Original

No. 35468-3-II
COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES H. MCINTYRE,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge James B. Sawyer II
Cause No. 06-1-00233-4

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury on the affirmative defense of unwitting possession.

2. The trial court erred in permitting McIntyre to be represented by counsel who provided ineffective assistance of counsel by failing to tender to the court the unwitting possession instruction he requested.

3. The trial court erred in ordering that McIntyre participate in the MRT +/or victim awareness education program and successfully complete a certified domestic violence counseling program and not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err by denying McIntyre's request to have an unwitting possession instruction presented to the jury when the State presented ample testimony and evidence to prove that he knowingly possessed methamphetamine?

2. Did the trial court err by permitting McIntyre to be represented by counsel who specifically requested that an unwitting possession instruction be provided to the jury?

3. Did the trial court err by ordering McIntyre to: (a) participate in MRT[1] and/or victim awareness education; and (b) not to go into bars, taverns, lounges or other places whose primary business is the sale of liquor when he was (c) convicted of a felony-level violation of the Uniform Controlled Substance Act and (d) at sentencing had an offender score of 9+?

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[1] Moral Reconation Therapy.

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C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." Clerk's Papers will be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2: Procedural History and Statement of Facts. Pursuant to RAP 10.3(b), the State accepts McIntyre's recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err by denying McIntyre's request to have an unwitting possession instruction presented to the jury because the State presented ample testimony and evidence to prove that he knowingly possessed methamphetamine. McIntyre also received effective assistance of counsel because his attorney requested that the trial court give an unwitting possession instruction to the jury.

Lastly, the trial court did not err by ordering McIntyre to: (a) participate in MRT and/or victim awareness education and/or (b) not to go into bars, taverns, lounges or other places whose primary business is the sale of liquor. McIntyre was convicted of a felony-level violation of the Uniform Controlled Substance Act in this case and at sentencing had an offender score of 9+. Because the legislature allows for the imposition of crime-related treatment, counseling services and/or prohibitions under

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RCW 9.94A.700 for violations of the Uniform Controlled Substances Act under RCW 69.50, the trial court did not err. The State concedes, however, that because domestic violence was not at issue in McIntyre's case, that the trial court erred by ordering him to participate in and successfully complete a certified domestic violence counseling program. The State asks the Court to remand this particular issue back to the trial so that the judgment and sentence (J&S) may be corrected. The judgment and sentence of the trial court is otherwise correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY DENYING MCINTYRE'S REQUEST TO HAVE AN UNWITTING POSSESSION INSTRUCTION PRESENTED TO THE JURY BECAUSE THE STATE PRESENTED AMPLE TESTIMONY AND EVIDENCE THAT MCINTYRE KNOWINGLY POSSESSED METHAMPHETAMINE.

The trial court did not err by denying McIntyre's request to have an unwitting possession instruction presented to the jury because the State presented ample testimony and evidence that McIntyre knowingly possessed methamphetamine.

Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance. *State v. Buford*, 93 Wn.App. 149, 150, 967 P.2d

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548 (1998). The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. *Buford* at 150-151. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. Generally, an instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. *Buford* at 151; *see State v. Trujillo*, 75 Wn.App. 913, 917, 883 P.2d 329 (1994).

The facts of *Buford* are partially analogous to McIntyre's case because they involve the possession of narcotics. In *Buford*, the defendant was convicted of possession of cocaine because a small amount of that drug was found in a crack pipe under his hat. *Buford* at 149. The court in *Buford* reasoned that:

> [T]he only evidence that could arguably support Buford's claim that he unwittingly possessed the cocaine is that the amount of cocaine seized was small and had to be scraped out of the crack pipe with a scalpel. But, this evidence, without more, does not support an inference that Buford unwittingly possessed the cocaine. In fact, as the State contends, Buford's proposed [unwitting possession] instruction would have invited the jury to engage in speculation or conjecture. *Buford* at 153.

At McIntyre's trial, testimony was given that deputies found two syringes and "some…real small Ziploc baggies" in the center console of the jeep in which McIntyre was a passenger. RP 43: 1-3. Although the Ziploc

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baggies were empty, one of the two syringes contained a "yellowish substance." RP 42: 4-6, 17-19. A red Marlboro bag that Tonya Glenn said McIntyre "had" on the morning of the incident was located directly behind him in the jeep. RP 181: 10; 43: 10-12. The red bag contained another syringe with a yellowish substance, an inmate card with McIntyre's photo, men's clothing and a coin-holder packed with multiple, Ziploc baggies that contained white crystals. RP 43: 12-25; 44: 1-3. The white crystals later tested positive for methamphetamine. RP 163: 7-8. Underneath the red bag behind McIntyre's seat was a locked, metal contained that when opened contained drug paraphernalia, scales, and a glass pipe used to smoke methamphetamine. RP 44: 6-14.

The distinction between *Buford* and McIntyre's case is that while defendant Buford had a crack pipe seized from under his hat, law enforcement found methamphetamine in the red Marlboro bag that contained McIntyre's photo identification. In addition, Tonya Glenn testified that McIntyre "had" the red bag when she "picked him up." RP 181: 5-6. As the court reasoned in *Buford*, the burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Here, McIntyre failed to meet that burden.

If the trial court had given an unwitting possession instruction in

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McIntyre's case, it would have had the effect that the *Buford* court tried to avoid, in that it would have invited the jury to speculate or conjecture. Considering all the testimony and evidence that was admitted at McIntyre's trial, the court did not err in declining to give the jury an unwitting possession instruction because it was not established that it was more probably true than not true that McIntyre unwittingly possessed methamphetamine.

2. THE TRIAL COURT DID NOT ERR BY PERMITTING MCINTYRE TO BE REPRESENTED BY COUNSEL WHO SPECIFICALLY REQUESTED THAT AN UNWITTING POSSESSION INSTRUCTION BE GIVEN TO THE JURY BECAUSE THAT ATTORNEY PROVIDED EFFECTIVE REPRESENTATION.

The trial court did not err by permitting McIntyre to be represented by counsel who specifically requested that an unwitting possession instruction be given to the jury because that attorney provided effective representation.

Effective assistance of counsel does not mean 'successful assistance of counsel.' *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969). An attorney "actively" represents a defendant when he [or she] enters an appearance

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on behalf of a criminal defendant, consults with him [or her] for the purpose of preparing a defense investigates his [or her] case…confers with co-counsel on strategy [and/or] offers the defendant legal advice. *Dorsey v. King County*, 151 Wash.App. 664, 672, 754 P.2d 1255 (1988).

Counsel for McIntyre made the following record regarding his stance on the unwitting possession instruction:

> I believe it's WPIC 52.01, the unwitting possession instruction…[W]e discussed this in chambers…and the packet, as proposed, doesn't contain that instruction. My position, on behalf of Mr. McIntyre, is that there is evidence of unwitting possession. RP 210: 2-7.

McIntyre's attorney also stated that he wanted the court to include the unwitting possession instruction because of what he felt was a "glaring gap" in the chain of custody between McIntyre and his possession of the red Marlboro bag, and the credibility of State's witness Tonya Glenn. RP 211: 16; 210: 10-11. After the trial court denied defense counsel's request, McIntyre's attorney stated:

> I appreciate the opportunity to make the record…[and] I I think [that] I've made a rather complete record…I feel [however] that I'll be considerably hamstrung in my [closing] argument. RP 216: 10-16.

The record from the trial court demonstrates that counsel for McIntyre actively represented his client and was simply unsuccessful in having an unwitting possession instruction given to the jury.

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3. THE TRIAL COURT DID NOT ERR BY ORDERING MCINTYRE TO:
   (A) PARTICIPATE IN THE MRT AND/OR VICTIM AWARENESS EDUCATION PROGRAM; AND/OR
   (B) TO NOT GO INTO BARS, TAVERNS, LOUNGES OR OTHER PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR,

   BECAUSE THE TRIAL COURT MAY ORDER AN OFFENDER TO COMPLY WITH ALL CRIME-RELATED PROHIBITIONS.

The trial court did not err by ordering McIntyre to (a) participate in the MRT and/or victim awareness education program and/or (b) not go into bars, taverns, lounges or other places whose primary business is the sale of liquor, because the trial court may order an offender to comply with all crime-related prohibitions. The State concedes, however, that because domestic violence was not at issue in McIntyre's case, that the trial court erred by ordering him to participate in and successfully complete a certified domestic violence counseling program. The State asks the Court to remand on this particular issue to correct the J&S.

The [trial] court shall order a one-year term of community placement for…A felony offense under chapter 69.50 or 69.52 not sentenced under RCW 9.94A.660. RCW 9.94A.700(1)(iv). Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions…The

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offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions...The offender shall participate in crime-related treatment or counseling services...The offender shall not consume alcohol...The offender shall comply with any crime-related prohibitions. RCW 9.94A.700(4)(c), (5)(c),(d), (e).

The facts of *State v. Jones* are partially analogous to McIntyre's case, because they involve how that a trial court may condition the terms of community custody. In *Jones*, the defendant pled guilty to burglary in the first degree and other crimes. *State v. Jones*, 118 Wash.App. 199, 202, 76 P.3d 258 (2003). Counsel for Jones stated that his client had used methamphetamine when he (Jones) committed these crimes. *Jones* at 202. Although no evidence was presented that alcohol had contributed to Jones' criminal activity, the trial court ordered him:

> [T]o engage in law-abiding behavior; not to consume alcohol; to participate in alcohol counseling, mental health treatment , and mental health counseling; to take his medications as prescribed; and not to drive without a valid license and insurance. *Jones* at 202.

Although the trial court in *Jones* noted that it dealt with amendments to the Sentencing Reform Act (SRA) as it was in 2001, it also stated that "these amendments remain in effect today [2003]." *Jones* at 205. Specifically, the court in *Jones* ruled that the plain terms of the SRA

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when sentencing for burglary in the first degree:

> [P]ermit a court to order an offender to perform affirmative conduct reasonably related to the offender's risk of reoffending or to the safety of the community. Such conduct includes obeying the community's laws. *Jones* at 205.

Applying the rationale of *Jones* to McIntyre's sentence, the trial court was well within its discretion when it ordered McIntyre to: (a) participate in the MRT [Moral Reconation Therapy] and/or victim awareness education program; and (b) not go into bars, taverns, lounges or other places whose primary business is the sale of liquor. The trial court did not err because at McIntyre's sentencing his offender score was 9+ and included five VUCSA convictions, making his risk to re-offend at that time high. When McIntyre stated at sentencing that his conviction under this appeal was simply the result of his being at "the wrong place at the wrong time [with the] [w]rong people," the trial court succinctly pointed out that his rationale:

> Doesn't work...The reason it doesn't work is [because] you've got 11 felony convictions. Wrong place, wrong time maybe works once, but 11 convictions? Start looking in the mirror, Mr. McIntyre...You're the guy. You're the one that's committing these crimes. You're the one that's the mover on this, and it isn't the wrong person, wrong place, wrong time. You need to start accepting your responsibility. You're absolutely responsible.
> RP 299: 21-25; 300: 1-13.

The trial court had the authority to order McIntyre to complete the terms

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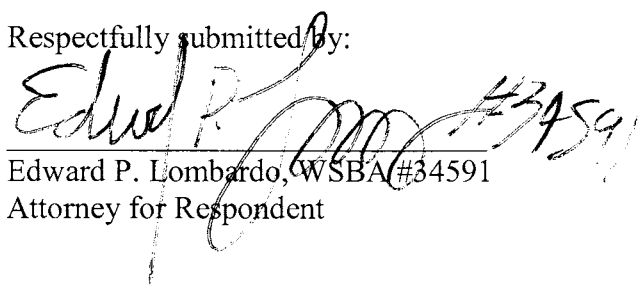
and conditions of community custody as outlined because they were reasonably related to lowering McIntyre's risk of reoffending and helped to maintain community safety. Given McIntyre's criminal history of substance abuse, the trial court's order that McIntyre not go into bars, taverns, lounges or other places whose primary business is the sale of liquor was entirely reasonable. No error occurred when McIntyre was sentenced to these terms and conditions.

F. CONCLUSION

Except for the issue regarding the domestic violence counseling program, the State respectfully requests that the Court find the judgment and sentence of the trial court to be correct and affirm. The State also requests that the issue regarding the domestic violence counseling be remanded to the trial court so that the judgement and sentence may be corrected.

Dated this 25th day of June, 2007.

Respectfully submitted by:



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

STATE OF WASHINGTON, Respondent, vs. JAMES H. MCINTYRE, Appellant,	)	No. 35468-3-II DECLARATION OF FILING/MAILING PROOF OF SERVICE

I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, JUNE 25, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 25TH day of JUNE, 2007, at Shelton, Washington.

Edward P. Lombardo, WSBA #34591

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