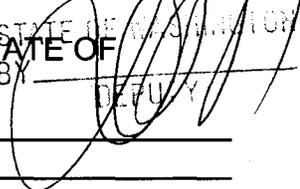


FILED  
COURT OF APPEALS  
DIVISION II

NO. 39219-4-II

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

STATE OF WASHINGTON  
BY   
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

RENATA LEE ABRAMSON,

Appellant.

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BRIEF OF APPELLANT

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MICHELLE BACON ADAMS  
WSBA #25200  
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Ms. Abramson's right to effective representation of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution was violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did trial counsel's failure to supplement the record, as previously ordered, at the time of the re-sentencing deprive Ms. Abramson of her right to effective assistance of counsel?  
(Assignment of Error No. 1)

C. STATEMENT OF THE CASE

Ms. Abramson was charged by way of an amended information of the following: Count I: Delivery of Methamphetamine, Count II: Possession of Methamphetamine, Count III: Possession of Methamphetamine with Intent to Deliver. CP 1-6. The information further alleged that Ms. Abramson was armed with a firearm in Count II, and armed with a firearm in Count III and the crime alleged in Count III occurred in a school zone. CP 1-6. Ms. Abramson was convicted of all counts. CP 37-45.

Ms. Abramson appealed the convictions. The appeal was considered by Division Two of the Court of Appeals in the case of *State v. Renata Lee Abramson*, Cause No. 35481-1-II. An unpublished decision in that matter was issued by the Court on July 22, 2008. A copy of the

decision is attached as Appendix A. During the pendency of the appeal, Division Two of the Court of Appeals ordered the appellant to designate and file with the Court supplemental Clerk's papers containing a full set of jury instructions or supplement the record. The order was issued on March 19, 2008.

Mr. Hester, appellant counsel for Ms. Abramson, responded to the order by sending a letter to the trial judge, Judge Mills, requesting her assistance in obtaining information regarding the jury instructions presented in the case. The letter was filed in the Kitsap County Court file on March 28, 2009.

Judge Mills responded to Mr. Hester's letter with a letter of her own. In that letter Judge Mills indicated that in her opinion the Order to Supplement the Record did not require any action to be taken by the trial court. However, Judge Mills also stated that if the parties reached an agreement on how to supplement the record, they could do so. Judge Mills also provided for a hearing to be set in the event court involvement was necessary.

An unpublished decision in the case of *State v. Abramson*, No. 35481-1-II, was issued on July 22, 2008. CP 7-36. The Court of Appeals reversed the school bus enhancement, but affirmed the convictions and firearms enhancement. In that decision, the Court found as follows: "...we note that Abramson's appellate counsel did not comply

with our court order and misinterpreted the Rules of Appellate Procedure.”

*State v. Abramson*, No. 35481-1-II, page 23, footnote 7.

The mandate was issued on February 23, 2009. CP 7-36.

Following the mandate, the trial court issued a note for motion docket setting a hearing to address the decision reached by the Court of Appeals.

The note for hearing was issued on March 13, 2009. The hearing to address the mandate was scheduled for April 3, 2009.

An order for production of Ms. Abramson was filed on March 16, 2009. Due to an error in that document, Ms. Abramson was not transferred to Kitsap County and the hearing was continued to April 17, 2009. RP 04/03/09, 2-4.

At the hearing of April 17, 2009, Mr. Anderson represented the State of Washington. The purpose of the hearing was to re-sentence Ms. Abramson in light of the decision reached by the Court of Appeals. RP 04/17/09 1-7. Mr. Arbenz represented Ms. Abramson and Ms. Abramson appeared at the hearing as well. RP 04/17/09, 2. Mr. Arbenz appeared on behalf of Mr. Hester, who had a conflict on the scheduled hearing date. RP 04/17/09, 2. Mr. Arbenz objected to any firearm enhancements.

“Mr. Arbenz: We would ask for the 24-month school zone enhancement which was reversed on appeal, be subtracted from the original 160-month sentence in this case. And for the record, Your Honor, we also are objecting to any firearm enhancements. Mr. Hester has

asked me to make sure that is on the record in this case, the imposition of firearm enhancements...”

RP 04/17/09, 4-5.

Judge Mills confirmed Mr. Arbenz’ sentencing proposal and discussed the objection raised by Mr. Arbenz:

“MR. ARBENZ: That’s what we’re proposing in this case.

THE COURT: But you’re still objecting to the firearm?

MR. ARBENZ: We are, for purposes of the record, Your Honor, objecting to firearm enhancements.

MR. ANDERSON: I guess the state would ask just for some guidance, as that went up on appeal and the court has affirmed it. For purposes of what record?

THE COURT: That’s what I’m confused about, actually.

MR. ARBENZ: Your Honor, the issue is – this is from what I’ve been told by Mr. Hester, who had unfortunately a conflict today.

THE COURT: You are representing your client today.

MR. ARBENZ: I am absolutely, Your Honor. Our understanding was that during Mr. Hester’s attempt to appeal this case, that the court either had misplaced jury instructions, or that the jury instructions were not recorded on the record, and made it impossible for Mr. Hester to effectively appeal certain issues pertaining to firearm enhancements. He’s asked me, for purposes of this sentencing, simply to make an on-the-record objection to the sentencing enhancements, for the possibility of future appeals. And that’s all I’m doing. With the rest of the sentencing, we defer to the court.”

RP 4/17/2009, 5-6.

Judge Mills sentenced Ms. Abramson to a total of 136 months of confinement. RP 4/17/2009, 7, CP 37-45, CP 46. The Court found that the firearm enhancement applied to this matter. *Id.* Of the 136 months sentence, 36 months was imposed for the firearm enhancement. RP 4/17/2009, 6; CP 37-45. This appeal follows that conviction. CP 47-78

#### D. ARGUMENT

1. Ms. Abramson's trial counsel's failure to take steps to supplement the record during the re-sentencing hearing was highly prejudicial and constituted ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App 406, 410, 907 P.2d 310 (1995). The federal Constitution and the Washington State Constitution both guarantee that the accused has the right to assistance of counsel in all criminal prosecutions. The right to counsel is defined as the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984).

Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a

defendant must prove the representation fell below an objective standard of reasonableness under professional norms. The test for prejudice is defined as a reasonable possibility exists that but for counsel's error, the result would have been different. *State v. Rice*, 118 Wn.2d at 888-89. The Court starts with the presumption counsel's representation was effective. *State v. Hendrickson*, 129 Wn.2d.61, 77, 917 P.2d 563 (1996).

A criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Thomas*, 70 Wn.App. 296, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L.Ed. 2d 21 (1962)); *see also* U.S. Const. Amend 14 sec. 1; WA Const. Art. I, sec. 3. A party seeking appellate review has the burden of perfecting the record so that the appellate court has all of the evidence relevant to the issue before it. *State v. Jackson*, 36 Wn.App. 510, 516, 676 P.2d 517 (1984), *aff'd* 102 Wn.2d 689, 689 P.2d 76 (1984). The right to a sufficient record stems from constitutional guarantees of due process, equal protection, effective assistance of counsel, and the state constitutional right to appeal. *State v. Thomas*, 70 Wn.2d at 299; Const. Art 1 sec. 22.

A sufficiently completed record does not necessarily mean a complete verbatim transcript, and other methods of reporting may be permissible if they allow for effective review. To meet Constitutional

requirements, the method of reconstruction must allow appellate counsel to determine which issues to raise and “place before the appellate court an equivalent report of the events at trial from which the appellants’ contentions arise”. *State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed. 2d 899 (1962)). The record, at a minimum, must allow counsel to determine which issues to raise on appeal. *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003).

The Washington Rules of Appellate Procedure establish a procedure for reconstructing the record when the recorded record is not complete. *State v. Tilton*, 149 Wn.2d at 785; RAP 9.3; RAP 9.4; RAP 9.5. One remedy to complete the record is to supplement the record with affidavits with the trial court judge resolving any disputes. *Id.* In the event the affidavits are “unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the appellate court must order a new trial. *State v. Tilton*, 149 Wn.2d at 782.

The case of *State v. Tilton*, *supra*, deals with the issue of a incomplete record. In that case, portions of the proceedings were not recorded. Specifically, it was discovered that the court tape recorded was not turned on when the defendant began testifying. None of the defendant’s direct testimony and only a small portion of his cross examination were recorded. *State v. Tilton*, 149 Wn.2d at 778. The error

in the record was discovered just prior to sentencing. *State v. Tilton*, 149 Wn.2d at 780. The prosecutor sought to reconstruct the record. *Id.* Counsel for the defendant supplied an affidavit to the court in which he indicated that he did not have any independent recollection of the defendant's testimony and had no notes because he had been asking questions. *Id.* The trial court allowed the record to be reconstructed based on affidavits and ruled that the defendant was not prejudiced by the failure to record his testimony. *State v. Tilton*, 149 Wn.2d at 781.

The Washington State Supreme Court vacated the conviction and remanded the case for a new trial. The fact that the defendant's trial attorney had no notes or independent recollection of the defendant's testimony was of significance to the court. Also of significance was the necessity of that portion of the unrecorded portion of the proceedings. Without the record, it was impossible for the defendant to raise his claims at the appellate level. *State v. Tilton*, 149 Wn.2d at 783. In that case the reconstructed record was not a 'record of sufficient completeness' to permit effective appellate review. *State v. Tilton*, 149 Wn.2d at 785.

In the case at hand, appellate counsel had previously been ordered to supplement the record. Counsel did not take the steps necessary to supplement the record. The missing record was necessary to address the claimed error with the jury instructions presented at trial. Without the missing information it was not possible to be certain of the

contents of the jury instruction packet presented to the jury at the time of trial. The record did not contain a complete copy of the jury instructions presented to the jury. See *State v. Abramson*, No. 35481-1-II, page 23. The record of the complete copy of the jury instructions was necessary to evaluate the claim related to the firearm enhancement. *Id.*

Former appellate counsel had the opportunity to supplement the record and meaningfully address the issue of the missing jury instructions at the time of Ms. Abramson's re-sentencing. Unfortunately, counsel did take any steps to supplement the record at the time of the hearing, although the objection to the firearm enhancement was made at the time of the re-sentencing. The actions of counsel were ineffective.

In this matter both tests for determining if counsel is ineffective, as set forth in *Strickland v. Washington, supra*, have been met. First, counsel's lack of attempt to supplement the record at the time of the re-sentencing was ineffective. As previously mentioned, the record in this matter was not complete. Counsel had the opportunity to address the issues with the record at the time of re-sentencing. Counsel's actions were limited to an objection to the firearm enhancement. RP 4/17/09, 2-6. Counsel should have been prepared to address in substance the issues of the missing record, but chose not to do so. The re-sentencing provided another opportunity to cure the issues with the record which would have in turn allowed Ms. Abramson to effectively appeal the imposition of the

firearm enhancement. The objection to the enhancement was made, which allows this issue to be raised in the present appeal. However, the steps required to fully address the issue, i.e. to supplement the record, that should have been taken at the time of the re-sentencing, were not taken.

In the case at hand, the appellate respectfully disagrees with the Court of Appeals' determination that the record was sufficient to address the appellant's claims. It is not possible, on the record available, to know with certainty what jury instructions the jury had in their possession at the time of deliberations. Therefore, it is impossible for Ms. Abramson to fully determine the appropriate issues to be raised, and argue those issues appropriately, on the limited record available. Counsel's decision not to perfect the record, when he believed that was an ongoing issue that precluded Ms. Abramson from appealing her conviction was ineffective. The ineffective action resulted in prejudice to Ms. Abramson. As a result of the lack of action taken by former appellate counsel, it is impossible to meaningfully address the issues with the jury instructions, other than what is set forth in this brief, at this stage of the proceeding. The missing portions of the record are necessary as argued previously in this brief.

2. The Court erred by failing to specifically address the objection made by Mr. Arbenz regarding the firearm enhancement.

As previously indicated in this brief, Mr. Arbenz made an objection to the firearm enhancement based on the issues with the record. RP 4/17/2009 at 6. The Court heard the objection, but did not address the objection. After Mr. Arbenz described the issues with the record as the basis for objection to the firearm enhancement, the trial court moved on to sentencing without comment on the objection. It does not appear that the Court fully considered the objection. The court's lack of acting on the objection was in error. ER 103.

3. The appropriate remedy is a new trial.

In the event available methods to reconstruct the record are unable to reconstitute a record of the events material to the issues raised on appeal, the appropriate remedy is a new trial. *State v. Tilton, supra*, *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963); see also *State ex. rel Henderson v. Woods*, 72 Wn.App.544, 550-52, 865 P.2d 33 (1994)

In the case of *State v. Larson, supra*, the Court held the reconstructed record was insufficient and ordered a new trial. In that case, the Court reporter's notes from the entire trial were lost and the trial judge prepared a narrative statements of facts based on his notes of the trial. *State v. Larson*, 72 Wn. 2d at 65. On appeal, the Court found the restructured record inadequate. In that case the appellate attorney was unable to determine what errors to assign for appellate review. The lack of a sufficient record was in fact a denial of the defendant's right to due

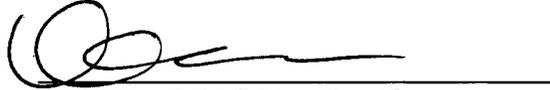
process, and the Court reversed the conviction and remanded for a new trial. *State v. Larson*, 72 Wn. 2d at 67. In the case of *State v. Tilton, supra*, the portions of the missing record was less than the case of the *State v. Larson, supra*, but the Washington State Supreme Court reversed the conviction and remanded for a new trial. *State v. Tilton*, 149 Wn.2d 775. In that case the Court held that reconstructed record was not sufficient complete to determine if the defendant could raise a claim of ineffective assistance of counsel. Therefore, the appellate court could not perform its constitutionally required function.

At this time it is now likely impossible to adequately reconstruct the record. The trial in this matter occurred in 2006. (see *State v. Abramson*, No. 35481-1-II) Given the workload of both trial counsel, it is very unlikely that over three years later counsel would be in a position to adequately reconstruct the record. Ms. Abramson cannot meaningfully appeal the issue of the firearm enhance without the record which is missing. Since the record cannot be adequately reconstructed, this court should set a new trial in this matter. That is the only remedy available at this time.

#### E. CONCLUSION

For the reasons stated above, Ms. Abramson respectfully asks the Court to vacate the convictions and set a new trial in this matter.

Respectfully submitted this 10<sup>th</sup> day of September, 2009.

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a cursive name, positioned above a horizontal line.

MICHELLE BACON ADAMS  
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Attorney for Appellant

## APPENDIX A

A-1-100

of Sup Ct.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

09-9-00482-7

STATE OF WASHINGTON,  
Respondent,

No. 35481-1-II

v.

MANDATE

RENATA LEE ABRAMSON,  
Appellant.

Kitsap County Cause No.  
05-1-01786-2

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DAVID W. PETERSON

**Court Action Required**

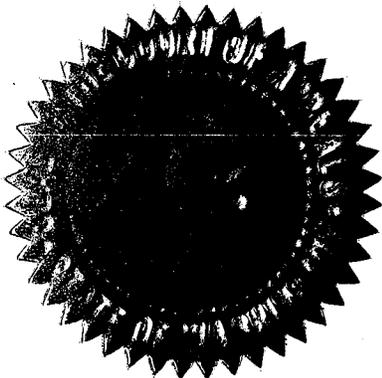
The State of Washington to: The Superior Court of the State of Washington  
in and for Kitsap County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on July 22, 2009 became the decision terminating review of this court of the above entitled case on February 4, 2009. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

- Judgment Creditor, State of Washington, \$78.00
- Judgment Creditor, Appellate Indigent Defense Fund, \$2106.91
- Judgment Debtor, Renata Lee Abramson, \$2184.91

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 20<sup>th</sup> day of February, 2009.



*David W. Peterson*  
Clerk of the Court of Appeals,  
State of Washington, Div. II

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CASE #: 35481-1-II, Mandate Pg 2  
State of Washington, Respondent v. Renata Lee Abramson, Appellant

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RENATA LEE ABRAMSON,

Appellant.

No. 35481-1-II

UNPUBLISHED OPINION

HUNT, J. — Renata Abramson appeals her convictions and her firearm and school bus stop enhanced sentences for methamphetamine delivery, methamphetamine possession, methamphetamine possession with intent to deliver, and second degree unlawful firearm possession. She argues that (1) the search warrant affidavit lacked probable cause; (2) insufficient evidence supports her convictions and sentence enhancements; (3) the trial court erred in admitting irrelevant and unfairly prejudicial evidence of prior bad acts; (4) the jury instructions were inadequate; and (5) she received ineffective assistance of counsel. The State concedes that insufficient evidence supports the school bus stop sentence enhancement. We affirm Abramson's convictions and her firearm sentence enhancement. Accepting the State's concession, we reverse Abramson's school bus stop sentence enhancement.

## FACTS

### I. METHAMPHETAMINE SALE AND POSSESSION

In 2001, Stacy Maykis, a methamphetamine addict, became a police operative for the West Sound Narcotics Enforcement Team (WestNET). As a police operative, Maykis assisted WestNET in investigating “[m]any, many people.”

In September and October 2005, on her own, Maykis purchased methamphetamine<sup>1</sup> from Renata Abramson at Abramson’s residence on Shamrock Drive in Bremerton. Maykis also owed Abramson money for methamphetamine and for food that Abramson had given to Maykis’ mother and son while Maykis was in jail.

Maykis was serving jail time for a DUI probation violation in October 2005, when she contacted WestNET Detective John Halsted, whom she knew from her prior work as a police operative. Maykis offered to provide information about Abramson’s illegal drug transactions and to perform a controlled buy in exchange for serving her remaining time on electronic home monitoring. Accepting her offer, Halsted helped Maykis transition to electronic home monitoring.

Based on Maykis’s information, Halsted set up a surveillance observation of Abramson’s Shamrock Drive residence on November 1, 2005. On that same day, Halsted observed Abramson at the Shamrock Drive residence. Halsted knew that Abramson had resided there as far back as 2003, when he had served a search warrant on her residence and arrested her for methamphetamine possession with intent to deliver at that time.

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<sup>1</sup> These methamphetamine purchases were not for WestNET.

A. Controlled Methamphetamine Buy

After Maykis's release, Halsted and Maykis set up a controlled methamphetamine buy from Abramson. On November 2, 2005, Maykis called Abramson's cellular phone while Halsted listened. Abramson agreed to sell Maykis methamphetamine, and told Maykis to meet her at the mall's parking lot in Kitsap County, where Abramson worked, because Abramson "wasn't feeling comfortable" selling the methamphetamine at her home. Halsted searched Maykis and her vehicle for weapons and contraband. Finding none, Halsted gave Maykis money to purchase methamphetamine from Abramson and had Maykis wait in her car at the mall's parking lot. Halsted and another detective waited in separate, unmarked patrol cars in the mall parking lot; they had a clear view of Maykis in her car.

Meanwhile, Sergeant Randy Drake and Detective Roy Alloway set up surveillance of Abramson's residence and maintained phone contact with Halsted. Drake followed Abramson's car from her residence to the mall. An unknown female<sup>2</sup> sat in Abramson's passenger seat. Drake did not observe Abramson make any stops between her residence and the mall.

When Abramson arrived at the mall parking lot, Maykis drove to where Abramson had parked, parked next to her, contacted Abramson through Abramson's driver's side window, and handed the methamphetamine money in a paper sack through the window to Abramson. As Halsted watched, Abramson got out of her car, walked to the back of her car, and then returned to the driver's seat. Her female passenger also got out of the car, but she stayed next to the passenger side car door. Abramson told Maykis that the methamphetamine was in a "white napkin" on the ground behind the car. Abramson and the female passenger went inside the mall.

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<sup>2</sup> At trial, Abramson testified that her female passenger was Kathy Conway.

Maykis retrieved the napkin, got back in her car, and left the mall with the detectives following. Behind a movie theater across the street from the mall, Halsted searched Maykis and her car for the second time. From her vehicle's front seat, Halsted retrieved a "Ziploc" bag wrapped in "Kleenex" containing four grams of methamphetamine.

#### B. Affidavit and Search Warrant

That same day, Detective Halsted requested and obtained a search warrant for Abramson's residence. Halsted's supporting affidavit stated that the confidential informant (1) had worked with law enforcement since 2001 performing controlled buys with several suspects, leading to the arrest and conviction of at least six people for drug offenses; (2) was a prior methamphetamine "abuser and distributor" and was familiar with how the drug was "packaged and distributed"; (3) had bought methamphetamine from Abramson "on a very regular basis for the last couple of months"; (4) had observed "a large amount of methamphetamine at Abramson's residence in the past" and firearms at the residence in the last two months; and (5) had observed surveillance cameras at Abramson's house used to "protect her drug operation from law enforcement." Clerk's Papers (CP) at 392-96.

Halsted's affidavit further stated that (1) he had performed a controlled methamphetamine buy with the operative and Abramson; (2) officers had followed Abramson from her Shamrock Drive residence to the controlled buy location with "no stops" between the two locations; (3) an unknown female passenger in Abramson's vehicle was originally sitting in the front passenger seat but got out of the car and stood on the passenger side of the vehicle during the controlled buy; (4) the operative told Halsted that a female, Amanda Cormany, resided at Abramson's residence, which was corroborated by a 2005 burglary report Cormany

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filed for the Shamrock Drive residence; and (5) Abramson had numerous prior felony convictions.

### C. Search of Abramson's Residence

The next day, several members of the WestNET team and the sheriff's office SWAT team executed the search warrant at Abramson's Shamrock Drive residence. When no one answered their knock on the front door, the SWAT team breached the door with a ram, breached a bedroom window, and saw Abramson run out of the bedroom. The WestNET and SWAT teams also found Amanda Cormany, Curtis Griffin, Terrance Larson, and Kathleen Conway in Abramson's residence.

During the search, the officers observed a closed-circuit television surveillance camera mounted on the house's roof apex and another camera in the backyard, pointing toward the front of the property.

In a room comprising both a bedroom and office area, officers found (1) documents addressed to Abramson, including mail addressed to her and court paperwork with her name, some of which were on the nightstand and others were found throughout the room; (2) photographs, some of them with Abramson in them; (3) paperwork with numerous names and dollar amounts; (4) a bag containing 7.04 grams of methamphetamine on a computer desk; (5) a digital scale on the computer desk; (6) "Ziploc baggies" one-inch-square with an orange and black eightball design on them, some of which were on the nightstand and others were elsewhere in the room; (7) larger plastic bags; (8) a small bag of methamphetamine with a Batman print on

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the nightstand; (9) \$1,207 in cash and two identification cards bearing Abramson's name in the safe; and (10) factory "Beretta" pistol grips in a "Hogue"<sup>3</sup> factory package in the dresser.

In a hallway closet, officers found a zippered pouch containing two semi-automatic pistols. Both pistols were loaded and operational. The Berreta pistol had Hogue grips installed on it.

In another bedroom, officers found (1) a "Curious George" tin containing ten "eightball"<sup>4</sup> labeled bags of methamphetamine, nine weighed between 7.4 and 7.6 grams and one weighed 1.3 grams; (2) another "Ziploc" bag containing 13.5 grams of methamphetamine; (3) a plastic bowl containing drug residue; (4) six bullets and two boxes of ammunition for the Berreta pistol; (5) a leather pouch containing two handgun magazines; (6) a gun-cleaning kit; (7) five digital scales; and (8) \$946 in cash from Griffin's pants.

## II. PROCEDURE

The State charged Abramson with (1) methamphetamine delivery, (2) methamphetamine possession, (3) methamphetamine possession with intent to deliver, and (4) second degree unlawful firearm possession. The State alleged firearm and school bus stop sentence enhancements for Abramson's methamphetamine possession and methamphetamine possession with intent to deliver charges.

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<sup>3</sup> "Hogue is an after-market grip for a pistol marketed for [a] Beretta [pistol]." Report of Proceedings (RP) (May 22, 2006) at 351.

<sup>4</sup> "[D]rugs [that] are sold in an 8th of an ounce size [are] referred to as an eightball." RP (May 22, 2006) at 253.

A. CrR 3.6 Suppression Hearing

Abramson filed a CrR 3.6 motion to suppress evidence seized from her residence. She alleged that the search warrant affidavit had failed to establish (1) a basis of knowledge or informant veracity, (2) the nexus between her residence and the items to be seized, and (3) that the information was not stale. At the hearing, Abramson argued that the search warrant affidavit failed to establish probable cause because it “omitted information related to the [operative’s] knowledge of the interior of Ms. Abramson’s home, or the lack of knowledge. . . . As well, the affiant failed to disclose the motivation of the [operative] . . . .” CP at 45. The trial court denied Abramson’s suppression motion.

B. Trial

1. State’s evidence

Detective Halsted testified about Maykis’s controlled buy from Abramson. He also testified that a couple years earlier, he had met Abramson at her Shamrock Drive residence in connection with an unrelated investigation.

Halsted testified that many drug dealers use closed circuit security cameras to monitor their homes from intrusion. He also testified about common ways to use and to ingest methamphetamine as well as the typical amounts sold by methamphetamine dealers. Halsted also testified that he measured the distance from the school bus stop to Abramson’s residence as 891 feet, but he did not testify about where on Abramson’s property his measurement ended.

Detective Weiss testified that lists with names and dollar amounts are typical of drug activity in residences because drug dealers “sometimes keep track of [the] people they sell drugs

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to,” as well as the amounts that people owe them for drugs. Report of Proceedings (RP) (May 22, 2006) at 275.

For purposes of the second degree unlawful firearm possession charge, Abramson stipulated that she had prior felony convictions.

## 2. Abramson's testimony

Abramson testified in her own defense. She testified that (1) she had never sold drugs to Maykis; (2) Maykis had never been to her house; (3) she had refused to sell drugs to Maykis on November 2, 2005; (4) she was surprised to see Maykis on November 2 at the mall where she (Abramson) worked; (5) she did not give Maykis methamphetamine on November 2; (6) the house on Shamrock Drive was hers; (7) her daughter, Cormany, had stayed with her for the three days before the residence search; (8) she (Abramson) was suspicious that her daughter had drugs in the house, but she did not know for sure; and (9) she did not know that there were any firearms or pistol grips in her house.

## 3. Jury verdict

The jury convicted Abramson as charged. It returned special verdicts finding that Abramson was armed with a firearm and within 1,000 feet of a school bus stop while possessing methamphetamine with intent to deliver.

## C. Motion to Arrest Judgment and Motion for New Trial

On June 7, 2006, Abramson moved to arrest judgment under CrR 7.4, arguing insufficient evidence at trial to support the jury's finding that her methamphetamine possession occurred within 1,000 feet of a school bus stop.

On September 21, Abramson moved for a new trial under CrR 7.5 based on her counsel's failure to call Kathy Conway as a witness during trial. Abramson argued that Conway was a "material and exculpatory witness" because Conway had told a private defense investigator that she had been a passenger in Abramson's vehicle during the controlled buy and that she, rather than Abramson, had dropped the methamphetamine behind Abramson's vehicle.

On September 29, the trial court denied as untimely Abramson's motions to arrest judgment and for a new trial. Noting that Abramson had brought the motions approximately three months after the verdict, the trial court ruled that Abramson had filed the motions well beyond the required time of ten days after the verdict.

#### D. Sentencing

The State and Abramson agreed that for sentencing purposes, count I, the methamphetamine delivery, and count II, the methamphetamine possession, convictions merged with count III, the methamphetamine possession with intent to manufacture or deliver, conviction. The trial court sentenced Abramson to 100 months for count III, with 36 additional months for the firearm enhancement and 24 additional months for the school bus stop enhancement, for a total of 160 months in prison. The trial court also sentenced Abramson to 43 months confinement on count IV, second degree unlawful firearm possession, to run concurrently with her sentence on count III.

Abramson appeals.

## ANALYSIS

### I. MOTION TO SUPPRESS

Abramson argues that the trial court erred in denying her motion to suppress because the search warrant affidavit (1) failed to establish a nexus among the methamphetamine, the firearms and her residence; (2) contained a material omission; and (3) rested on stale information. The State responds that the (1) search warrant affidavit demonstrated a sufficient nexus between the criminal investigation and Abramson's residence; (2) Abramson cannot raise the material omission argument for the first time on appeal; (3) furthermore, the search warrant affidavit did not contain any material omissions; and (4) the search warrant affidavit's information was not stale. We agree with the State.

#### A. Standard of Review

A magistrate exercises judicial discretion in determining whether to issue a search warrant. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). We review the magistrate's decision to issue a search warrant for an abuse of discretion. *Id.* We accord great deference to the issuing magistrate and resolve doubts concerning the existence of probable cause in favor of issuing the search warrant. *Id.*

#### B. Search Warrant Probable Cause

A court may issue a search warrant "only upon a determination of probable cause." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A warrant application:

must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. . . . Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.

*Thein*, 138 Wn.2d at 140 (citations omitted). To establish probable cause, the State must show “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 (internal quotation marks omitted). Here, the search warrant affidavit clearly met this test.

The affidavit stated that (1) the police operative had bought methamphetamine from Abramson at her residence on regular basis for months preceding the search; (2) the operative had observed a large amount of methamphetamine at Abramson’s residence in the past two months, as well as firearms and surveillance cameras; (3) the detective and the operative had performed a controlled methamphetamine buy from Abramson after she was observed driving directly from her residence to the buy site on the same day as the search warrant request; and (4) Abramson had numerous prior felony convictions.

Thus, the search warrant affidavit met the *Thein* test: It established probable cause that Abramson was probably involved in criminal activity and that evidence of that activity was at her residence.

#### C. No Material Omissions in Affidavit

At the suppression hearing, Abramson alleged that the search warrant affidavit failed to establish probable cause because it “omitted information related to the [operative’s] knowledge of the interior of Ms. Abramson’s home, or the lack of knowledge. . . . As well, the affiant failed to disclose the motivation of the [operative] . . . .” CP at 45. But Abramson did not allege that the search warrant affidavit was deficient because it omitted that a female passenger had been in Abramson’s car when she left her residence.

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Generally, we will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). The exception is when a claim of error, raised for the first time on appeal, is a manifest error affecting a constitutional right. *Kirkman*, 159 Wn.2d at 926; RAP 2.5(a)(3). “The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Kirkman*, 159 Wn.2d at 926-27 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Abramson fails to show that the trial court committed manifest error that actually affected her constitutional rights. First, Abramson fails to show how the presence of a female passenger in her vehicle when Abramson left her residence affects probable cause to believe that she possessed and delivered methamphetamine, especially in light of the officers having observed Abramson deliver methamphetamine directly to the police operative.

Moreover, even if the presence of a female passenger somehow affected probable cause, the search warrant affidavit stated that (1) detectives had observed a female passenger in Abramson’s vehicle during the controlled methamphetamine buy; and (2) officers saw Abramson leaving her residence and driving to the controlled buy site without making any stops. Thus, the warrant affidavit gave enough information to the trial court that a female passenger was in Abramson’s vehicle during the controlled buy and likely was in her vehicle when they left Abramson’s residence.

Abramson thus fails to show actual prejudice affecting her constitutional rights. Therefore, she alleges no manifest error allowing appellate review where she did not preserve the error by objecting specifically on this ground below.

## D. Probable Cause Not Stale

A delay in executing a search warrant may render the magistrate's probable cause determination stale. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). We apply a common sense test for staleness of information in a search warrant affidavit. *Id.* A search warrant's information "is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *Id.* at 506.

In evaluating a potentially stale probable cause determination, we look at the totality of the circumstances. *Id.* "The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity." *Maddox*, 152 Wn.2d at 506 (citing *Andresen v. Maryland*, 427 U.S. 463, 478, n.9, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (probable cause not stale despite three month delay in warrant's execution because of the nature of documentary evidence and defendant's ongoing criminal activity)). We also look at "the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Maddox*, 152 Wn.2d at 506.

Here, (1) the informant regularly observed and bought methamphetamine from Abramson at her Shamrock Drive residence for months preceding the warrant's execution; (2) the officers obtained the search warrant on the same day that they had observed the controlled buy from Abramson; and (3) they executed the search warrant and searched Abramson's residence the next day after the warrant was issued. Thus, probable cause for issuance of the search warrant was not stale.

## II. SUFFICIENT EVIDENCE

Abramson also argues that insufficient evidence supports her convictions and sentence enhancements. The State responds that sufficient evidence supports Abramson's convictions and her firearm sentence enhancement, but it concedes that insufficient evidence supports her school bus stop sentence enhancement. We agree with the State and accept its limited concession of error.

### A. Standard of Review

When reviewing a challenge to sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Abramson's insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the fact finder's resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "Circumstantial evidence provides as reliable a basis for findings as direct evidence." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

### B. Methamphetamine Possession

Abramson's insufficient evidence claim admits the truth of the State's evidence that officers found numerous bags of methamphetamine, methamphetamine packaging, digital scales, and large amounts of cash throughout her house. *Salinas*, 119 Wn.2d at 201. It also admits the reasonable inference that she possessed and knew about the methamphetamine because officers found bags of methamphetamine with mail addressed to Abramson and court documents bearing

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her name in a room and on a dresser that also containing Abramson's personal items. *Salinas*, 119 Wn.2d at 201.

Accordingly, we hold that sufficient evidence supports Abramson's methamphetamine possession conviction.

C. Methamphetamine Possession with Intent to Deliver

Abramson's insufficient evidence claim admits the truth of the State's evidence that she delivered methamphetamine to Maykis during a controlled buy. *Salinas*, 119 Wn.2d at 201. It also admits the reasonable inference that Abramson intended to deliver methamphetamine based on the evidence that she had methamphetamine, drug packaging, and digital scales at her residence. *Id.* Thus, sufficient evidence supports Abramson's methamphetamine possession with intent to deliver conviction.

D. Unlawful Firearm Possession Conviction

Abramson argues that "[n]o evidence exists that [she] ever had possession of the firearm, or, even had knowledge that it was in the house." Br. of Appellant at 23. Abramson's argument fails.

At trial, Abramson stipulated that she was a convicted felon for purposes of the unlawful firearm possession charge. As a convicted felon, the law prohibited Abramson from possessing firearms. RCW 9A.04.040. Abramson's insufficient evidence claim admits the truth of the State's evidence that officers found two loaded, operational pistols in her home. *Salinas*, 119 Wn.2d at 201. Her claim also admits the reasonable inference that she knew that the firearms were in her house based on the officers finding the pistol grips in the dresser drawer in the room where they also found Abramson's personal effects. Additionally, there is a reasonable inference that

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Abramson used, or intended to use, the firearms and the closed-circuit surveillance cameras to protect her methamphetamine site from intrusion.

#### E. Firearm Sentence Enhancement

For a firearm sentence enhancement, the State must prove that the defendant was armed during the commission of her crimes. *State v. Schelin*, 147 Wn.2d 562, 566, 55 P.3d 632 (2002) (plurality opinion). A defendant is armed when she “is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime.” *Schelin*, 147 Wn.2d at 575-76. Mere presence of a weapon at the crime scene may be insufficient to establish the nexus between a crime and a weapon. *Schelin*, 147 Wn.2d at 570. When analyzing whether the requisite nexus existed, this court examines the nature of the crime, the type of weapon, and the circumstances under which it is found. *State v. O’Neal*, 126 Wn. App. 395, 422, 109 P.3d 429 (2005), *aff’d* 159 Wn.2d 500 (2007) (citing *Schelin*, 147 Wn.2d at 570).

In *Simonson*, the defendant was manufacturing methamphetamine over a six-week period. *State v. Simonson*, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), *review denied*, 137 Wn.2d 1016 (1999). During that time, Simonson kept seven guns on the premises and some were loaded. *Simonson*, 91 Wn. App. at 883. We held that it was “reasonable to infer that the purpose of so many loaded guns was to defend the manufacturing site in case it was attacked.” *Id.* Based on this reasonable inference, we held that the evidence was sufficient to support the deadly weapon enhancement. *Id.* Similarly, in *O’Neal*, we held that sufficient evidence supported the deadly weapon enhancement where a loaded gun with a chambered round was found in the open bedroom closet. *O’Neal*, 126 Wn. App. at 425.

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Here, Abramson does not dispute that her Shamrock Drive residence contained loaded firearms and a closed circuit security camera system.<sup>5</sup> Similar to *Simonson* and *O'Neal*, it is reasonable to infer that Abramson had the weapons along with the security system to protect the methamphetamine site from intrusion. Accordingly, there is sufficient evidence of a nexus between Abramson, the weapons, and the crime. We affirm Abramson's firearm sentence enhancement.

#### F. School Bus Stop Sentence Enhancement

The State concedes that insufficient evidence supports the school bus stop sentence enhancement. We accept the State's concession.

To support a school zone sentence enhancement, there must be evidence that the distance between the school bus stop and the site of the offense was no more than 1,000 feet. *State v. Jones*, 140 Wn. App. 431, 437-38, 166 P.3d 782 (2007). Although a witness's estimate of distance based on measurements is sufficient to support a school zone enhancement, where the record is devoid of any evidence of a measurement to the *exact* site of the crimes, the evidence is

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<sup>5</sup> Although she does not dispute that the officers found loaded firearms and the closed circuit security camera system at her house, Abramson alleges the firearms belonged to her daughter and her daughter's boyfriend. This is the same theory that Abramson presented to the jury. Whether Abramson possessed the firearms, or whether her daughter possessed them, was an issue of credibility for the jury to decide. We do not review the jury's credibility determinations. *Camarillo*, 115 Wn.2d at 71.

Additionally, possession may be actual or constructive and need not be exclusive. *State v. Turner*, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000). A jury can find that a defendant constructively possessed an object based on evidence of dominion and control over the object or the place where it was found. *Turner*, 103 Wn. App. at 521; *see also* CP at 226 (jury instruction 14, informing the jury that possession may be actual or constructive, need not be exclusive, and may be established by a defendant's dominion and control over a substance). Based on the special verdict finding that Abramson possessed the firearms during the commission of her crimes, it is clear that the jury rejected Abramson's contention that she did not know about or possess the firearms.

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insufficient to support a school zone enhancement. *Jones*, 140 Wn. App. at 437; *State v. Byrd*, 83 Wn. App. 509, 514, 922 P.2d 168 (1996), *review denied*, 130 Wn.2d 1027 (1997). The State may establish the measurements to the exact site of the crimes by “global positioning systems, hard copy maps, digital maps, pedometers, satellite imaging,” or any other device that can accurately establish the distance from the school bus stop to the crime site. *Jones*, 140 Wn. App. at 437-38. Merely measuring to the front porch or front door of a residence, where the crimes occurred somewhere within the residence, is insufficient, without further evidence, to support a school zone sentence enhancement. *Id.*

Here, the State presented evidence that Abramson’s residence was 891 feet from a school bus stop, but it did not specify where on Abramson’s property this measurement ended. Additionally, the State failed to present any evidence of measurements from where the officers found methamphetamine or firearms to a school bus stop. Nor did the State present evidence of the total length of Abramson’s property, the length of the rooms, or how far back her residence was located from the road.

Accordingly, we accept the State’s concession and hold that insufficient evidence supports the school bus stop sentence enhancement.

### III. ADMISSION OF EVIDENCE

Abramson argues that the trial court erred in admitting evidence of Abramson’s prior methamphetamine sales with Maykis and Halsted’s knowledge that Abramson had resided at the residence for a few years, because the evidence was (1) irrelevant, (2) a prior bad act, and (3) unfairly prejudicial. Her arguments fail.

A. Standard of Review

We review a trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

B. Relevant Evidence

Generally, relevant evidence is admissible. ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. To be relevant, evidence must meet two requirements: (1) The evidence must have a tendency to prove or disprove a fact; and (2) this fact must be of consequence in the context of other facts and the applicable substantive law. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). Evidence's relevancy depends on the circumstances of each case and the relationship of the facts to the ultimate issue. *Id.* Relevant evidence encompasses facts that present both direct and circumstantial evidence of any claim or defense. *Id.*

Evidence that Abramson sold methamphetamine to Maykis in the months preceding the controlled buy and search of Abramson's residence was relevant to prove the charges against Abramson and to rebut Abramson's defense. The prior drug sales make Abramson's defenses "less probable" that (1) she had never sold methamphetamine to Maykis, (2) did not sell methamphetamine to Maykis on the day of the controlled buy, and (3) did not know that methamphetamine was in her residence. ER 401. The trial court did not abuse its discretion in admitting evidence of Abramson's prior sales of methamphetamine to Maykis.

Nor did the trial court abuse its discretion in admitting evidence that Abramson had resided at the Shamrock Drive residence since 2003. The State is correct that evidence showing Abramson lived at the Shamrock Drive residence since 2003 makes it more probable that Abramson possessed the methamphetamine in her house and shows that Abramson had “dominion and control over the residence.” Br. of Resp’t at 28. Because this evidence has a tendency to prove a fact that was relevant to the ultimate issue of whether Abramson possessed methamphetamine, the trial court did not abuse its discretion.

### C. Prior Bad Acts

Abramson argues that evidence of her methamphetamine sales to Maykis is inadmissible as prior bad acts.<sup>6</sup>

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, evidence of Abramson’s methamphetamine sales to Maykis was admissible to show Abramson’s intent to sell methamphetamine and as evidence to rebut Abramson’s defenses that she had never sold methamphetamine to Maykis and did not possess any methamphetamine. *See State v. Thomas*, 68 Wn. App. 268, 273-74, 843 P.2d 540 (1992) (evidence of defendant’s three prior drug sales was properly admitted under ER 404(b) because it related directly to whether

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<sup>6</sup> Abramson also argues that the evidence of her prior methamphetamine sales to Maykis was improper profile testimony. Her argument fails because the challenged testimony did not identify Abramson as part of a group that is more likely to commit drug offenses. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 720, 904 P.2d 324 (1995) (where testimony does not identify a group that is more likely to commit a crime, there is no improper profile testimony), *review denied*, 129 Wn.2d 1007 (1996).

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defendant intended to sell the cocaine he possessed), *review denied*, 123 Wn.2d 1028 (1994).

Thus, the trial court did not abuse its discretion in admitting this evidence.

#### D. No Unfair Prejudice

Abramson argues that evidence of her methamphetamine sales to Maykis is inadmissible because it was unfairly prejudicial. Again, her argument fails.

Under ER 403, otherwise “relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .” Because evidence is used to convince the trier of fact to reach one decision rather than another, “[a]lmost all evidence is prejudicial.” *Rice*, 48 Wn. App. at 13. Thus, “the linchpin word is unfair” when determining whether ER 403 excludes evidence. *Rice*, 48 Wn. App. at 13 (internal quotation marks omitted). Generally, “unfair prejudice is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors.” *Rice*, 48 Wn. App. at 13 (internal quotation marks omitted). Additionally, the trial court, “not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence.” *State v. Harris*, 97 Wn. App. 865, 869, 989 P.2d 553 (1999) (citing *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)), *review denied*, 140 Wn.2d 1017 (2000).

Here, Abramson fails to show that the probative value of her past methamphetamine sales to Maykis, which rebutted Abramson’s defenses, was “substantially outweighed by the danger of [any] unfair prejudice.” ER 403; *see Thomas*, 68 Wn. App. at 273-74 (probative value of prior cocaine sales greatly outweighed prejudicial effect). Furthermore, given the evidence of the controlled methamphetamine buy between Abramson and Maykis, it is unlikely that there was any unfair prejudice from evidence that she had sold methamphetamine to Maykis in the past

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few months. Accordingly, we hold that the trial court properly allowed evidence of Abramson's prior sales of methamphetamine.

#### E. No Cumulative Error

Lastly, Abramson argues that "[r]eversal may be required due to the cumulative effects" of "all of the errors mentioned above [which] implicated the credibility of Ms. Abramson while bolstering the credibility of the alleged accusers." Br. of Appellant at 32-33. Abramson's argument fails because she has not shown that the trial court committed cumulative errors which would require reversal of her convictions.

#### IV. JURY INSTRUCTIONS

Abramson argues that the trial court failed to instruct the jury adequately because it did not give the jury instructions for special verdict enhancements, did not give an accomplice instruction, and did not give "an instruction for one of the crimes for which the jury found Ms. Abramson guilty." Br. of Appellant at 34. Abramson's arguments fail; furthermore, she mischaracterizes the record.

#### A. Standard of Review

We review jury instruction challenges de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

## B. Adequate Instructions

Abramson's counsel asserts, "[T]he instructions in the Clerk's Papers may not be an accurate reflection of what the jury actually possessed." Br. of Appellant 34, n.2. The State agrees that the record on appeal is not complete, but it argues that the jury did receive a complete set of all necessary instructions. Nothing in the record indicates to the contrary.

The State explains that "for reasons not known, the copy of the instructions placed in the court file after trial was incomplete," but the record is clear that "the jury was fully instructed." Br. of Resp't at 31. The record contains a complete set of the State's proposed jury instructions, which includes the instructions that Abramson alleges the jury did not receive. The record also contains an extensive discussion between the trial court and counsel about the jury instructions. From the record, it is clear that, contrary to Abramson's assertions, the trial court gave the jury instructions on the sentence enhancements, accomplice liability, and "to convict" instructions for the crimes charged.<sup>7</sup> Having carefully reviewed the record, we hold that the trial court adequately instructed the jury.

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<sup>7</sup> We ordered Abramson's appellate counsel to supplement the record with either the report of proceedings that detailed the trial court's reading of the instructions to the jury or to hold a hearing in front of the trial court under RAP 9.2(b), 9.3, 9.4, and 9.5 to reconstruct the record. Abramson's appellate counsel responded to our order by submitting an affidavit asserting that (1) the applicable report of proceedings does not exist, and (2) appellate counsel cannot participate in a record reconstruction if he was not also trial counsel. Although there is adequate evidence in the record to decide whether the trial court properly instructed the jury, we note that Abramson's appellate counsel did not comply with our court order and misinterpreted the Rules of Appellate Procedure. Contrary to Abramson's counsel's affidavit, RAP 9.3 allows appellate counsel to reconstruct missing portions of the record in cooperation with the trial court and trial counsel.

## V. EFFECTIVE ASSISTANCE OF COUNSEL

Abramson argues that she received ineffective assistance when her trial counsel failed (1) to examine and admit Abramson's cellular phone records; and (2) to call Kathy Conway to testify at trial that Conway, not Abramson, had given the methamphetamine to Maykis during the controlled buy. Abramson's arguments fail.

## A. Standard of Review

We review an ineffective assistance of counsel claim de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). "If either part of the test is not satisfied, the inquiry need go no further." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). We give great judicial deference to trial counsel's performance and begin the analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Phone Records

Abramson argues that her trial counsel's failure to examine and to admit her cellular phone records as evidence at trial was ineffective assistance of counsel. We disagree.

Without citation to the record, Abramson asserts that her trial counsel failed to examine her phone records. The State correctly notes that there is no evidence in the record that Abramson's trial counsel failed to examine her cellular phone records. Where there is no evidence that trial counsel failed to examine evidence, Abramson has failed to establish that she received ineffective assistance. See *McFarland*, 127 Wn.2d at 335 (courts give great judicial deference to trial counsel's performance and begin the analysis with a strong presumption that counsel was effective).

Additionally, Abramson fails to establish that there is a reasonable probability that the jury would not have found her guilty had her counsel admitted her cellular phone records. *Reichenbach*, 153 Wn.2d at 130. Abramson's testimony at trial corroborated Maykis's testimony about when Maykis called Abramson. Abramson fails to argue on appeal and failed to make an offer of proof below about how introducing the phone records at trial would have changed this corroboration. Thus, Abramson's ineffective assistance of counsel argument fails because she establishes neither deficient performance nor prejudice.

C. Decision Not to Present Conway's Testimony

Relying on *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), Abramson argues that her counsel's failure to call Conway as a witness was ineffective assistance of counsel. This argument also fails.

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Abramson is correct that the Ninth Circuit held that defense counsel's failure to personally interview potential exculpatory witnesses and failure to call these witnesses at trial was ineffective assistance of counsel. *Lord*, 184 F.3d at 1094-96. But Abramson's case differs significantly from *Lord's*.

In *Lord*, defense counsel never met nor interviewed the potential exculpatory witnesses. 184 F.3d at 1095. The *Lord* court noted that "[f]ew decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial." 184 F.3d at 1095. Because the decision to call a witness at trial is based on professional judgment and trial strategy, the *Lord* court held that "[w]e would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person." 184 F.3d at 1095.

Here, defense counsel hired a private investigator who interviewed Conway. Trial counsel was present for Conway's interview and observed her demeanor. Unlike trial counsel in *Lord*, Abramson's counsel personally met Conway and was present for her interview. Additionally, the *Lord* court held that trial counsel's failure to present potential exculpatory witnesses was prejudicial because (1) the State did not have any witnesses that saw the defendant commit the crimes, (2) the potential testimony had only minor discrepancies, and (3) the potential testimony was consistent with the defendant's theory of the case.

None of these circumstances in *Lord* are present here. First, the State presented three witnesses who saw Abramson deliver methamphetamine to Maykis. Two of these witnesses were detectives who watched the transaction from unmarked patrol cars parked nearby. Second, Conway's statement contained significant discrepancies. According to Abramson's private

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investigator, Conway stated that neither she nor Abramson had any methamphetamine with them on the day of the controlled buy. But Conway later said that she had dropped a napkin behind Abramson's car with a small amount of methamphetamine residue in it. Conway also stated that she knew Maykis, and that Maykis's name was "Rochelle," contrary to Maykis's and Abramson's testimony that Maykis's first name is Stacy.

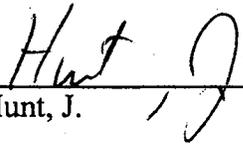
Finally, Conway's statement contradicted Abramson's testimony. Conway told the private investigator that Maykis had not given Abramson any money that day and did not hand Abramson a paper bag. At trial, Abramson testified that Maykis handed her a paper bag through the driver's side window that contained cash. Based on all of this evidence, defense counsel adequately investigated Abramson's potential defenses, met with Conway, was present for Conway's interview, and observed first hand Conway's demeanor.

We defer to defense counsel's decision where she was able to observe Conway's demeanor. Where defense counsel has personally met a potential witness, the State has eye witnesses to the defendant's commission of the crime, the potential witness's testimony contains significant discrepancies, and the potential witness's testimony conflicts with the defendant's testimony, defense counsel's decision not to call the witness is a legitimate strategic decision and is not ineffective assistance of counsel. *See In re Personal Restraint of Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007) (legitimate strategic or tactical decisions are not ineffective assistance of counsel). Thus, Abramson's counsel's performance was not deficient when she failed to call Conway to testify at trial.

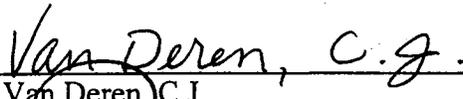
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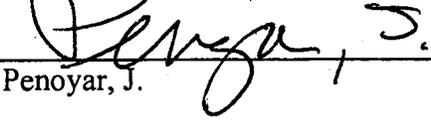
We affirm Abramson's convictions and firearm sentence enhancement. Accepting the State's concession of error, we reverse her school bus stop sentence enhancement and remand to correct her judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Hunt, J.

We concur:

  
\_\_\_\_\_  
Van Deren, C.J.

  
\_\_\_\_\_  
Penoyar, J.

NO. 39219-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RENATA LEE ABRAMSON,

Appellant.

CERTIFICATION OF MAILING

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DIVISION II

I, JEANNE L. HOSKINSON, declare under penalty of perjury

under the laws of the State of Washington that the following statements  
are true and based on my personal knowledge, and that I am competent  
to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned  
case hand-delivered or mailed as follows:

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950 Broadway, Suite 300  
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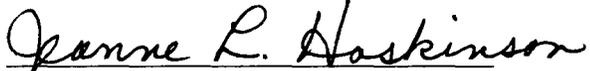
**Copy Hand-Delivered To:**

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DATED this 10th day of September, 2009, at Port Orchard, Washington.

  
JEANNE L. HOSKINSON  
Legal Assistant