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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 335⁷¹~~17~~-9-II

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

STATE OF WASHINGTON

Respondent,

v.

MICHAEL B. JOHNSON,

Appellants.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

In 2003 police became aware that Michael Johnson may be drugs selling drugs out of the house at 20 Levanders Street in Stevenson, Washington. RP 24, 25, 26. The police used Tracy Foster, a citizen informant, to make several controlled buys of methamphetamine from the house at 20 Levanders Street. RP 29, 32, 35, 39, 43-44, 141, 145, 146-148. The police executed a search warrant on Michael Johnson's house on January 30, 2004. RP 46, 92-93. During the execution of the search warrant the police located a safe in Michael Johnson's bedroom. RP 48, 94. Inside the safe the police located a digital scale, plastic Ziplock baggies, cash and a baggy of methamphetamine RP 95, 100-102. The police also found marijuana less than 40 grams during the execution of the search warrant. RP 118.

At Michael Johnson's jury trial there was evidence submitted that 20 Levanders Street was 550 feet from Stevenson Elementary School. RP 127. Detective Scheyer testified that she used a digital range finder to measure the distance between the house and the school. RP 121, 125-126. Detective

Scheyer testified that the distance between the house and the school was approximately one city block and that the distance of one city block is about 550 feet. RP 127. Detective Scheyer also testified she was trained to use the range finder by Detective Sergeant Monty Buetnner. RP 122.

The jury found Michael Johnson guilty of three counts of Delivery of Methamphetamine, one count of Possession of Methamphetamine and one count of Possession of Marijuana. CP 163-170, RP 238-239. The jury also returned a special verdict finding that Michael Johnson delivered methamphetamine within 1,000 feet of the perimeter of a school ground. CP 163-170, RP 239. Mr. Johnson was given the standard sentencing range CP 201-212.

II. ARGUMENT

A. The Defendant Received Effective Assistance Of Counsel.

Appellant argues that he received ineffective assistance of counsel because counsel elicited the date of delivery of methamphetamine on Count III.

The Appellant contends that the State had failed to elicit proof of this element and it was prejudicial for Appellant's counsel to do so in cross examination. Brief of Appellant 9. In reviewing a claim for ineffective assistance of counsel the court's "scrutiny of counsel's performance must be highly deferential." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). When evaluating ineffective assistance of counsel claims the court must presume that counsel was competent. Strickland v. Washington, 466 U.S. at 689; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563, 571 (1996). The two-part test for ineffective assistance of counsel established by the Court in Strickland is, 1) defendant must demonstrate that counsel's performance was deficient and 2) the defendant was prejudiced by counsel's errors. State v. Hendrickson, 129 Wn.2d at 77-78. In part two of the test the defendant must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" State v. Hendrickson, 129 Wn.2d at 78, citing Strickland, 466 U.S. at 687.

In the case at hand Appellant argues that trial counsel was ineffective because he elicited testimony in cross examination that proved an essential part of the State's case which the State had failed to elicit in its direct examination. Brief of Appellant 7-8. The Appellant claims he was prejudiced by counsel's actions because but for counsel's elicited testimony the State could not have proven its case on Count III delivery of methamphetamine on January 27th, 2004. Brief of the Appellant 9.

For the jury to make a finding of guilt for Delivery of Methamphetamine, as charged in Count III of the information, they were instructed that they must find the following: "That on or about the 27th day of January, 2004, the defendant delivered a controlled substance." CP 147. There was testimony from Skamania County Sheriff's Deputy Ty McKay that on January 16th, 2004 Tracy Foster made a controlled buy from Michael Johnson. RP 42. Deputy McKay also testified that after January 16th, 2004 he contacted Tracy Foster to make one more controlled buy. RP 42. Tracy Foster made one more controlled buy for twenty dollars worth of methamphetamine. RP 43,

146-147. Deputy McKay testified that Mr. Foster returned the methamphetamine to Deputy McKay, Deputy McKay field tested the methamphetamine and then sent it up to the crime lab. RP 44-45. Deputy McKay further testified that on the envelope he sent up to the crime lab he put the case number on it, the date and initialed it. RP 45. The date on the envelope was 1/27 of '04. RP 45.

The jury was required to find that Appellant had committed Count III on or about January 27, 2004. The testimony at trial is clearly states that Mr. Foster gave a baggy of meth to Deputy McKay and that baggy was sealed in an envelop on January 27, 2004 to be sent to the crime lab for testing. RP 44-45. The standard for establishing prejudice is clear, the Appellant must show that prejudice exists "when a reasonable probability exists that but for the deficiency [of counsel], the result of the trial would have been different. State v. Lopez, 107 Wn. App. 270, 277, 27 P.3d 237 (2001), *affirmed by*, 147 Wn. 2d 515, 55 P.3d 609 (2002) . The Court when making a determination regarding the ineffective assistance of counsel "must consider the totality of the evidence before the judge or jury." Strickland

v. Washington, 466 U.S. at 695. In the case at hand, looking at the totality of the evidence presented by the state, it is reasonable for a jury to have found the Appellant guilty of Delivery of Methamphetamine in Count III and any possible error made by counsel did not prejudice the Appellant.

B. The Trial Court Properly Admitted Evidence That The Defendant Delivered Methamphetamine Within One Thousand Feet Of A School Zone.

The trial court properly admitted into evidence, through the testimony of Detective Summer Scheyer, the distance between 20 Leavens Street to the Stevenson Elementary School, which was 550 feet. RP 125-127. When reviewing rulings on the admissibility of evidence the standard of review is abuse of discretion. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997), *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Ohlson, 131 Wn. App. 71, 76, 125 P.3d 990, 993 (2005).

The Appellant argues the court abused its discretion by allowing Detective Scheyer to testify that the distance between 20 Leavens Street and Stevenson Elementary School was five-hundred and fifty-five (555) feet. Brief of Appellant 11-12. The Appellant's reasoning is there was no tenable grounds in which the court could have decided to admit the evidence. Brief of Appellant 12. Yet, when one reads the transcript it is clear the court had tenable grounds in which it decided to admit the evidence of the distance between the house and the school. The Prosecutor asked Detective Scheyer to explain how the range finder worked and she explained that it produces a digital readout of the distance between two points. RP 125. Detective Scheyer went on to explain to use the range finder a person merely has point it in the direction you want to measure and line up the cross-hairs with the area you want to measure out. RP 125. Detective Scheyer then explained that she was on the grassy knoll at the elementary school and placed the cross-hairs on the roof of 20 Leavens Street to obtain a digital readout of the distance between the two. RP 124-125. Detective Scheyer went on to testify that the digital readout was consistent with what she

would have estimated the distance to be. RP 126. Detective Scheyer testified that the distance was approximately one city block and that distance is approximately five-hundred and fifty-five feet. RP 127. Detective Scheyer testified that the distance between 20 Leavens Street and the elementary school was five-hundred and fifty-five feet. RP 127.

The court did not abuse its discretion because it had more than enough tenable grounds for admitting the evidence of the distance between the elementary school and the residence at 20 Leavens Street. Detective Scheyer testified to her knowledge of the range-finder, how it operates, her estimated distance, that it was consistent with one city block which is approximately five-hundred and fifty-five feet and that the digital readout was consistent to her estimated distance. Defense counsels objection to statement of the distance was not timely because Detective Scheyer had established her basis for knowing the distance between the residence and the school and had already answered that it was five-hundred and fifty-five feet.

III. CONCLUSION

For the reasons stated above, the State respectfully requests that the court affirm the defendant's conviction and dismiss the appeal.

Respectfully Submitted this 12th day of May,
2006.

A handwritten signature in black ink, appearing to read 'Adam N. Kick', written over a horizontal line.

ADAM N. KICK, WSBA # 27525
Deputy Prosecuting Attorney

