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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

GREGALINE TYLER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in amending the information to add the escape from community custody count.
2. The joinder of the offense of escape from community custody with the offense of unlawful possession of methamphetamine prejudiced Mr. Tyler.
3. The trial court entered a felony sentence not authorized by the jury verdict.

## **II. ISSUES PRESENTED**

1. Did Mr. Tyler waive a joinder challenge by entering a guilty plea to escape from community custody and by failing to move to sever the counts, and, alternatively, was joinder proper where the offenses are based on a common series of acts connected together?
2. Did the trial court properly enter a felony sentence authorized by the jury verdict where the to-convict instruction explicitly required the jury to make a finding that the controlled substance Mr. Tyler possessed was methamphetamine?

## **III. STATEMENT OF THE CASE**

Gregaline Tyler appeals his convictions for possession of a controlled substance—methamphetamine and escape from community custody. CP 74.

### *Substantive facts.*

Spokane Police Department Officer Arthur Plunkett was on patrol on September 22, 2018. RP 158-59. Several hours past midnight, he saw a man riding a bicycle with no light. RP 159-61. He stopped the person, who identified himself as Gregaline Tyler, for the infraction. RP 161.

Officer Plunkett had police dispatch check Mr. Tyler's name for officer safety concerns, and also for a warrant check. RP 161. Dispatch confirmed Mr. Tyler had a warrant for his arrest for escape from community custody. RP 161; CP 33. Mr. Tyler had a previous second degree assault conviction and, as part of his sentence, needed to report to his community custody officer (CCO) after release from the Department of Corrections (DOC). CP 33. DOC released Mr. Tyler on August 30, 2018; he reported to his CCO at that time. CP 33. Mr. Tyler's CCO directed him to report back on September 5, 2018. CP 33. Mr. Tyler never contacted his CCO again. CP 33. His CCO successfully sought an arrest warrant for escape on September 7, 2018, two weeks prior to Mr. Tyler's encounter with Officer Plunkett. CP 33.

Having confirmed the arrest warrant, Officer Plunkett placed Mr. Tyler under arrest and searched him incident to arrest. RP 162. He discovered a yellow, cylinder-like container in Mr. Tyler's jacket pocket. RP 162. Inside was a substance that Officer Plunkett immediately recognized as crystallized methamphetamine. RP 162. A field test and crime laboratory test confirmed the substance was methamphetamine. RP 162-63, 180.

*Procedural history.*

On September 25, 2018, the State initially charged Mr. Tyler with possession of a controlled substance—methamphetamine. CP 3. The parties entered negotiations, and on November 14, 2018, the State informed Mr. Tyler that it would not charge him with escape from community custody as part of a resolution on the possession of a controlled substance charge. RP 17. The State left that offer open, but the parties were unable to reach a plea agreement. RP 17-18.

On the morning of trial, February 4, 2018, the State moved the court to amend the information to include one count of escape from community custody. CP 27. Mr. Tyler filed a response in opposition to the State's motion to amend the information. CP 24. Both parties presented memorandum argument conflating the motion to amend the information with joinder. CP 24-29. Concurrently, Mr. Tyler filed a motion in limine seeking to exclude the State from offering any mention of an arrest warrant or community custody at trial. CP 22-23.

The trial court heard argument where each side again conflated the motion to amend with joinder. RP 5-13. The court granted the State's motion to amend the information, reasoning that there was a commonality and course of action linking the charges that culminated with Mr. Tyler's

arrest. RP 12-13. Mr. Tyler did not move the court to sever the offenses or bifurcate the trial. *See* RP 13, 14-53.

The court also, in part, granted Mr. Tyler's motion to exclude the arrest warrant:

As far as the warrant is concerned, that can be sanitized at the election of the defendant. I don't think the jury has to know what he was on community custody for or what the warrant was for, simply that there was an outstanding warrant.

RP 13; CP 42-43. Mr. Tyler immediately asked the court to dismiss the escape charge, alleging a CrR 4.7 discovery violation. RP 13. The State responded that Mr. Tyler was not being candid with the court because the State had informed Mr. Tyler nearly three months earlier, on November 14, 2017, that it would agree "not to file the escape from community charge" as part of on-going negotiations for a plea agreement and would make all of its witnesses available to Mr. Tyler. RP 16-17, 21. The State had remained firm in its negotiating position that it would agree not to file the escape charge for the entire three months that the parties sought to resolve the case. RP 16-21.

The State informed the trial court that the police report and body camera recording it had already disclosed in discovery both explicitly mentioned the felony DOC escape warrant. RP 16. The State also noted that it had left the original plea offer open until the moment the trial court

determined whether or not to allow the State to amend the information, and that the remedy under the court rule was a continuance. RP 16-18. Defense counsel agreed that she had contacted Mr. Tyler's CCO as early as December 2017 in order to investigate any possible defense to the escape charge. RP 19. Defense counsel also only demanded an interview with the arresting law enforcement officer one week before trial was set. RP 21-22.

The trial court made an oral ruling, first determining that all parties had been on notice about the escape charge for several months. RP 23. The court next found the State had not made any willful discovery violation and denied the motion to dismiss. RP 23. The trial court granted Mr. Tyler's request for a three-week continuance. RP 25-27. Before court adjourned, Mr. Tyler entered a not guilty plea for the escape charge. RP 28.

After the continuance and on the morning of trial, the trial court granted or denied various motions in limine. RP 35-38. Mr. Tyler again argued that the court should exclude evidence of the warrant; he then notified the court he wished to plead guilty to the escape charge. RP 38-40. The State opposed the plea, citing case law that stood for the proposition that a criminal defendant only has a right to plead guilty at arraignment, and the acceptance of a plea is otherwise at the trial court's discretion. RP 41. The court permitted Mr. Tyler to plead guilty to the escape from community custody charge over the State's objection. RP 44-48. The court also

reminded the parties that it had ruled it would allow evidence that Mr. Tyler had an active arrest warrant, “but not the reason or the charge for which the warrant was founded on,” directed the parties to prepare plea paperwork, and accepted the plea. RP 44-48; CP 47-57. The case proceeded to trial on the count of possession of a controlled substance. Mr. Tyler asserted an unwitting possession defense. CP 70.

At the conclusion of trial, the court instructed the jury. CP 58. The to-convict instruction read:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22<sup>nd</sup> day of September, 2018, the defendant possessed methamphetamine, a controlled substance; and

(2) That this act occurred in the State of Washington.

CP 67. The verdict form read, “[w]e, the jury, find the defendant, GREGALINE TYLER, \_\_\_\_\_ of the crime of Possession of a Controlled Substance as charged in Count I.” CP 73. The jury rejected Mr. Tyler’s defense and returned a guilty verdict. CP 73.

The trial court sentenced Mr. Tyler to 14 months confinement for possession of a controlled substance—methamphetamine, and 90 days on the escape charge, to run concurrently. CP 79. Mr. Tyler appeals. CP 90.

#### IV. ARGUMENT

##### A. MR. TYLER HAS WAIVED ANY ARGUMENT ABOUT JOINDER OR AN IMPROPER AMENDMENT. THE OFFENSES WERE PROPERLY JOINED.

Mr. Tyler argues that the trial court improperly joined his two charges for trial. He has abandoned his argument on an improper amendment and waived his challenge to the alleged improper joinder. Regardless, there was no error because the joinder of offenses was proper.

1. *Mr. Tyler waived his challenge to the amendment of the information by pleading guilty to the charge.*

A defendant who pleads guilty waives numerous rights, including, generally, the right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); *State v. Wilson*, 25 Wn. App. 891, 895, 611 P.2d 1312 (1980). But “a plea of guilty does not preclude an appeal where collateral questions, such as the validity of the statute, the sufficiency of the information, the jurisdiction of the court, or the circumstances under which the plea was made, are raised.” *State ex rel. Fisher v. Bowman*, 57 Wn.2d 535, 536, 358 P.2d 316 (1961); *see also Majors*, 94 Wn.2d at 356. Due process requires a guilty plea be knowing, intelligent, and voluntary. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

Mr. Tyler appeals his conviction—after a guilty plea—for escape from community custody, and asks this Court to reverse the conviction. He does not assign error to, or ask to withdraw, his guilty plea and does not

challenge the sufficiency of the information or circumstances under which he entered his plea. These facts should preclude his requested relief as it concerns his escape conviction. Similarly, because he pleaded guilty to escape prior to his trial on possession of a controlled substance, all prejudice he asserts occurred is speculative; the jury never was asked to determine whether Mr. Tyler escaped from community custody because he was only tried on the charge of possession of a controlled substance.

Because the State amended the information to include an additional count the day of trial, but Mr. Tyler received a continuance and pleaded guilty to that added count on his continued trial date, this argument is nuanced. Mr. Tyler would be permitted, for instance, to raise on appeal whether his plea was knowing, intelligent, and voluntary. This would include challenging whether he knowingly entered a plea where an amended information did not fully properly advise him of the elements of the crime charged. *See generally, Matter of Montoya*, 109 Wn.2d 270, 277-80, 744 P.2d 340 (1987).

That is not the claim that Mr. Tyler makes. He claims, in essence, that the trial court improperly permitted the State to charge him with escape from community custody. Mr. Tyler is not arguing he did not make his plea knowingly, intelligently, and voluntarily. This Court should decline to grant him his requested relief, which is reversal for both of his convictions.

Additionally, because Mr. Tyler pleaded guilty to the escape charge prior to trial, he has waived his ability to assert that charge prejudiced the charge that actually went to trial. As the State will discuss further below, trial courts consider four factors when determining undue prejudice arising from joinder: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 883 P.2d 747 (1994). When the State amends an information to add a charge—joining it to the existing charge or charges—and a defendant subsequently pleads guilty to that charge, the defendant always effectively severs the charges with their plea. The guilty plea both removes any prejudice from the amendment and concedes the ability to defend against the charge itself. In this case, Mr. Tyler has waived his ability to challenge the strength of the evidence, clarity of his defense, or jury instructions concerning escape from community custody, because he pleaded guilty. No appellant can demonstrate prejudice simply from the cross-admissibility of evidence, because it is only one of the four factors. *See State v. Bluford*, 188 Wn.2d 298, 315, 393 P.3d 1219 (2017). This Court should consider the guilty plea a waiver of these alleged errors.

2. *The trial court did not abuse its discretion when it joined the offenses by amending the information.*

Our state Supreme Court recently clarified the interplay between joinder and severance, though it did not address the interplay between an amended information that adds charges with joinder. *See Bluford*, 188 Wn.2d 298.

- a. Standard of review

Review is for abuse of discretion, and trial courts have “considerable discretion” in this area. *Id.* Mr. Tyler asserts the standard of review is de novo, citing *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). That case is overruled in light of *Bluford*, a Washington Supreme Court case from 2017. 188 Wn.2d at 305. The Court explicitly noted “[t]he parties differ sharply on the scope and the standard of review of the joinder issue. We reaffirm our precedent and clarify that ... a trial court’s decision on a pretrial motion for joinder is reviewed for abuse of discretion.” *Id.* A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

- b. Rules of law concerning joinder

Joinder, pursuant to CrR 4.3(a), “should be liberally allowed where the charged offenses (1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a

series of acts connected together or constitutions parts of a single scheme or plan.” *Bluford*, 188 Wn.2d at 310 (internal quotations omitted).

When considering a pretrial joinder motion, the court should “balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issue.” *Id.* Considerations include judicial economy, expedience in judicial administration, as well as undue prejudice to the defendant. *Id.* at 311. Trial courts consider four factors when determining undue prejudice arising from joinder: “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.” *Id.* at 311-12 (quoting *Russell*, 125 Wn.2d at 63). The mere fact that evidence is not cross-admissible does not automatically preclude joinder. *Id.* at 315. If joinder is not proper but offenses were consolidated in one trial, the convictions must be reversed unless the error is harmless. *Bryant*, 89 Wn. App. at 864. To determine whether an error is harmless, this Court decides whether there is a reasonable probability that the outcome of trial would have been materially affected. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014).

c. Analysis

The most important consideration is that even if joinder was improper, any error is harmless because Mr. Tyler entered a guilty plea to the escape charge before trial. Mr. Tyler naturally severed the charges by pleading guilty. The State presented proof supporting his conviction for possession of a controlled substance—methamphetamine. The joinder, whether improper or proper, could have no effect on that verdict because Mr. Tyler was not tried on the charge he complains was improperly joined; he was tried on only the original charge.

Failing that, the joinder was proper. The trial court had considerable discretion in this area. To be fair to Mr. Tyler, the State also conflated the issue of joinder when arguing its motion to amend, and the trial court's analysis was limited for that reason.<sup>1</sup> Different court rules address the two procedures. *See* CrR 2.1(d), 4.3. However, the trial court had tenable reasons for implicitly permitting joinder by amending the information and articulated them on the record.

The court first noted that to prove escape from community custody, the State would need to present evidence that Mr. Tyler made himself unavailable to his CCO between September 5 and September 22. RP 12.

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<sup>1</sup> Because both parties conflated the issues, the State is not addressing whether both issues are preserved.

The court reasoned that the State's evidence showed a continued sequence of events: Mr. Tyler was contacted by law enforcement on September 22; Mr. Tyler had an arrest warrant; and when Officer Plunkett arrested Mr. Tyler, he searched him and found methamphetamine. The court determined that this was "a course of actions that took place that culminated with his arrest on the 22nd." RP 13. The court also determined prejudice would be limited because the jury did not need to know why Mr. Tyler was on community custody, or what the arrest warrant was for, but "simply that there was an outstanding warrant." RP 13. The court stated the "benefit of joining these two offenses outweighs any undue prejudice." RP 13. The trial court's reasoning was tenable.

Mr. Tyler asserts that the escape occurred on September 5, and the possession of methamphetamine happened on September 22, but he does not explain how the court abused its discretion by reasoning they were related because the escape served as the basis for the officer's continued contact with Mr. Tyler and, ultimately, discovery of the methamphetamine. The escape was on-going, as the trial court pointed out. Had Officer Plunkett not verified whether Mr. Tyler had a warrant, he would have no reason to arrest or search Mr. Tyler incident to arrest. As the court noted, the jury need not hear why Mr. Tyler was on community custody, or what the warrant was for.

3. *The trial court did not abuse its discretion when it permitted the State to amend the information.*

Mr. Tyler also assigns error to the trial court's decision to permit the State to amend the information but provides no argument on whether the amendment was proper. *See* Br. of Appellant at 5-8. He has abandoned this assignment of error. RAP 10.3(a); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 419 (2002). If this Court does reach this alleged error, the trial court properly permitted the State to amend the information.

CrR 2.1(d) authorizes trial courts to permit amendment of an information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." A defendant objecting to amendment bears the burden of showing prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). A defendant who is misled or surprised by an amendment is entitled to move for a continuance if needed to prepare a defense. *Id.* This Court reviews a trial court's decision to allow amendment for abuse of discretion. *State v. Gutierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

The court's reasoning in granting the amendment was identical to its reasoning for granting joinder, and, for the same reasons argued above, was a tenable use of discretion. More importantly, for this test, Mr. Tyler

cannot demonstrate prejudice. The record reflects, and the trial court recognized on the record, that Mr. Tyler had known about the possibility that the State would add the escape charge *at least three months* prior to trial. He asked for a three-week continuance to prepare his defense, which the trial court granted. He contacted his CCO to investigate possible defenses to the escape charge in December 2017, three months prior to trial. He did not seek to sever the offenses or bifurcate the trial,<sup>2</sup> either of which would eliminate any of the speculative unfair prejudice that may have influenced a jury. The trial court repeatedly ruled that it would sanitize the basis for the arrest warrant. Ultimately, he pleaded guilty as argued above. Assuming this Court reaches this alleged error, there is no prejudice.

**B. THE TO-CONVICT INSTRUCTION REQUIRED THE JURY TO FIND MR. TYLER POSSESSED METHAMPHETAMINE**

Mr. Tyler next argues that the jury's verdict did not authorize the felony sentence. This error is not reviewable: this error is not preserved and not manifest on the record, and he both waived and invited this error by agreeing to the State's instruction without proposing his own. And contrary to Mr. Tyler's argument, the court specifically instructed the jury that it

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<sup>2</sup> Other than by his guilty plea, which operates as a waiver to Mr. Tyler's claim of an improper joinder.

could only convict if the State proved Mr. Tyler possessed methamphetamine, a controlled substance.

“[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury’s verdict.” *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). If a court imposes a sentence not authorized by the jury’s verdict, the harmless error analysis does not apply. *Id.* at 900-01.

*1. This issue is unpreserved, invited, and waived.*

During a conference on jury instructions Mr. Tyler only proposed one instruction, the unwitting possession instruction. RP 212. The trial court granted Mr. Tyler’s request and gave the jury this instruction. CP 70; RP 214, 220-21. The court asked Mr. Tyler if he wished to propose any other instructions, and he said no. RP 216. Mr. Tyler did not object to the verdict form used in his trial; he only objected to the verdict form for escape from community custody, which was no longer necessary in light of his plea. RP 211.

RAP 2.5(a)(3) permits an appellate court to review an unpreserved claim of error if it involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the

asserted error must be manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). This is an issue of constitutional magnitude. *Williams-Walker*, 167 Wn.2d at 896. Mr. Tyler still must demonstrate it is manifest.

Analysis of whether an issue is manifest must strike “a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused.” *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077, *review denied*, 190 Wn.2d 1027 (2018) (citing *Kalebaugh*, 183 Wn.2d at 583). To establish manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. “‘To demonstrate actual prejudice, there must be a plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756). The “consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.” *Dunleavy*, 2 Wn. App. 2d at 427 (internal citations omitted) (emphasis added).

Nothing in the record demonstrates this issue is manifest. Mr. Tyler had the opportunity to propose instructions and chose not to propose any, other than one relating to his defense of unwitting possession. By not

proposing a different verdict form and not objecting to the State’s proposed verdict form, Mr. Tyler essentially agreed that the State’s form was appropriate.<sup>3</sup> The trial court realized that verdict form B, relating to Mr. Tyler’s escape charge, was no longer necessary in light of his plea. Further, the to-convict instruction specifically required the State prove Mr. Tyler possessed methamphetamine in order for the jury to return a guilty verdict. There is no obvious or flagrant error in the jury instructions as to warrant review on this record. The instructions as a whole required the State to prove Mr. Tyler possessed methamphetamine. Mr. Tyler has waived this claim of error.

## 2. *Analysis.*

Mr. Tyler misapplies the holding of *State v. Rivera-Zamora*, 7 Wn. App. 2d 824, 435 P.3d 84 (2019). In that case, the State charged the defendant with possession of a controlled substance with intent to deliver—

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<sup>3</sup> A party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires “affirmative actions by the defendant.” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000). By proposing only a single instruction, Mr. Tyler affirmatively agreed not to propose his own verdict form.

methamphetamine. *Id.* at 827. However, the trial court’s to-convict<sup>4</sup> jury instruction did not identify the controlled substance at issue in the case. *Id.* at 829. This Court determined there was no error as to the sentence because the verdict form explicitly included the identity of the controlled substance: methamphetamine. *Id.* The case does not stand for the proposition that the verdict form must contain all of the elements of a crime; instead, the verdict form “cured” a defect in the to-convict instruction for this type of challenge.

The test this Court should apply to determine if a jury’s verdict authorizes a sentence is whether an express jury finding based on the instructions as a whole supports the sentence. This Court applied this reasoning in *State v. Barbarosh*, No 36010-5-III, 2019 WL 4065623, 448 P.3d 74 (Wash. Ct. App. 2019) (unpublished),<sup>5</sup> after analyzing several cases with similar issues.

The first case this Court analyzed was *State v. Clark-El*, 196 Wn. App. 614, 384 P.3d 627 (2016). The State charged the defendant

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<sup>4</sup> Also referred to as the “elements” instruction. Notably, the defendant in that case alleged an error in the to-convict instruction in addition to an error in the trial court’s sentence.

<sup>5</sup> Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

with delivering a controlled substance—methamphetamine. The to-convict instruction required proof only that he “delivered a controlled substance” and failed to identify methamphetamine as the substance. *Id.* at 619. This Court held that omission of “methamphetamine” from the to-convict instruction authorized the trial court to impose only the lowest possible sentence for delivery of a controlled substance, which was a Class C felony. *Id.* at 624-25.

The next case was *State v. Gonzalez*, 2 Wn. App. 2d 96, 408 P.3d 743, *review denied*, 190 Wn.2d 1021 (2018). The State charged the defendant in that case with possessing a controlled substance—methamphetamine. *Id.* at 98. The to-convict instruction required proof that the defendant possessed a controlled substance “as charged in Count II,” but the jury instructions did not advise the jury what Count II alleged. *Id.* at 104. This Court reasoned, “[w]ithout a finding regarding the nature of the controlled substance, the jury’s verdict did not provide a basis on which the trial court could impose a sentence based on possession of methamphetamine.” *Id.* at 114. The lowest possible sentence for possession of a controlled substance was a 90-day misdemeanor sentence for possession of marijuana. *Id.* at 109.

The last case was *Rivera-Zamora*, 435 P.3d 844. This Court determined there was no error where the to-convict instruction left out the

element of methamphetamine because the verdict form explicitly included the identity of the controlled substance: methamphetamine. *Id.* at 829. These cases present a pattern that demonstrates a charging document alone will be insufficient to demonstrate a jury finding:

Case name	To-convict instruction	Verdict form	Charging document	Sentence authorized?
<i>Clark-El</i>			X	No
<i>Gonzalez</i>			X	No
<i>Rivera-Zamora</i>		X	X	Yes
Mr. Tyler	X		X	???

As the above table demonstrates, of the two cases where the verdict did not authorize the sentence, the problem was that the instructions did not identify the controlled substance, and any reference to the charging document or language was too attenuated from the verdict.

Applying these cases here, the jury in Mr. Tyler’s case authorized the sentence because it could only find him guilty if it determined the State proved Mr. Tyler possessed methamphetamine. Although the verdict form simply stated the jury found Mr. Tyler guilty “of the crime of possession of a controlled substance as charged in Count 1,” the to-convict instruction required the jury to find that Mr. Tyler “possessed methamphetamine, a

controlled substance.” CP 67, 73. This is an express jury finding, based on the instructions as a whole, that supports the trial court’s sentence.

## V. CONCLUSION

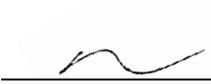
Mr. Tyler pleaded guilty to escape from community custody, so, unless he establishes a basis to withdraw his plea, he is not entitled to reversal of that conviction; he also has waived any claim he suffered prejudice because the trial court permitted the State to amend the information to include that charge. The court did not abuse its discretion either in amending the information or joining the charges.

The to-convict jury instruction required the jury to find Mr. Tyler possessed methamphetamine, consequently authorizing the trial court’s sentence for possession of methamphetamine.

This Court should affirm.

Dated this 4 day of November, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Brett Pearce, WSBA #51819  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

GREGALINE TYLER,

Appellant.

NO. 36715-1-III

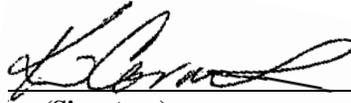
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 4, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Thomas Kummerow  
wapofficemail@washapp.org

11/4/2019  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**November 04, 2019 - 10:31 AM**

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