct illegal activities and the other for ordinary use. RP 258. Notably absent was any use paraphernalia on the Appellant’s person or in his vehicle. The officers didn’t recover any pipes, needles, snort tubes, or any other items associated with the use of methamphetamine, rather, only items and behaviors associated with sale and distribution.

There is substantially more evidence of the Appellant’s intent in this case, beyond what was discovered by the police pursuant to the search of his vehicle on January 25, 2017. The evidence educed at trial included testimony and evidence concerning a pattern of trafficking behavior, including three controlled buys of methamphetamine from the Appellant. Audio recordings were

admitted and included a recording of the Appellant himself discussing his methamphetamine distribution business and how he sells methamphetamine broken down into “balls.”

The Appellant seems to argue that the amount (5.4 grams) is a relatively small amount of drugs and precludes the trial court from finding that the drugs were possessed with the intent to deliver them to another. However, this argument has been soundly rejected by the Supreme Court of this state. See State v. Goodman, *supra*. On that issue the Court stated:

Goodman primarily argues “that a sizeable amount of drugs must be a starting point in any analysis of intent to deliver.” This argument lacks merit. First, it has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver.

Goodman, at 782–83 (*citations omitted*). In Goodman, the defendant possessed only three and three tenths (3.3) grams total. *Id.* at 783. On facts substantially similar to this case, the Supreme Court, in affirming the conviction, stated:

Even though evidence may be consistent with personal use, it is the duty of the fact finder, not the appellate court, to weigh the evidence. *Id.* at 136–37, 48 P.3d 344. Here the police found six baggies of a white powder substance totaling 2.8 grams; three baggies tested positive for methamphetamine. The police also found a scale, additional baggies, and an accessory kit in a safe located in Goodman’s bedroom. The police also found three vials and another small baggie, which contained another 0.5 grams of methamphetamine. Moreover, the

trial court found a link between the August 7 controlled buy and the items seized from Goodman's room, namely baggies with identical logos involved in each instance. The amount of methamphetamine alone may not have been sufficient to convict Goodman, but the evidence as a whole was sufficient to allow a rational jury to convict Goodman beyond a reasonable doubt.

Id. at 783 (*citations omitted*). Here, while not having scales on his person or additional packaging material, the Detectives testified that the amount of methamphetamine found under the seat cover was more than would ordinarily be possessed or purchased by a tertiary user of methamphetamine. The CI testified that she ordinarily bought 3.5 grams (a "ball") from the Appellant. She further stated that she did so under the auspices that she was further breaking that amount down for resale, and that the Appellant was aware of this. Further, the Appellant's recorded statements regarding his sale of drugs and confirming that he sells in eighth ounce increments further supports the trial court's finding. The three controlled buys, coupled with separately packaged methamphetamine (similarly to his arrest in Idaho), cash wadded in his pocket, and multiple cell phones further confirmed his intentions. Considering the totality of the circumstances, there was ample evidence that the methamphetamine found in the Appellant's vehicle was possessed with the intent to deliver.

Coupled with his argument regarding the sufficiency of the evidence to support the conviction in Count 4, the Appellant claims

that the School Bus Stop Enhancement cannot be sustained, although for reasons separate from sufficiency of the evidence.⁶ Instead, the Appellant argues that he was not volitionally within the protected zone. In support of his argument, the Appellant cites, State v. Eaton, 143 Wn.App. 155, 177 P.3d 157 (Div. II, 2008), *aff'd*, 168 Wn.2d 476, 229 P.3d 704 (2010). In Eaton, the defendant was arrested and taken to jail where officers found drugs on his person. *Id.* at 158-9. The State charged the defendant with Possession of a Controlled Substance and included a special enhancement alleging that the crime was committed in a jail facility. *Id.* The defendant argued:

The State should not be allowed to physically force a subject into an enhancement zone and then be permitted to choose whether he will be penalized for possessing contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established.

Eaton, 143 Wn. App. at 159. The Court agreed, determining that the corrections facility enhancement required a volitional act on the part of the defendant. *Id.* at 162-4. This case is inapplicable to the current case.

Here, the Appellant was in control of his vehicle. He was driving in the very area and well within the overlapping protected

⁶The Appellant does not challenge the sufficiency of the evidence concerning the locations or their respective proximity to bus stops.

zones when Deputy Snyder first observed his vehicle. The Appellant's circuitous path took him immediately past several of the bus stops, and while his route may have been influenced by the fact that there was a law enforcement officer in the area, he most certainly and of his own volition, chose his path, including where he pulled the vehicle over. The case would certainly be different, and more like Eaton, if the enhancement were based upon protected zones that the Deputy drove the Appellant through while transporting him to jail. But that is not the case. The Appellant's own volitional conduct placed him squarely within the protected zones. The school bus stop enhancement statute does not require an intent to deliver within a particular area, only an intent to deliver at some location and possession within the protected zone. See State v. McGee, 122 Wn.2d 783, 788, 864 P.2d 912 (1993). The Appellant, of his own volitional act, possessed the methamphetamine within one thousand feet of four different school bus stops. The Court should reject the Appellant's meritless arguments, both as to the sufficiency of the evidence to support his conviction, and as to the applicability of the enhancement.

3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S BENCH TRIAL VERDICT OF GUILTY ON THE CHARGES IN COUNT 1, 2, AND 3.

Finally, the Appellant claims that there is insufficient evidence to support the trial court's verdict on Counts 1, 2, and 3 of three counts of Delivery of a Controlled Substance (Methamphetamine). The Appellant bases the entirety of this claim on a challenge to the credibility of the CI and her trial testimony. The Appellant's request to have this Court render a credibility determination on appeal should be rejected out of hand.

First and most importantly, credibility determinations are within the sole province of the trier of fact and may not be reviewed on appeal. See State v. Teshome, 122 Wn. App. 705, 715, 94 P.3d 1004, 1009 (Div. I, 2004); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). While couched in terms of abuse of discretion and quantum of proof, the Appellant's argument is merely a second attempt at a closing argument and a request for this Court to second guess credibility determinations on the dry record before it. The Appellant cites no authority⁷ for the proposition that credibility determinations are properly reviewable on Appellant because, in fact they are clearly not.

⁷The Appellate Court need not consider issues unsupported by citation to authority. State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). Where no authorities are cited in support of a proposition, the court is not required to search out authorities but may assume that counsel, after diligent search, has found none. State v. Logan, 102 Wn. App 907, 911, 10 P.3d 504 (Div I, 2000).

The Appellant's accusations concerning drug use are not compelling. "Drug possession and use are not probative of truthfulness because they have little to do with a witness's credibility." State v. Stockton, 91 Wn. App. 35, 42, 955 P.2d 805 (Div. I, 1998); State v. Cochran, 102 Wn. App. 480, 487, 8 P.3d 313 (Div. III, 2000). Understanding that drug use or influence thereof is properly considered with to the ability of the witness to perceive events and later recall them, the fact that the CI using, could not properly be considered as evidence of dishonesty. See State v. Russell, 125 Wn.2d 24, 83, 882 P.2d 747 (1994). In any event, the trial court was aware of this evidence.

This Court recently addressed and rejected similar arguments. State v. N.B., ___ Wn.App. ___, ___ P.3d ___; 2019 WL 1066474, at *3 (Div. III, March 7, 2019). There, this Court stated:

N.B. also argues that the evidence was insufficient because S.J. was not credible. This court does not judge credibility. The facts found by the trial court amply supported its judgment.

We review this argument under well settled principles of law. "Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." "Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." In reviewing insufficiency claims, the appellant necessarily admits the truth of the State's evidence and all reasonable inferences drawn therefrom. Finally, this court must

defer to the finder of fact in resolving conflicting evidence and credibility determinations.

This approach is the specific application of the evidentiary sufficiency standard dictated by the Fourteenth Amendment to the United States Constitution. Jackson stated the test for evidentiary sufficiency under the federal constitution to be "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Id. (Emphasis original)(citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This Court continued:

Under Jackson, the test is could the trier of fact find the element(s) proved. Whether the trial judge *should* have done so is not our concern, since the trial judge is the person who decides which witnesses are credible and which are not. For that reason, the argument N .B. raises goes to the weight to be given the testimony by the trier of fact. He may believe that S.J. should not have been believed over him, but the trial judge decided otherwise. She was convinced by the testimony of S.J., finding that more believable than the denial by N.B.

Id. (Emphasis original).

There was ample reason for the trial court to find credible the testimony of the CI. The Appellant points to the testimony of Erica Gireth as conclusive proof that the drugs were left behind by the CI prior to the controlled buy operations. However, the trial court was fully aware of Ms Gireth's testimony at trial. Ms Gireth had not been inside the Appellant's residence for a substantial period of time, and while the CI may or may not have left belongings at the Appellant's

house, there was no evidence that she planted drugs. To the contrary, the recorded conversation confirmed that the CI purchased methamphetamine from the Appellant. The Appellant could be heard in each of the buy operation body wire recording discussing the sale and, in one particular recording, setting out his drug operation in substantial detail. This testimony also doesn't explain the CI's ability to purchase methamphetamine from the Appellant at other locations like Mr. K's.

Further, while the CI admitted to using during the time of these buy operations, Det. Aase did not observe any overt symptoms of intoxication sufficient to raise issues concerning her ability to observe and recall events. It should not be lost on the Court that the CI's continued drug use during that period of time involved the Appellant providing her with methamphetamine to use, including the second operation where no drugs were turned over to police. Even in that operation, the Appellant actually delivered methamphetamine to the CI which she consumed in the Appellant's residence.

The Appellant's subsequent arrests further corroborated the CI's claims that the Appellant was selling methamphetamine. Shortly after the last controlled buy operation in October 2017, the Appellant was stopped in Idaho, on information provided by the CI, and found in possession of a significant amount of methamphetamine,

confirming her credibility. Likewise, the January 2017 arrest further established that, even after his arrest in Lewiston, Idaho, the Appellant continued to traffic methamphetamine.

Given the totality of the testimony and evidence, the trial court was well within its discretion to find the CI's testimony credible. This Court should affirm the Appellant's various convictions and enhancements and deny his appeal.

4. THE SENTENCING COURT ERRED IN FINDING THAT THE APPELLANT WAS LEGALLY ELIGIBLE FOR A DOSA SENTENCE PURSUANT TO RCW 9.94A.660.

The sentencing court improperly imposed a sentence pursuant to RCW 9.94A.660. The State has cross appealed this decision. The Appellant is not legally eligible for a sentence under DOSA and the sentencing court erred in granting his such a sentence.

First, the State is allowed to appeal imposition of a sentence under DOSA. See State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Generally, a standard range sentence, of which a DOSA is an alternate form, may not be appealed. *Id.* at 146; RAP 2.2(b)(6); RCW 9.94A.585(1). This prohibition does not, however, bar a party from challenging legal errors or abuses of discretion in the determination of what sentence applies. *Id.* at 147. An abuse of discretion occurs if the sentencing court's decision is manifestly unreasonable or based upon untenable grounds or reasons. State v.

Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Imposition of a sentence for which the offender is ineligible constitutes abuse of discretion. See State v. Corona, 164 Wn. App. 76, 78-9, 261 P.3d 680 (Div. II, 2011)(*a trial court abuses its discretion when it applies the wrong legal standard or bases its ruling on an erroneous view of the law*).

To be eligible for a sentence under RCW 9.94.A.660(1)(a), the offender may not have been convicted of, *inter alia*, a violent offense. Any Class A felony is a violent offense. See RCW 9.94A.030(55)(a)(i). RCW 9.94A.035(1) defines any offense punishable by 20 years or more (20) as a Class A felony. Ordinarily the maximum penalty for Delivery of a Controlled Substance (Methamphetamine) or Possession of a Controlled Substance with Intent to Deliver (Methamphetamine) would be ten (10) years. See RCW 69.50.401(2)(b). However, pursuant to RCW 69.50.435(1), the maximum period of incarceration is doubled to twenty (20) years if the delivery or possession occurred within one of the delineated protected zones. RCW 69.50.435(1)(c) establishes one of these zones as an area “[w]ithin one thousand feet of a school bus route stop designated by the school district.”

The Appellant here was convicted of three counts of Delivery of Methamphetamine and one count of Possession with Intent to Deliver the same. Each of these convictions was found to have

occurred within one thousand feet of a school bus stop, which was designated by the school district. CP 138 As such, each of these four convictions was eligible for a sentence of up to twenty (20) years, making each a Class A felony.⁸ CP 84-5, 105-6,138. Because, a Class A felony is a violent offense, as a matter of law, the Appellant was not eligible for sentencing pursuant to the DOSA statute and the court abused its discretion by imposing sentence thereunder. The State respectfully requests that this Court remand the matter for imposition of a sentence within the standard range.

VI. CONCLUSION

The Appellant has failed to preserve the issue of amendment of the Information which, inaccurate and inapplicable citations to authority notwithstanding, was properly within the sound discretion of the court below. There was substantial and sufficient evidence produced at trial to support the Appellants conviction for each the charges in the first four counts. This Court should decline to reconsider the credibility of witnesses and should further hold that the quantum of evidence in this case was more than sufficient to support the trial court's verdict and findings. The sentencing court erred however in imposing a sentence pursuant to the DOSA statute. The

⁸Due to his prior history, which included prior convictions under RCW 69.50, the Appellant was already subject to twenty-year maximum sentence. See RCW 69.50.408(1), CP 139.

State respectfully requests that this Court enter a decision affirming the Appellant's convictions and remanding for imposition of a sentence within the standard range.

Dated this 20th day of March, 2019.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

JAMIE L. WALTARI,

Appellant.

Court of Appeals No: 36308-2-III

DECLARATION OF SERVICE

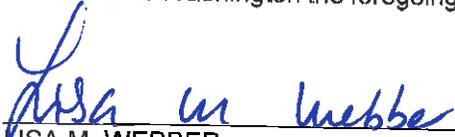
DECLARATION

On March 20, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT/CROSS APPELLANT in this matter to:

BEVAN J. MAXEY
hollye@maxeylaw.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on March 20, 2019.


LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**

ASOTIN COUNTY PROSECUTOR'S OFFICE

March 20, 2019 - 1:02 PM

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