NO. 42844-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

TAWANA DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00248-7

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 25, 2012, Port Orchard, WA _____
Original e-filed with the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the credibility of the informants who engaged in the controlled buys of methamphetamine from Davis is relevant to the question of whether the evidence was sufficient to support her convictions?

2. Whether the warrant affidavit was sufficient to establish probable cause to search Davis's room?

3. Whether Davis fails to show that counsel's failure to challenge the search warrant was ineffective assistance?

4. Whether most of the impeachment evidence Davis faults the court for excluding was actually admitted at trial and whether the remainder was properly limited?

5. Whether the detective's brief hearsay testimony that the informant said that Davis told her she had meth to sell was harmless where the informant testified, in greater detail, about her conversation with Davis ?

6. Whether the issue of whether the evidence in support of Count III was sufficient is moot where Davis was acquitted of that count?

7. Whether the crime of unlawful use of building for drug purposes is not unconstitutionally vague as applied to Davis's conduct?

8. Whether the evidence was sufficient to support the school-

zone sentencing enhancement?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tawana Davis was charged by second amended information filed in Kitsap County Superior Court with the following offenses:

COUNT	OFFENSE	OFFENSE DATE
I	Delivery of Methamphetamine (School Zone)	11/16/10
II	Delivery of Methamphetamine (School Zone)	12/3/10
III	Delivery of a Non-controlled Substance in Lieu of a Controlled Substance	12/30/10
IV	Delivery of Methamphetamine (School Zone)	1/14/11
V	Possession of Methamphetamine	1/18/11
VI	Unlawful Use of a Building for Drug Purposes	11/16/10-1/18/11
VII	Bail Jumping	7/6/11
VIII	Bail Jumping	7/13/11
IX	Tampering with a Witness	9/13/11

CP 43. The jury acquitted on Count III, and found Davis guilty as charged of the remaining offenses. CP 92-97.

B. FACTS

In the Fall of 2010, Bremerton Police Special Operations Group

Detective Matthew Musselwhite was conducting investigations at the Chieftain Motel. 2RP 145. Musselwhite used two informants in this case: Laura Sutton and Robert White. 2RP 162.

Musselwhite described how he determined that Sutton could be a reliable source and how he decided to use her in this case. 2RP 167. Sutton agreed to cooperate with SOG in exchange for a positive recommendation to the prosecutor's office on a drug charge for which she had been arrested. 2RP 167. He took into account the factors he had discussed earlier, such as her ability to provide information about "quality" suspects.

By quality suspects, he meant suspects who were going to have the greatest impact on the community if they were interrupted. 2RP 167. Musselwhite also considered Sutton's criminal history. 2RP 167. That history included, over a number of years, multiple drug-related felony convictions, two forgery or identity theft felony convictions, and some misdemeanor thefts. 2RP 169.

She had made multiple statements to him that were against her own penal interest, including that she had been purchasing and selling methamphetamine, and was a user. 2RP 167.

From that he concluded that she was being honest with him at the time. 2RP 168. There would be no reason for her to lie to him about what she was

doing. 2RP 168.

He also concluded that her level of knowledge of the methamphetamine world added to her reliability: she would be able to recognize methamphetamine and drug paraphernalia when she saw them. 2RP 168. Her information about Davis was also corroborated from other sources and led him to believe that what she was telling him was true. 2RP 168. Because the activities at the Chieftain were one of his priorities at the time, Musselwhite decided to consider using Sutton as a CI. 2RP 168. He had not used her as a CI previously. 2RP 169.

Sutton contacted Musselwhite on November 16. They had spoken the day before about her ability to be an informant. 2RP 163. Sutton named a person she knew as Tawana as a supplier she could purchase from. 2RP 164. Musselwhite asked Sutton to try to set up a buy from Tawana. 2RP 164. He asked Sutton about her because he was trying to identify who Tawana was. 2RP 164.

Sutton told him Tawana's approximate age, that she was a white female, lived at the Chieftain, and had a son with the street name of Porky. Sutton also named some of Tawana's other associates, with whom Musselwhite was familiar from his work. 2RP 164. He knew Porky was Joshua Golding, a.k.a. Joshua Hansen, whose mother was identified in police

reports as Tawana Hansen, and who lived at the Chieftain, and who matched the description Sutton gave. 2RP 165. Tawana Hansen was an alias commonly used by Tawana Davis. 2RP 165.

Sutton told Musselwhite that she had called Davis and asked if she had methamphetamine available for purchase, and Davis confirmed that she did. 2RP 166. Based on that conversation, Musselwhite arranged for Sutton to meet with him and another detective at a secure location. They talked about the phone conversation and planned a controlled buy of one gram of methamphetamine. 2RP 167.

Later that day, Musselwhite met with Sutton and another detective shortly before lunchtime. 2RP 169. Davis worked at the motel and was able to meet on her lunch break and make drug sales. 2RP 169. He thoroughly discussed the plan with Sutton. 2RP 169. She was to drive to the motel, and go to Davis's room and buy a gram. 2RP 169. She was to leave as soon as the transaction was completed, and drive to a secure location for debriefing. 2RP 169.

After the plan was established Musselwhite and Detective Plumb thoroughly searched Sutton and her car. 2RP 170. The search included her shoes. 2RP 170. Nothing was found on her. 2RP 170.

Plumb located a syringe, a mirror with residue, and about 0.2 grams

methamphetamine in the car. 2RP 170-71. They confronted Sutton, and asked her "What did we find?" 2RP 171. Sutton said that there was a syringe she forgot to get rid of. 2RP 171. She did not recall anything else being in the car. 2RP 171.

After a discussion, Musselwhite was satisfied that Sutton genuinely did not know the methamphetamine was there. 2RP 171. Based on her body language and his experience as an interviewer, Sutton appeared genuinely surprised when they showed it to her. 2RP 171. Further, since the buy was to be for a gram, that she was in possession of 0.2 grams did not affect the reliability of the buy. 2RP 172.

Sutton also stated that she shared the car with her husband, also a drug user, and that he sometimes hid things. 2RP 172. Musselwhite knew from experience that meth users frequently misplaced pipes and small amounts of drugs, and that they lost things. 2RP 172. It was a side effect of the meth use. 2RP 172. Based on these factors, it did not appear to Musselwhite that she was trying to hide anything or sneak anything by him. 2RP 172.

They made a decision to give Sutton a warning and to continue with the buy. 2RP 172-73. After confirming the plan with Sutton, they let her know that they would be watching her. 2RP 173. He did not tell her where he would be watching from or how many officers would be watching her.

2RP 175. She was told that if she did not complete the transaction in 30 minutes, they would come to the room and retrieve her. 2RP 174.

Sutton left and drove to the Chieftain. 2RP 173. She arrived at the motel at 12:26 p.m. 2RP 177. They followed, and kept her in visual contact the whole time. 2RP 173. Musselwhite watched her park her car and walk toward the motel office and rooms. 2RP 174. At that point he lost sight of her. 2RP 174.

Musselwhite watched the motel from the top of the steep driveway at the condo complex across the street. 2RP 177. Because of the hill, he was higher than the roof level of the motel. 2RP 178. Plumb was initially in the parking lot of the drug store next to the condos, and also drove by periodically to get a better view. 2RP 178.

Musselwhite could see Sutton park her car, and could see her car the entire time. 2RP 179. He view of the motel was partially obstructed by the motel office, but it had glass walls that he could see through. 2RP 179. It was not feasible for him to have watched from any closer vantage point. Although the motel had a wooded area behind it, when they had tried using the wooded area in the past, the officers were spotted and the residents yelled at them. 2RP 179. He also could not use the parking lot, because the residents all knew each other and he would have been obvious and out of

place there. 2RP 179. Additionally, to access the wooded area, they would have to lose sight of the motel entirely. 2RP 180.

Musselwhite rejected the notion that the informant could have "gone anywhere" in the motel. 3RP 281. He could see a large portion of the motel from his vantage point. 3RP 281. There were only two or three doors on the front side of the motel that he could not see. 3RP 282. The parking lot was in clear view. 3RP 282.

After about 10 minutes, Sutton returned to view and got in her car. 2RP 180. She drove away, and Musselwhite followed her to the secure location. 2RP 180. Sutton gave him what appeared to be about a gram of methamphetamine. 2RP 180. He later weighed it and determined that it was 0.9 grams.

They discussed the details of the buy and what Sutton observed in the room. 2RP 184. They again searched Sutton and her car. 2RP 184. They did not locate any money or contraband. 2RP 184.

Musselwhite showed Sutton a photo montage that included a picture of Davis. 2RP 184. Sutton immediately identified Davis as the person she knew as Tawana and from whom she had purchased the methamphetamine. 2RP 187. He told Sutton to call him within a week and let him know when she could do another buy. 2RP 189.

The second of the four buys in this case occurred on December 3, 2010. 2RP 201. Sutton was again the CI. 2RP 202. They met at a secure location, again with Sergeant Plumb. 2RP 202. They again discussed the plan, which was the same as the first time, except this time he gave her $40 to purchase 0.4 grams. 2RP 202-03. They again searched Sutton's person and car, and this time, no contraband was found. 2RP 202. She did have some cash on her, which Musselwhite took until after the buy was complete. 2RP 204. They followed Sutton to the Chieftain, and Musselwhite took the same position across the street. 2RP 202.

Sutton parked at the motel and walked toward the rooms. 2RP 202. The buy took about 20 minutes. 2RP 203. Musselwhite called her and asked why it was taking so long. 2RP 203. She said she was just waiting in the room. 2RP 203. Sutton reappeared and they drove to the secure location. 2RP 203.

Sutton produced what appeared to be 0.4 grams of methamphetamine. 2RP 203. They searched Sutton and her car, again with negative results. 2RP 203. After they discussed the transaction in detail, Musselwhite instructed Sutton to call him when she was ready to do another buy. 2RP 203. The baggie did not have any designs on it this time. 2RP 205. Musselwhite weighed the baggie and it weighed 0.5 grams. 2RP 206.

The third controlled buy occurred on December 30, 2010. The informant was Robert White. 2RP 206. Musselwhite had determined that White also knew Davis and could buy from her. 2RP 206. White was already working as a CI in another case. 2RP 207. He was hoping for a positive recommendation for charges that his girlfriend was facing. 2RP 207. He had successfully completed another case that involved three controlled buys. 2RP 207. All the information he had provided in the prior case had been corroborated afterwards when a search warrant was executed and an arrest was made. 2RP 207.

The other factors Musselwhite considered were White's criminal history, his level of knowledge of methamphetamine and distribution. 2RP 207. Additionally, his knowledge of Davis was good: he gave a good description of her and where she lived, and what she was doing. 2RP 208. Musselwhite felt that his knowledge was sufficient, and based on his past performance, his reliability did not seem to be an issue. 2RP 208. His criminal history involved a misdemeanor assault and a DUI. 2RP 208.

The girlfriend had expressed a desire to cooperate, but White, not she, was usually the one who made the buys. 2RP 208. They were both addicts and worked together to get the drugs. 2RP 209. White was willing to cooperate. 2RP 209.

On the day of the buy, Musselwhite and Detective Polonsky met White at a secure location. 2RP 209. They discussed the plan, which was for White to go to Davis's room and purchase methamphetamine from her. 2RP 209. They searched White's person and car. 2RP 210. They found no contraband. 2RP 210. Musselwhite gave White $130 to purchase a "teener," or 1/16 of an ounce, which was roughly 1.75 grams. 2RP 210. They followed White to the Chieftain, and Musselwhite assumed his usual position on the hill, while keeping in telephone contact with White. 2RP 210.

Musselwhite watched White park and walk toward the motel. 2RP 210. A very short time later, White returned, and they followed him back to the secure location. 2RP 210. They discussed the buy in detail, which did not go exactly as planned. 2RP 211. The buy did not occur in the motel room but through a car window as Davis was leaving the motel. 2RP 213. White produced a baggie that contained mostly some sort of imitation substance. 2RP 211. He then searched White very thoroughly. 2RP 211. He had no actual methamphetamine on him. 2RP 212. A search of his car had the same result. 2RP 212. Musselwhite instructed White to bring up with Davis the fact that the substance was bad, which he said he did. 2RP 212-13.

The final buy occurred on January 14, 2011. 2RP 216. Musselwhite received a call from the CI indicating that he could purchase methamphetamine from Davis at the Chieftain. 2RP 217. Musselwhite and

Plumb met White around 5:00 p.m. 2RP 217. They searched White and his car and found no money, drugs, weapons, or other contraband. 2RP 217.

Musselwhite planned to use a video camera during the buy, which he strapped to White's torso. 2RP 218. Musselwhite gave White $140 with instructions to purchase a "teener" or 1/16 of an ounce. 2RP 218. They followed him to the motel and took their usual positions. 2RP 218. Musselwhite observed the informant park and approach the motel. 2RP 218. He went into the office and approached the counter, and then proceeded in the direction of the 100-level rooms, at which point Musselwhite lost sight of him. 2RP 218.

The room had changed from 108, where the previous buys had occurred, to Room 102. 2RP 218. The 100-level rooms were one flight down from the office and parking area. 2RP 219. Room 102 was directly beneath the office. 2RP 219.

After about 10 minutes, White reemerged, got in his car, and drove back to the secure location. 2RP 219. There, White produced a baggie with Superman symbols on it, which Musselwhite immediately realized was far less than a teener. 2RP 220, 226. Musselwhite searched White and found no money or contraband on him. 2RP 220.

As Musselwhite began to discuss the why the baggie was so light,

Plumb indicated that he had found some pieces of methamphetamine lying on the back seat of White's car. 2RP 220. There was a jacket covering them. 2RP 220.

White denied any knowledge of how it got there. 2RP 221. White subsequently admitted to taking the methamphetamine from the baggie and putting it in the back seat. 2RP 228. Musselwhite reviewed the video from the hidden camera and learned that it had malfunctioned about the time White got out of his car at the motel. 2RP 223. Musselwhite was not particularly suspicious about that because the device had malfunctioned in the past, due to a worn power wire. 2RP 223. Musselwhite examined the device and it did not appear to have been tampered with. 2RP 224.

On January 18, 2011, Musselwhite obtained a search warrant for Room 102. 2RP 228. On the same day, Musselwhite, along with Detectives May and Polonsky and Officer Meade served the warrant. 2RP 230. They were also serving a second warrant at the Chieftain that day. 2RP 231. The plan was for them to go to the office and get keys to the rooms and then serve the warrants. 2RP 231. Plumb was in charge of the second warrant. 2RP 231. The second warrant was unrelated to Davis's case. 2RP 231.

Musselwhite went to Room 102, knocked and announced loudly that they had a warrant and to open the door. 2RP 233. Initially there was no

response, and he knocked and announced again. 2RP 233. A female voice yelled, "Who is it?" Musselwhite again said it was the police with a warrant. 2RP 233. He waited 15-20 seconds, then tried to open the door with the key. 2RP 233. The key would not turn the deadbolt. 2RP 233.

Musselwhite then kicked the door open. 2RP 233. He entered the room and saw that the bathroom door was cracked open. 2RP 234. He could see that someone was in the bathroom. 2RP 234. Davis said she was in the shower. 2RP 234. He instructed her to cover herself and come out with her hands visible. 2RP 234. She complied. 2RP 234.

After the room was secured, they permitted Davis to get dressed. 2RP 236. She was then handcuffed. 2RP 236. Then they searched the room for evidence. 2RP 236. Davis was given *Miranda* warnings. 3RP 243. Musselwhite told Davis that she was under arrest for delivery of methamphetamine. 3RP 245. Davis agreed to talk to him. 3RP 246.

Musselwhite collected some items of evidence retrieved from the room: drug paraphernalia, digital scales, packing materials, both used and unused, and other items associated with methamphetamine usage and distribution. 3RP 251.

The smaller unused baggies were of the same type that the methamphetamine was packaged in during the controlled buys. 3RP 253.

The baggies with residue in them were larger and of the type typically used to for delivery from a supplier to a dealer. 3RP 253.

Some of the smaller baggies had a black cross on them. 3RP 257. One of the controlled buys came in a baggie with a black cross. 3RP 257. There were also baggies with Superman logos on them, which was what the last buy had come in. 3RP 257. There were also small baggies with no markings, which two of the buys had used. 3RP 257

They also recovered a black and silver digital scale, as described by the CI. 3RP 258. The police also found a false soda can used for hiding things and typically found in possession of people who traffic in illegal drugs. 3RP 261-62. Musselwhite showed the items to Davis and she confirmed that they were hers. 3RP 251.

The warrant team did not find any significant quantity of methamphetamine in the room. 3RP 251. Musselwhite had information that Davis's boyfriend Bernard Lee was present during some of the buys. 3RP 248. He asked her if Lee was doing the selling or if they were working together. 3RP 248. Davis confirmed that they were working together, and that she was not under duress. 3RP 248. Davis declined to further discuss Lee's involvement. 3RP 248.

Musselwhite had seen Lee in the lobby when he obtained the room

key. 3RP 250. He asked Davis if Lee was holding any methamphetamine on his person, and she said that he was. 3RP 251. She said that he had left the room with it. 3RP 251.

Musselwhite told Davis he was interested in the identity of her supplier. 3RP 247. Davis said it was from Jill. 3RP 247. This confirmed his investigation which indicated the supplier was Jill Lusty, a.k.a. Jill Lloyd. 3RP 247. He had seen Lloyd's vehicle parked at the motel. 3RP 247.

Davis agreed to call Lloyd and order some methamphetamine to continue the investigation. 3RP 247. When asked when the last time she got a delivery from Lloyd, Davis told him that things had been pretty dry lately. 3RP 249. They tried to call Lloyd, but the battery in the room phone was dead. 3RP 250. After they were unable to set up the controlled buy Davis was booked into the jail. 3RP 264.

Musselwhite checked the Bremerton School District website and determined that the closest school bus stop was at Forest Avenue and Kitsap Way. 3RP 264-65. He was unable to use the measuring wheel to measure the distance due to the terrain. 3RP 266. He printed out a satellite photo. 3RP 266. He determined that the closest school was the West Sound Technical Skills Center. 3RP 266. From the north corner of the Chieftain Motel to the school campus was 670 feet. 3RP 266.

Musselwhite discounted the idea that there could have been another source that the informants bought the drugs from. They were only investigating buys from one room not associated with Davis: Room 341, which was clearly visible from the parking lot. 3RP 326. At no time during any of the controlled buys did anyone go in or out of Room 341. 3RP 327. White's reliability. 3RP 331-32.

Sutton and White both testified at length about their purchases from Davis. 3RP 351-59; 3RP 364-68; 397-402; 408-16. They did not know each other. 3RP 374; 3RP 420.

Kitsap County Geographic Systems Department Analyst Paul Andrews, using mapping software, calculated a thousand-foot radius from the center of the Chieftain Motel. 3RP 432-34. Both the bus stop and the West Sound Technical Skills Center were within the radius. 3RP 435. The skills center was a training center that the School District sent students to. 3RP 436.

The principal of the West Sound Technical Skills Center testified that the center was a public high school operated by the Bremerton School District. 4RP 516, 519.

The Bremerton School District Student Transportation Supervisor testified that the nearest school bus stop to the Chieftain was at Kitsap Way

and Forest Drive. 4RP 521-23.

Testing by the crime lab determined that the substance purchased in the first, second and third buys was methamphetamine. 4RP 537, 539, 541. That bought in the third contained no controlled substances.

4RP 540.

Finally, a recording of incriminating phone calls made by Davis from the jail were admitted and played for the jury. 4RP 584, 590-95.

III. ARGUMENT

A. DAVIS MISTAKENLY ARGUES THAT THE CREDIBILITY OF THE INFORMANTS WHO ENGAGED IN THE CONTROLLED BUYS OF METHAMPHETAMINE FROM HER IS RELEVANT TO THE QUESTION OF WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT HER CONVICTIONS.

Davis appears to argue that the methamphetamine obtained during the controlled buys was insufficient to support her conviction. She relies, however, on cases addressing the sufficiency of probable cause to issue a warrant. The test for sufficiency to support a conviction, however is whether taking the evidence in the light most favorable to the State, a reasonable jury could have convicted her. The evidence met this standard, and her convictions should therefore be affirmed.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, evidence was presented for each of the three controlled buys of

methamphetamine of which Davis was convicted that confidential informants were searched, given marked bills, and followed to the Chieftain motel, after which they returned and gave methamphetamine they testified they had purchased from Davis to the police. The substances were tested and determined to be methamphetamine. This evidence is sufficient to support the convictions.

The State notes that this Court recently rejected a very similar claim, albeit in the context of a claim of ineffectiveness of counsel:

> Foster argues that his trial counsel was ineffective by failing to move to suppress Turner's testimony because he was not a reliable CI under the *Aguilar–Spinelli* test. ... Foster argues that Turner's trial testimony should have been suppressed because Turner previously lied to law enforcement, as shown by Turner's trial testimony when he admitted prior criminal conduct. Foster actually is challenging Turner's credibility. But the jury determines credibility. *Thomas*, 150 Wn.2d at 874–75. Furthermore, the proper tools to impeach Turner's testimony were the rules of evidence, not the Aguilar–Spinelli test.

State v. Foster, 140 Wn. App. 266, ¶ 43, 166 P.3d 726 (2007) (footnote omitted). Because the evidence was sufficient under the correct standard of review, this claim must also be rejected here.

B. THE WARRANT AFFIDAVIT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH DAVIS'S ROOM.

Davis next claims that the warrant for the search of Davis's room

lacked probable cause. This claim is without merit because it was supported by four controlled buys involving two informants whose basis of knowledge and veracity were established in the affidavit.

1. Standard of Review

A magistrate's decision to issue a search warrant is reviewed for abuse of discretion. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). "A search warrant may be issued 'only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location.'" *In re Yim*, 139 Wn.2d 581, 594, 989 P.2d 512 (1999) (*quoting State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Review "is limited to the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Although the reviewing court generally defers to the judge issuing the warrant, probable cause is a legal conclusion that is reviewed de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).[1]

2. Nexus

A search warrant should only be issued if the affidavit shows probable

[1] Because the determination of the validity of a warrant is limited to the face of the document and is largely a question of law, the State would concede that the record is adequate for review of the warrant under RAP 2.5. This concession is limited to the *facial* validity of the warrant.

cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "'[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140, 977 P.2d 582 (*quoting State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Here, the warrant alleged that all of the controlled buys took place at the Chieftain motel, where Davis lived and worked. One occurred in the parking lot, and the others were completed in the room occupied by Davis at the time of the buy. The room to be searched was Davis's last known residence, and where the final buy took place.

Davis argues that because only the last buy took place in the room searched, only the last buy may be considered to establish probable cause. Brief of Appellant at 11. This claim misreads the holding of *Thein*. There, the affiant had relied on the mere inference that evidence of drug dealing was likely to be found in a drug dealer's home. The Court declined to accept that inference: "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable

nexus is not established as a matter of law." *Thein*, 138 Wn.2d at 147. Thus in that case, where the only evidence was that the defendant was dealing on the street, the Court found a lack of probable cause. Here, on the other hand, the evidence presented in the affidavit showed that Davis repeatedly dealt from her motel room. That she moved to a different room in the same motel after the first two occurred sales does not render evidence that she hold sold from her previous room irrelevant to the question of whether she would have evidence of drug dealing the room she was currently occupying. Therefore the buys conducted by both White and Sutton were relevant to probable cause.

3. Knowledge and Veracity

When the existence of probable cause depends on information supplied by an informant, the two-prong *Aguilar–Spinelli* test[2] must be satisfied. *Cole*, 128 Wn.2d at 287. For an informant's information to create probable cause, the affidavit must set forth (1) circumstances from which the informant drew his information so that a magistrate can independently evaluate the informant's basis of knowledge (the "basis of knowledge" prong) and (2) underlying circumstances establishing that the informant was credible or his information reliable (the "veracity" prong). *State v. Jackson*,

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[2] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

102 Wn.2d 432, 433, 435, 688 P.2d 136 (1984).

The basis of knowledge prong is satisfied if the informant relays information of a crime he or she has witnessed firsthand. *Jackson*, 102 Wn.2d at 437. The veracity prong is satisfied by showing that the informant provided accurate information to the police in the past. *Id.*

State v. Casto, 39 Wn. App. 229, 692 P.2d 890 (1984), is instructive. In that case, the informant reported to police that he could purchase drugs in the defendant's residence. Police then arranged for the informant to make a purchase with marked bills and searched the informant before he entered the transaction. Police maintained surveillance on the informant before he entered the residence. Upon searching him when he returned, police found drugs. The court in *Casto* explained that a controlled buy is sufficient to establish informant reliability and satisfy both prongs of *Aguilar–Spinelli* when an informant "'goes in empty and comes out full'" under controlled circumstances, i.e., when police search him for contraband before the buy and observe him en route to the deal. *Casto*, 39 Wn. App. at 234. By returning from the controlled buy with contraband, an informant "proves the truth of his earlier assertion and establishes his own credibility, at the same time obtaining information for the law enforcement investigation. Such an

informant has a reason to be reliable." *Casto*, 39 Wn. App. at 235.

a. Knowledge

Davis concedes that the affidavit establishes White's basis of knowledge. Brief of Appellant at 12. Davis does not address the basis of Sutton's knowledge, presumably relying on her contention that her knowledge was irrelevant. As previously addressed, that contention is flawed, however.

Moreover, the affidavit also shows that Sutton also had a sufficient basis of knowledge. It observed that the CI (Sutton) had twice purchased methamphetamine from Davis in Room 108, had observed a scale, a pipe and packaging materials in the room. CP 268. It also stated that Sutton had made purchases and provided information in prior investigations that was found to be accurate and reliable when search warrants were executed. *Id.* It also noted that she had multiple prior drug convictions. *Id.*

b. Veracity

As noted veracity can be demonstrated by showing that the informant provided accurate information to the police in the past. Here, both Davis and Sutton had previously conducted buys as informants in other investigations and provided accurate and reliable information. CP 265, 268.

Additionally, circumstances may indicate a sufficient level of veracity

for an admission against interest by a criminal. It "can be said ... that one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys." 2 Wayne R. LaFave, *Search and Seizure* § 3.3(c), at 139 (4th ed.2004). If an informant provides information while knowing that discrepancies "'might go hard with him,'" that knowledge can be a reason to find the information reliable. 2 LaFave, § 3.3(c), at 139 (*quoting Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (JJ. Clark, Harlan, Stewart and White dissenting)). Washington's courts have adopted this reasoning. In *Jackson*, the Supreme Court stated that a declaration against the informant's penal interest can establish indicia of reliability. *Jackson*, 102 Wn.2d at 437.

Here, both Sutton and White confessed to criminal involvement in the use of methamphetamine. Moreover both were acting out of self interest, Sutton to attempt to ease her own problems with the justice system, and White on behalf of his girlfriend. The magistrate properly found that the veracity of the informants was established and that there was probable cause to search Davis's room.

C. DAVIS FAILS TO SHOW THAT COUNSEL'S FAILURE TO CHALLENGE THE SEARCH WARRANT WAS INEFFECTIVE ASSISTANCE.

Davis next claims that counsel was ineffective for not challenging the

warrant in the trial court. This claim is without merit because the warrant establishes probable cause on its face. Moreover, the record fails to show a basis for going beyond the face of the warrant.

1. Standard of Review

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

2. Facial Challenge

As discussed previously, the warrant in this case was facially sufficient to establish probable cause to search Davis's room. As such, Davis fails to show either deficient performance or prejudice.

3. Franks hearing

The record is also insufficient to establish that counsel was ineffective for not seeking a *Franks*[3] hearing. Normally, once issued, a search warrant is entitled to a presumption of validity, and courts will give great deference to the magistrate's determination of probable cause and resolve any doubts in favor of the warrant. *State v. Chenoweth*, 160 Wash.2d 454, 477, 158 P.3d 595 (2007). However, a warrant may be invalidated, and the fruits of a search may be suppressed, if the applying officer intentionally or recklessly

[3] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

omitted material information from the warrant affidavit. *Id.* A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, if he makes a substantial preliminary showing of the omissions and their materiality. *Franks*, 438 U.S. at 155–56.

An omission or misrepresentation of the facts made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); *State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992). Reckless disregard for the truth exists if affiant entertained serious doubt as to the truth of the information in the absence of the omitted facts. *State v. Clark*, 68 Wn. App. 592, 600-01, 844 P.2d 1029 (1993); *aff'd*, 124 Wn.2d 90 (1994). Serious doubt is demonstrated by "'(1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" *Clark*, 68 Wn.App. at 600-01 (*quoting State v. Jones*, 55 Wn. App. 343, 346, 777 P.2d 1053 (1989)).

Innocent or negligent omissions do not affect the validity of the warrant. *Garrison*, 118 Wn.2d at 872; *State v. Seagull*, 95 Wn .2d 898, 908, 632 P.2d 44 (1981). If the defendant fails to establish that the omission was deliberate or made with reckless disregard for the truth, then these omissions do not affect the validity of the warrant. *See Seagull*, 95 Wn.2d at 908; *State*

v. Taylor, 74 Wn. App. 111, 117, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994).

Here, Davis charges Musselwhite with omitting the facts that White was a meth addict, that he regularly bought at the Chieftain, and that he regularly did drugs with Davis. Davis fails on this record to establish that these alleged omissions were deliberate or reckless. Moreover, it is also difficult to see how they detract from White's credibility. That an informant is a drug user is hardly startling information, and that fact that White bought drugs at the Chieftain, and did drugs with the defendant if anything tend to bolster his basis of knowledge and credibility.

Davis next argues that Musselwhite made a false statement that Davis told White during the third buy (which occurred the parking lot) that she had moved to Room 102. Davis misreads the record. White testified on direct (in the portion cited by Davis) that he believed at the time that Davis was living on the third floor. 3RP 398. However, on cross-examination, he clarified his testimony, and explained that while he thought that when he arrived for the third buy, Davis was in fact not living on the third floor. 3RP 423. The record is actually silent as to when Davis actually moved and how or when White learned that she had changed rooms. He testified that he did not recall if "if she told me, or if I actually asked the clerk at the front desk that it was apartment right below the office." 3RP 408. The record thus does not

establish that the representation was even untrue, much less that it was made deliberately or recklessly.

Davis also faults Musselwhite for not indicating that there were multiple controlled buys (involving other suspects) occurring at the Chieftain.[4] However, other than the fact that another warrant was served, the record is silent as to when these other deals took place, which informants or suspects or officers were involved, or any other specifics. The record thus fails to show that the alleged omission was material, or whether it was reckless or deliberate. Moreover, the mere fact that other drug dealing was going on in the vicinity is again hardly shocking. Nothing in this fact detracts from the fact that on four occasions informants with personal knowledge of the defendant and proven track records purchased methamphetamine or counterfeit methamphetamine from Davis at this location.

Davis fails to show that he would even have been entitled to a *Franks* evidentiary hearing, much less that the evidence would have been suppressed if one had been held. As such he fails to prove either deficient performance or prejudice. This claim should be rejected.

---

[4] Davis also alleges, Brief of Appellant at 16, that there were multiple buys occurring the day the warrant was executed. In fact the testimony on the cited page was that one other *warrant* was being executed that day. 2RP 230-31. As this fact was not in existence at the time the warrant was sought, it is difficult to understand the relevance of this point. Davis also mischaracterizes White's testimony that "all the deals" were happening at the Chieftain. In fact his testimony was that that was why *Davis* dealing there. RP 404.

D. MOST OF THE IMPEACHMENT EVIDENCE DAVIS FAULTS THE COURT FOR EXCLUDING WAS ACTUALLY ADMITTED AND THE REMAINDER WAS PROPERLY LIMITED.

Davis next claims that her right to cross-examine the informants was unconstitutionally limited. This claim is without merit because most of the evidence she faults the court for excluding was actually admitted and the remainder was properly limited.

Both the United States Constitution and the Washington State Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses. U.S. Const. Amend. VI; Const. art. 1, § 22. Although the right to confrontation should be zealously guarded, that right is not without limitation. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (the right to confrontation is not absolute). The right to confrontation, and the associated right to cross-examine adverse witnesses, are limited by general considerations of relevance. *Id.* There is no constitutional right to admission of irrelevant evidence. *Darden*, 145 Wn.2d at 624.

1. Sutton

First it must be noted that Davis misrepresents the court's rulings. *See* Brief of Appellant at 19. While it initially ruled that the evidence concerning Barbara Ivy was collateral, 1RP 40-41, after hearing an offer of

proof from Sutton, 2RP 112-18, the Court reversed its prior ruling. It then ruled that all of Sutton's activities at the Chieftain from November 16 through December 3 were admissible, including both her activities with Ivy and her drug use and (unauthorized) dealings with Davis. 2RP 124.

Indeed, Sutton testified on direct that she and her husband had purchased methamphetamine from Davis in between the two controlled buys, and smoked some of it with her. 3RP 350, 369-72. It was pointed out that this was a violation of her agreement. 3RP 370. She also testified that she bought drugs from Barb Ivy during this period as well. 3RP 372-73. These points were also explored on cross. 3RP 376-79.

Likewise, the Court initially planned to limit the discussion of the drugs and paraphernalia the detectives found in Sutton's car before the first controlled buy. 1RP 35-36. However, the court almost immediately reversed itself:

> THE COURT: Just so we're clear. What was found in the car is going to come in. Mr. Thimons can cross-examine her about who the needle, residue, and baggie belonged to and she can explain. So all that is coming in.

1RP 37-38. And again, Sutton testified about the items that the detectives found in her car before the first buy. 3RP 352. On cross, Davis again discussed the implications of these items in terms of her contract with the police. 3RP 380. Counsel ended his cross-examination of Sutton with the

following exchange:

> Q. Okay. When you were doing the contract with the detective, you knew that -- you were trying to work off a serious situation you were in, correct?
>
> A. Yes.
>
> Q. And even with that, you still engaged in criminal activity, correct?
>
> A. Yeah. Basically I thought maybe I could get away with doing what I was still doing and yet still -- it's called criminal thinking, sir.

3RP 381.

That leaves only two items that court actually limited: that Sutton received a 100-month sentence, and that she was arrested after the second buy for buying methamphetamine from another informant. Davis fails to show that either fact was relevant and admissible impeachment.

Davis did elicit from Sutton that she was working off charges and was facing a lengthy sentence at the time of the buys. 3RP 377. Davis had additionally sought before trial to elicit testimony that the sentence was 100 months. CP 35; 1RP 28-31.

Davis failed below, however, as she does now, to explain why her receiving a 100-month sentence would be relevant. To the contrary, it appears that she had already been sentenced at the time of trial. Once the sentence had been imposed, it is difficult to see how its length had any relevance at all. There was no evidence whatsoever that the State would

consider seeking to reduce the sentence based on her trial testimony.

Likewise, Davis fails to explain how the fact of Sutton's arrest would be relevant to impeach her. Sutton was asked about and admitted to buying and using drugs in violation of her contract. She admitted that she did it because she thought she could get away with it. Finally, given the extensive impeachment to which Sutton was subjected, it difficult to see how the exclusion of this one additional fact, particularly where she admitted the underlying conduct, could have possibly affected the outcome of the trial. Any purported error would be harmless.

2. White

Davis also faults the court for excluding evidence that some five months after her arrest, White again attempted to steal some of the methamphetamine that he obtained during a controlled buy in which he was acting as a paid informant. Davis, however, fails again to cite any authority in support of her claim that this was error.

Cross-examination "'to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court.'" *State v. Kunze*, 97 Wn. App. 832, 988 P.2d 977 (1999) (*quoting State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)). Under ER 608(b) impeachment with specific instances of

misconduct is subject to the discretion of the trial court. Failing to allow cross-examination of a crucial State's witness under ER 608(b) is an abuse of discretion only if the alleged misconduct constitutes the only available impeachment. *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). Once the witness is impeached, there is less need for further impeachment on cross. *Id.*

Additionally, "not every instance of ... even a key witness's ... misconduct is probative of a witness's truthfulness or untruthfulness under ER 608(b)." *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). Relevant considerations to the court's exercise of discretion in admitting ER 608 evidence include whether the evidence is collateral to the question presented in the litigation and whether there are alternative avenues available for impeachment. *O'Connor*, 155 Wn.2d at 351-52. If the misconduct involved lying, whether the lying occurred under oath is also relevant. *Id.*

In *O'Connor*, which involved a far less collateral issue, the Supreme Court found that the trial court properly limited the cross examination. Here, the subsequent theft was neither shown to have been charged as a crime or to have involved lying under oath. More importantly, White was thoroughly impeached both on direct and cross-examination. It was brought out that he was a meth user and addict. 3RP 390, 421. The State inquired into White's taking of some of the drugs during the fourth controlled buy. 3RP 418-20.

On cross, the defense delved into the subject at length and in detail. 3RP 426-29. Davis also got White to admit that he violated his agreements to be truthful, to not engage in criminal activity, and to not consume drugs. 3RP 426. She brought out that he had lied to the officers about stealing the meth, 3RP 427, and that he had lied when he denied taking it during the pre-trial interview with the defense a few weeks before trial. 3RP 429. Davis also cross-examined White regarding the buy of the counterfeit substance and the failure of the video camera, with the tone of the examination suggesting that White was lying about these incidents as well. Given this substantial impeachment, it cannot be said that the trial court abused its discretion in limiting evidence of an event that was unrelated to Davis's crimes and was remote in time and place. For the same reason, any error would be harmless.

E. DETECTIVE MUSSELWHITE'S BRIEF TESTIMONY THAT DAVIS TOLD SUTTON SHE HAD METHAMPHETAMINE AVAILABLE TO SELL, WHILE HEARSAY, WAS HARMLESS.

Davis next claims that the trial court erred in allowing Musselwhite to testify that Sutton told him Davis had methamphetamine to sell. The State would agree that the evidence was hearsay and not relevant to show context. *See State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

Nevertheless, the error was harmless. An evidentiary error by the trial

court such as admission of hearsay testimony is harmless unless, within reasonable probability, the outcome of the trial would have been materially different. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

Musselwhite's testimony was brief:

> Q. What did Ms. Sutton tell you with respect to setting up this controlled buy –
>
> A. She told me –
>
> Q. -- limited to that.
>
> A. She told me she called Tawana and asked if she could purchase -- if she had methamphetamine available for purchase and she was -- Tawana told her that there was methamphetamine available for purchase.

2RP 166. Moreover, it was completely redundant to Sutton's own non-hearsay testimony:

> Q. All right. So turning to, let's focus on the November 16th buy.
>
> How was that particular deal arranged? Explain how you came into the contact with the defendant, what your conversation was?
>
> A. On that particular day, I had called that morning to ask if she was going to be available and when I could stop by. I said what I wanted. I asked her at that time if I could do a gram for 80 to get a special deal, and she said that she could probably do that. She said that we'd have to do it about noon because that was her lunch hour.

3RP 351. Sutton also provided similar testimony regarding the second buy:

> Q. Okay. I want to move now to the second controlled buy on December 3rd.
>
> How was this second deal arranged?

A. Pretty much the same way over the phone that morning. Again, she said I had to wait until noon, her lunch hour. I said, okay.

Q. Okay. And what was the agreement, what was the price and the drugs, the quantity?

A. She couldn't do a gram that day. So I was only buying a 40, four tenths of a gram.

Q. For how much?

A. $40.

3RP 364.

Additionally, both informants testified that Davis in fact supplied them with methamphetamine, and returned from the motel to provide the methamphetamine to the police. As such, especially considering that the declarant presented the same testimony as that briefly mentioned by the detective, and described a second incident where Davis again told her that she could supply methamphetamine, it is difficult to see how exclusion of this very brief testimony could have changed the outcome of the case. Because the error was harmless, this claim should be rejected.

F. THE SUFFICIENCY OF THE EVIDENCE CLAIM PERTAINING TO COUNT III IS MOOT WHERE THE JURY ACQUITTED DAVIS OF THAT CHARGE.

Davis next claims that the evidence was insufficient to support her conviction of delivery of a substance in lieu of a controlled substance. Davis again misapprehends the standard of review as discussed above. However,

since Davis was in fact acquitted of this charge, the point is moot in any event.

G. THE CRIME OF UNLAWFUL USE OF BUILDING FOR DRUG PURPOSES IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO DAVIS'S CONDUCT.

Davis next claims that the crime of unlawful use of building for drug purposes is unconstitutionally vague as applied to her conduct. Davis fails to demonstrate vagueness.

Vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. *Spokane v. Douglass*, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990). Because the present claim does not involve Davis's First-Amendment rights, the statute must be judged as applied. *Id.* Accordingly, the statute is tested for unconstitutional vagueness by inspecting her actual conduct and not by examining hypothetical situations at the periphery of the statute's scope. *Id.* In an as-applied challenge, if persons of ordinary intelligence can understand a penal statute, it is not vague for uncertainty. *State v. Sigman*, 118 Wn.2d 442, 446, 826 P.2d 144 (1992).

RCW 69.53.101(1) provides in pertinent part:

> It is unlawful for any person who has under his or her ... control any ... room ... as ... lessee [or] employee, ... to

> knowingly ... make available for use, with or without compensation, the ... room ... for the purpose of unlawfully ... delivering, selling, storing, or giving away any controlled substance ...

The term "make available" is an extremely common one that is easily understood by persons of normal intelligence. Here Davis clearly made her room available for the sale and delivery of methamphetamine to Sutton and White.

Davis relies primarily upon an argument that has been specifically rejected by the Washington Supreme Court: that the term "make available" must be read as similar to renting or leasing:

> The Court of Appeals erred in holding that "the term 'make available' be read only as contemplating an act similar to renting or leasing." ... That reading of the statute ignores the disjunctive "or". The statute is perfectly plain in declaring it unlawful to "knowingly rent, lease, *or* make available". (Italics ours.) RCW 69.53.010(1). To reach the conclusion of the Court of Appeals one must ignore the disjunctive "or" and one must fail to read the statute as a whole. That is contrary to relevant rules of construction

Sigman, 118 Wn.2d at 447-448. The Court went on to quote with approval the Ninth Circuit's rejection, under an analogous federal statute, of a claim similar to Davis's:

> In *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir.1991), the Ninth Circuit stated: "section 856(a)(2) requires only that proscribed activity was present, that ... [the defendant] knew of the activity and allowed that activity to continue." *See also United States v. Martinez-Duran*, 927 F.2d 453, 457 (9th Cir. 1991); *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990).

Sigman, 118 Wn.2d at 447-448 (editing the Court's).

Davis alleges that it is not reasonable to suppose the Legislature intended to "increase the penalties for drug offenses committed in the privacy of the defendant's own room." Brief of Appellant at 28. Davis asks this Court to engage in statutory construction where none is needed.

In interpreting a statute, the fundamental objective is to ascertain and carry out the Legislature's intent. *State v. Gray*, ___ Wn.2d ___, ¶ 11, 280 P.3d 1110 (2012). Statutory interpretation begins with a statute's plain meaning. *Id.* Plain meaning is to be discerned from the ordinary meaning of the language at issue. *Id.* If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *Id.* A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. Here, the meaning of the statute is plain, and as such no further inquiry is required.

Moreover, even were a further examination of Legislative intent required, Davis offers no evidence of what the Legislative intent was, other than her own dudgeon for committing her offenses in the "privacy of her own room." In response the State would question why the Legislature might not want to punish her for such usage. The statute requires more than mere use:

it requires manufacturing, sales or deliveries or storage. Such uses are just as deleterious to the neighbors in her building whether the room is her residence or at another location she controls.

Further, the statute does include a defense. An unknowing proprietor can avoid criminal liability. RCW 69.53.010(2). Notably the Legislature did not make residence on the premises a defense. This claim should be rejected.

H. THE EVIDENCE WAS SUFFICIENCT TO SHOW THAT DAVIS COMMITTED HER CRIMES IN A SCHOOL ZONE.

Davis finally claims that the evidence was insufficient to establish the school-zone sentencing enhancement. This claim is without merit because the State showed that the crime occurred both within 1000 feet of a school bus stop and within 1000 feet of a school.

1. Bus stop

Without citation to any authority, Davis argues that the bus stop must be within 1000 feet of the scene of the crime as measured via a sidewalk or road. This is so, she says because crows are not subject to the statute so distance "as the crow flies" is immaterial. While RCW 69.50.435(1)(c) may not apply to crows, it just as surely contains no requirement that someone measure the distance on foot.

To the contrary, the statute specifically authorizes the method of proof

used in this case:

> ... This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

RCW 69.50.435(5). Because the uncontradicted evidence in this case showed that the site of the crime was within 1000 feet of the bus stop, this claim should be rejected.

2. School

Under RCW 69.50.435(1) a violation of RCW 69.50.401 is subject to so-called school-zone enhancements if the crime takes place, inter alia:[5]

> (a) In a school;
>
> (b) On a school bus;
>
> (c) Within one thousand feet of a school bus route stop designated by the school district;
>
> (d) Within one thousand feet of the perimeter of the school grounds; ... or
>
> (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

Davis argues that under the last antecedent rule, "the school" must be the one served by the bus stop referenced in paragraph (c). This contention defies both normal statutory interpretation and common sense.

---

[5] *See* RCW 9.94A.533(6).

First, Davis misunderstands the last antecedent rule. "[U]nless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent." *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 781–82, 903 P.2d 443 (1995). The problem with her interpretation is that "Within one thousand feet of the perimeter of the school grounds" cannot in any way be considered a qualifying phrase of "Within one thousand feet of a school bus route stop designated by the school district." Each term in this list is plainly independent from the others.

Further, even if the rule did apply, a contrary intention would appear in the statute. First, "school" is specifically defined under the statute and has the meaning ascribed to it under RCW 28A.150.010 or 28A.150.020. RCW 69.50.435(6)(a). RCW 28A.150.010 provides:

> Public schools shall mean the common schools as referred to in Article IX of the state Constitution and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.

RCW 28A.150.020 further explains:

> "Common schools" means schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade or any part thereof including vocational educational courses otherwise permitted by law.

Nothing in these definitions limits the term "school" in the manner Davis would have it.

Further the definition of school "also includes a private school." RCW 69.50.435(6)(a). However, "'school bus route stop' means a school bus stop as designated by a school district. RCW 69.50.435(6)(c). Davis's interpretation would exclude schools specifically included in the statutory definition of "school" because public school buses do not transport children to private schools.

Davis's interpretation also defies common sense. It is unlikely there are very many school bus stops within 1000 feet of the schools they serve. Davis's reading of the statute would effectively read paragraph (d) out of the statute.

This statute is not comparable to the situation in the accomplice liability statute. The most likely reason for the use of the word "the" is that "Within one thousand feet of the perimeter of *a* school grounds" would be a peculiar construction. The statute is plain on its face, and clearly refers to *any* school within 1000 feet of the crime. This contention should be rejected.

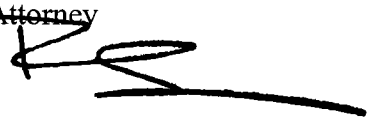
IV. CONCLUSION

For the foregoing reasons, Davis's conviction and sentence should be affirmed.

DATED September 25, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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