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No. 41564-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Vernon Bennett,

Appellant.

Lewis County Superior Court Cause No. 09-1-00509-0

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Bennett's convictions in Counts I and IV infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The prosecution failed to prove that Mr. Bennett personally distributed methamphetamine to a person under 18, and the court did not instruct on accomplice liability.
3. The prosecution failed to prove that Mr. Bennett possessed a sufficient quantity of methamphetamine to warrant conviction.
4. The trial court violated Mr. Bennett's First, Sixth, and Fourteenth Amendment right to an open and public trial.
5. The trial court violated Mr. Bennett's right to an open and public trial by conducting a closed hearing in chambers to select the appropriate jury instructions.
6. The trial judge abused his discretion by admitting irrelevant evidence in violation of ER 402.
7. The trial judge abused his discretion by admitting prejudicial and cumulative evidence in violation of ER 403 and ER 404(b).
8. The trial judge abused his discretion by failing to conduct a complete ER 404(b) analysis on the record.
9. The trial court erred by admitting photographs showing that Mr. Bennett had decorated his basement walls with pictures of naked women.
10. Mr. Bennett's two delivery convictions violated his constitutional right not to be twice put in jeopardy for the same offense.
11. The two school bus stop enhancements (imposed on Counts I and II) violated Mr. Bennett's constitutional right not to be twice put in jeopardy for the same offense.
12. Mr. Bennett's possession conviction violated his constitutional right not to be twice put in jeopardy for the same offense.

13. The trial judge erred by imposing a 24-month enhancement on Count I.
14. The trial judge lacked authority to impose a 24-month enhancement on Count I.
15. The trial court erred by failing to find that Counts I and II were the same criminal conduct.
16. The trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence.
17. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.
18. Mr. Bennett was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
19. Defense counsel was ineffective for failing to argue that Counts I and II comprised the same criminal conduct.
- 20.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for distributing methamphetamine to a person under 18, the prosecution is required to prove each element of the charged crime beyond a reasonable doubt. In this case, the court did not instruct the jury on accomplice liability, and yet the prosecutor failed to prove beyond a reasonable doubt that Mr. Bennett personally delivered methamphetamine to Hensley, who was underage. Did Mr. Bennett's conviction in Count I infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. To convict Mr. Bennett of Possession of a Controlled Substance, the prosecution was required to prove that he possessed a sufficient quantity of drugs to warrant a felony charge. At trial, the evidence established only that he possessed methamphetamine residue. Did Mr. Bennett's

possession conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

3. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to select the jury instructions that guided the jury's deliberations. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?
4. Evidence that is irrelevant, prejudicial, or cumulative should not be introduced at a criminal trial. Here, the trial judge admitted photographs showing that Mr. Bennett had decorated his basement walls with photographs of naked women. Did the trial court err by admitting irrelevant and prejudicial evidence without balancing relevant factors on the record?
5. An accused person may not be punished twice for the same offense. In this case, Mr. Bennett received two delivery convictions, two enhancements, and a possession charge arising from a single act. Did the multiple convictions and punishments violate Mr. Bennett's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?
6. A trial court exceeds its sentencing authority when it imposes a sentence beyond what the legislature expressly confers. In this case, the court added a 24-month enhancement to Mr. Bennett's sentence for distributing methamphetamine to a person under 18, even though such enhancements are only available for convictions for delivery. Did the trial judge exceed his sentencing authority by imposing an enhancement that was not expressly authorized by the legislature?
7. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred

at the same time and place and if they were committed for the same overall criminal purpose. Here, the court failed to analyze Counts I and II to determine whether or not they were the same criminal conduct. Did the trial judge abuse his discretion by failing to determine whether or not Counts I and II should score separately?

8. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Bennett's defense counsel unreasonably failed to argue that Counts I and II comprised the same criminal conduct. Was Mr. Bennett denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In November of 2008, Vernon Bennett was visited by Ashley Penfield and 17-year-old Chelsea Hensley.¹ RP (8/24/10) 62-63. The three of them smoked methamphetamine together, sharing a pipe and passing it around.² RP (8/24/10) 69-74. Later that month, Hensley visited again, this time in the company of a man named Daniel Stone. On that visit, she drank alcohol in Mr. Bennett's basement. RP (8/25/10) 6-7, 9-11.

Police obtained a search warrant for Mr. Bennett's house and found alcohol bottles and several pipes containing methamphetamine residue. RP (8/24/10) 154-156; RP (8/25/10) 28-31, 57-61. Mr. Bennett was charged with distributing methamphetamine to a person under age 18 and delivery of methamphetamine. The prosecution also alleged that these crimes took place within 1000 feet of a school bus route stop. CP 1-3. Mr. Bennett was also charged with furnishing liquor to a minor and possession of methamphetamine. CP 1-4.

¹ The charging document refers to Hinsley as C.R.H. CP 1. Throughout the transcript, her last name is spelled Hinsley. *See* RP, *generally*. However, two exhibits pertaining to "Hensley, Chelsea Renee" were admitted at trial. Exhibits 2 and 3, Supp. CP.

² Penfield claimed that Mr. Bennett provided the methamphetamine. RP (8/24/10) 69-72. Mr. Bennett testified that the two young women brought the drugs with them. RP (8/25/10) 129, 143-144.

Hensley did not appear for trial. *See* RP, *generally*. Penfield testified that she smoked methamphetamine with Mr. Bennett and Hensley. RP (8/24/10) 69-74. She did not specifically testify that Mr. Bennett personally passed the pipe containing methamphetamine to Hensley. RP (8/24/10) 60-128.

At trial, Mr. Bennett objected to the introduction of several photographs which showed that he had decorated his basement with pictures of naked women. RP (8/24/10) 76-83, 91; Exhibits 31, 32, 33, Supp. CP. He argued that the photographs were irrelevant, prejudicial, and cumulative. RP (8/24/10) 76-83, 91. The objections were overruled. RP (8/24/10) 81-82, 91.

At the close of the evidence, the trial court judge met with counsel in chambers to select the appropriate jury instructions. RP (8/25/10) 145. The court did not explain why the instructions conference would take place behind closed doors. RP (8/25/10) 145.

The court did not instruct the jury on accomplice liability. Court's Instructions to the Jury, Supp. CP.

Mr. Bennett was convicted of all four counts, and the jury returned special verdicts finding that Counts I and II took place within 1000 feet of a school bus route stop. CP 9-10. Mr. Bennett was sentenced to 96 months in prison, and he appealed. CP 12, 18.

ARGUMENT

I. MR. BENNETT’S CONVICTIONS ON COUNTS I AND IV VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EACH CHARGE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The application of law to a particular set of facts is a mixed question of law and fact reviewed *de novo*. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

B. Due process requires the prosecution to prove each element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v.*

Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

C. The prosecution was required to prove that Mr. Bennett *personally* distributed methamphetamine to a person under 18, because the court did not instruct the jury on accomplice liability.

To obtain a conviction in Count I, the prosecution was required to prove that Mr. Bennett personally delivered methamphetamine to Hensley, who was under 18. RCW 69.50.406; Instruction No. 6, Court's Instructions to the Jury, Supp. CP. This is so because the jury was not instructed on accomplice liability. Court's Instructions to the Jury, Supp. CP; *see, e.g., State v. Spencer*, 111 Wash.App. 401, 412, 45 P.3d 209 (2002); *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984). In the absence of such an instruction, Mr. Bennett could only be convicted as a principal—that is, if he himself delivered methamphetamine to a person under 18. *Id.*

But nothing in the record established that Mr. Bennett personally handed Hensley a loaded methamphetamine pipe. Instead, Penfield testified that the three shared a pipe, passing it around, and that she could not recall who took the pipe first. RP (8/24/10) 71-74. Although all three smoked, it is possible that Mr. Bennett consistently handed the pipe to Penfield, who handed it to Hensley. This may have been sufficient to

prove accomplice liability, but it was not sufficient to prove that Mr. Bennett was guilty as a principal.

Without some evidence that Mr. Bennett personally passed the pipe to Hensley, the evidence was insufficient to prove the crime beyond a reasonable doubt. *Davenport, supra; Winship, supra*. Accordingly, the conviction for distributing methamphetamine to a person under 18 was entered in violation of Mr. Bennett's Fourteenth Amendment right to due process. *Id.* The conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

- D. The evidence was insufficient to prove that Mr. Bennett possessed a measurable amount of methamphetamine.
 - 1. Washington should not become the only state to permit conviction of a felony based on possession of drug residue without proof of knowledge.

To obtain a conviction for Possession of a Controlled Substance, the prosecution is required to prove beyond a reasonable doubt that the accused person possessed a controlled substance. RCW 69.50.4013. The statute does not specify a minimum amount necessary for conviction; however, common sense dictates that the prosecution must prove the possession of some minimum amount in order to sustain a conviction. Otherwise, guilt would be determined not by the actions of the accused person but by the sensitivity of the equipment used to detect the presence

of the substance. *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993) (“It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”)

Other states fall into three different categories when it comes to dealing with the problem of residue.

First, a number of jurisdictions have held that residue or trace amounts of a controlled substance cannot sustain a conviction. *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used).

Second, most jurisdictions require proof of knowing possession, and allow conviction for mere residue if that mental element is established.³ *See, e.g., Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant

³ Often, the element of knowledge can be established, in part, by proof that the residue is visible to the naked eye.

“knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of “awareness” and “conscious intent to possess”).⁴ For at least one state in this category, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. *See New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The relationship between the mental element and the quantity required for conviction is best illustrated by the evolution of the law in Arizona. In that state, conviction for possession required proof of a “usable quantity” of a controlled substance. *See Arizona v. Moreno*, 374

⁴ *See also, e.g., Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a “miniscule” amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *N.J. v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode* 988 P.2d 685, 687 (1999) (rejecting “usable quantity” rule, but noting that prosecution must prove knowledge); *Lord, supra* (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (“When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established).

P.2d 872 (1962). *Moreno* was decided under a 1935 statute which criminalized possession, and which required no proof of knowledge. *Arizona v. Cheramie*, 189 P.3d 374, 377 (2008). The statute was subsequently amended, adding a knowledge requirement to the crime of simple possession. *Id.*, at 377-378. In response, the Arizona Supreme Court removed the requirement that the state prove a “usable quantity.” *Id.* The court explained the basis for the “usable quantity” rule and the subsequent change in the law as follows:

Moreno's “usable quantity” statement affirmed that Arizona's narcotic statute requires something more than mere possession: it requires *knowing* possession. Thus, if the presence of the drug can be discovered only by scientific detection, to sustain a conviction the state must show the presence of enough drugs to permit the inference that the defendant knew of the presence of the drugs....

Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a “usable quantity” helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a “usable quantity” remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant “knowingly” committed the acts described...

Id., at 377-378.

In Washington, the Supreme Court has held that knowledge is not an element of simple possession.⁵ *State v. Bradshaw*, 152 Wash.2d 528, 536, 98 P.3d 1190 (2004). Because of this, it cannot fall into the second category of jurisdictions, which allow conviction for mere residue upon proof of knowing possession.

The Supreme Court has never directly addressed the validity of a conviction based on mere residue. However, the Court has rejected a “usable quantity” test, and affirmed a conviction for possession of what it described as “a measurable amount” of a controlled substance. *State v. Larkins*, 79 Wash.2d 392, 395, 486 P.2d 95 (1971).

If Washington were to permit conviction for possession of residue, it would be the only state in the country to impose criminal liability for *de minimis* possession without proof of knowledge.⁶ Division II should reject this approach.⁷ It would be unduly harsh to convict someone of a felony for possessing something in a quantity so small as to be unnoticeable

⁵ The only other state without a *mens rea* requirement is North Dakota. See *Dawkins v. Maryland*, 547 A.2d 1041, 1045 (1988) (surveying statutes and court decisions in the 50 states).

⁶ North Dakota has apparently not yet had the opportunity to decide whether or not possession of residue is a felony.

⁷ Divisions I and III of the Court of Appeals have imposed such liability; Division II has not issued a published opinion on the subject. See *State v. Rowell*, 138 Wash.App. 780, 786, 158 P.3d 1248 (2007); *State v. Malone*, 72 Wash.App. 429, 438-440, 864 P.2d 990 (1994).

under most circumstances, especially since the substance possessed cannot be identified without the aid of chemical tests.

Both the *Rowell* court and the *Malone* court concluded that conviction was permitted for any quantity of drugs; however, neither case engaged in a full analysis. In *Malone*, Division I relied on *dicta* from an earlier case without even analyzing the plain language of the statute.⁸ *Malone*, at 439. The basis for the court's conclusion in *Rowell* is even less clear; Division III's decision in *Rowell* relied on two cases that did not even tangentially address the quantity issue in *dicta*.⁹ See *Rowell*, at 786 (citing *Bradshaw*, *supra*, and *State v. Staley*, 123 Wash.2d 794, 872 P.2d 502 (1994)).

Neither *Rowell* nor *Malone* acknowledged the judiciary's power to recognize common law elements of an offense or even to create defenses. See, e.g., *State v. Goodman*, 150 Wash.2d 774, 786, 83 P.3d 410 (2004) ("the identity of the controlled substance is an element of the offense

⁸ The *Malone* court relied on *State v. Williams*, 62 Wash.App. 748, 749-750, 815 P.2d 825 (1991), *review denied*, 118 Wash.2d 1019, 827 P.2d 1012 (1992). In *Williams*, the court suggested in *dicta* that "There is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction." *Id.*, at 751 (citing *Larkins*, at 394). As noted previously, *Larkins*, upon which *Williams* relied, was not a residue case; instead, it involved a "measurable quantity" of drugs.

⁹ At the conclusion of the opinion, the court also cited to *Williams*, *supra*. Thus, at best, *Rowell* suffers from the same infirmity as the opinion in *Malone*, as pointed out in the preceding footnote.

where it aggravates the maximum sentence”); *State v. Cleppe*, 96 Wash.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession to “ameliorate[] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance”); *State v. Chavez*, 163 Wash.2d 262, 180 P.3d 1250 (2008) (upholding the common law definition of assault in the face of separation of powers challenge). Indeed, the legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060.

Instead of following *Malone* and *Rowell*, Division II should exercise this authority and supplement the statutory offense. Nothing in Washington’s statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a conviction for simple possession.¹⁰

To convict a person of simple possession under RCW 69.50.4013, the prosecution must be required to prove some quantity beyond mere residue. In light of *Larkins*, it need not be a usable quantity, but it should

¹⁰ In some states, for example, the statute permits conviction if a person knowingly possesses “any quantity” or “any amount” of a controlled substance. *See, e.g.*, Kentucky Revised Statutes §218A.1415 (“A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains *any quantity* of methamphetamine...”) (emphasis added).

be at least a measurable amount.¹¹ If such a common-law element is not recognized, Washington will be the only state in the nation that permits conviction of a felony for possession of residue, without proof of knowledge.

2. Mr. Bennett's possession of mere residue was insufficient for conviction.

Here, the prosecution did not prove that Mr. Bennett possessed more than mere residue. Defense counsel argued that the evidence was insufficient for conviction, and unsuccessfully sought dismissal after the prosecution rested its case. RP (8/25/10) 121-122. The trial court should have granted the motion.

The conviction was based on insufficient evidence, and therefore violated Mr. Bennett's right to due process. *Smalis*. Accordingly, his possession conviction must be reversed and the case dismissed with prejudice. *Id.*

¹¹ The problem with defining the amount solely in terms of whether or not it is "measurable" is that the standards for measurability will always be in flux as technology improves.

II. THE TRIAL COURT VIOLATED BOTH MR. BENNETT’S AND THE PUBLIC’S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *Schaler, at* 282. Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, ___ Wash.App. ___, ___ P.3d ___ (2011).

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 723, ___ L.Ed.2d ___ (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club, at* 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club, at*

261-262, 257.¹² In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct. at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.”

¹² See also *State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

*See, e.g., Strode, at 230.*¹³

- C. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearing to select the appropriate jury instructions. RP (8/25/10) 145. This *in camera* proceeding, conducted outside the public's eye without the required analysis and findings, violated Mr. Bennett's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public's right to an open trial. *Id.* Accordingly, Mr. Bennett's conviction should have been reversed and the case remanded for a new trial. *Id.*

- D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the right to a public trial only extends to hearings that require the resolution of disputed facts, and does not encompass hearings to resolve issues that are purely legal or ministerial. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view

¹³ ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

of the public trial right is incorrect, and should be reconsidered.

The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to feelings of resentment, and speculation about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or

minority jurors.¹⁴ Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots; the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In *Sublett*, the Court of Appeals also implied that the need for an open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett*, at 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of written jury instructions in this case does not eliminate the constitutional requirement that proceedings be open and public.

¹⁴ Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

In this case, the *in camera* hearing violated Mr. Bennett's public trial right under the state and federal constitutions. It also violated the public's right to monitor proceedings. For these reasons, Mr. Bennett's conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra*.

III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE THAT PAINTED MR. BENNETT IN A NEGATIVE LIGHT.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson, at 652*.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id., at 579*.

- B. The trial judge abused his discretion by admitting numerous photographs showing that Mr. Bennett had decorated the walls of his basement with pictures of naked women.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “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.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Under ER 404(b), “[e]vidence of other... 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.”

Before evidence of other acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.””

Asaeli, at 576 (quoting *State v. Pirtle*, 127 Wash.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.¹⁵

Asaeli, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wash.App. 727, 733, 25 P.3d 445 (2001).

Here, the trial court erroneously overruled Mr. Bennett's objection to evidence that he had decorated his basement with pictures of naked women. RP (8/24/10) 76-83, 91. The photographic evidence was irrelevant and highly prejudicial. It did not relate to any element of the charged crimes, it painted Mr. Bennett in a negative light, and it was unnecessarily cumulative. For these reasons, the evidence should have been excluded under ER 402, ER 403, and ER 404(b).

Furthermore, the court failed to conduct an adequate analysis on the record by identifying the purpose for its admission, considering its relevance, and weighing its probative value against its prejudicial effect. *Asaeli, supra*. Finally, the court failed to give the jury a limiting instruction. Court's Instructions to the Jury, Supp. CP.

¹⁵ However, if the record shows that the trial court adopted a party's express arguments addressing each factor, then the trial court's failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

The error requires reversal because it is prejudicial. *Asaeli, supra*. There is a reasonable probability that the admission of the evidence and the failure to give a limiting instruction materially affected the outcome of the trial. *Id., at 579*. If the jury believed Mr. Bennett lured two teenage girls into his basement for sexual purposes, they were more likely to draw adverse conclusions about all the evidence. The same is true even if they thought he had no sexual purpose, but simply exercised bad judgment by displaying inappropriate photographs on his walls. Accordingly, Mr. Bennett's convictions must be reversed and the case remanded for a new trial, with instructions to exclude evidence that he had decorated his basement walls with photographs of naked women. *Id.*

IV. MR. BENNETT'S MULTIPLE CONVICTIONS ARE BASED ON THE SAME ACTS, AND THUS VIOLATE HIS DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at 282*. The proper interpretation and application of the double jeopardy clause is a question of law, reviewed *de novo*. *In re Francis*, 170 Wash.2d 517, 523, 242 P.3d 866 (2010).

- B. The state and federal constitutions prohibit entry of multiple convictions for the same offense.

The Fifth Amendment¹⁶ provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. An accused person may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010). Two convictions are for the same offense if the charged crimes are “the same in law and fact.” *State v. Marchi*, 158 Wash.App. 823, 829, 243 P.3d 556 (2010) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

Under *Blockburger*, a double jeopardy violation occurs whenever two crimes arise from the same act and the evidence supporting conviction of one crime is sufficient to support conviction of the other crime. *Marchi*, at 829; *Blockburger*, at 304. In undertaking this analysis, a reviewing court views the offenses as they were charged, rather than in the

¹⁶ The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

abstract. *Francis, at 524.* The remedy for a double jeopardy violation is vacation of the lesser offense. *Marchi, at 829.*

- C. The two delivery convictions (and the associated sentence enhancements) violate double jeopardy because they are the same in law and in fact.

Mr. Bennett's two delivery convictions violate double jeopardy.

First, the two crimes arose from the same act, when Mr. Bennett shared methamphetamine by passing a pipe around with both Penfield and Hensley. RP (8/24/10) 69-74. Because the prosecution relied on the shared use by all three participants at a single time and place (rather than two distinct deliveries), the two crimes were the same in fact. *Marchi, at 829.*

Second, the two offenses are the same in law, because evidence supporting conviction of distributing to a person under 18 is sufficient to support conviction of delivery. Because the prosecutor relied on a single act—the sharing of the pipe—to prove both offenses, the only additional fact required to prove Count I was Hensley's age. No additional facts were required to prove Count II. Accordingly, the two offenses were also the same in law. *Marchi, at 829.*

Because the two delivery convictions were the same in fact and in law, the lesser charge (Count II) and its associated enhancement must be

vacated. *Marchi*, at 829. The remaining charges must be remanded to the superior court for a new sentencing hearing.

D. The possession conviction violates double jeopardy because it is the same in law and in fact as the two delivery convictions.

Mr. Bennett's conviction for simple possession was the same in law and in fact as the two delivery convictions. *Marchi*, at 829.

First, the two convictions were based on the same act. Under the state's theory of the case, the residue seized during the search of Mr. Bennett's house was a fraction of the same methamphetamine that he had delivered to Penfield and Hensley in November. Thus, under the state's theory, Mr. Bennett possessed a quantity of methamphetamine during the November visit, and continued to possess a small amount of that methamphetamine on the day the search was conducted.

Second, the two offenses were the same in law. *Marchi*, at 829. Proving delivery of a controlled substance necessarily establishes possession of that substance. *State v. Rodriguez*, 48 Wash.App. 815, 740 P.2d 904 (1987).

Because the two offenses were the same in law and in fact, conviction of both violates Mr. Bennett's right to be free from double jeopardy. *Marchi*, at 829. Accordingly, the possession conviction must

be vacated and the case remanded for resentencing on the remaining charges. *Id.*

V. THE SENTENCING JUDGE EXCEEDED HIS STATUTORY AUTHORITY BY IMPOSING A SENTENCING ENHANCEMENT ON COUNT I.

A. Standard of Review

A court's sentencing authority is an issue of law, reviewed *de novo*. *State v. Pleasant*, 148 Wash.App. 408, 411, 200 P.3d 722 (2009).

Issues of statutory interpretation are also reviewed *de novo*. *Id.* A sentence that is illegal or erroneous may be challenged for the first time on appeal. *State v. Bahl*, 164 Wash.2d 739, 745, 193 P.3d 678 (2008).

B. The provisions of RCW 9.94A.533 and RCW 69.50.435 do not apply to distributing methamphetamine to a person under 18.

A trial court exceeds its authority when it imposes a sentence beyond what the legislature expressly confers. *State v. Steen*, 155 Wash.App. 243, 247, 228 P.3d 1285 (2010). In such cases, the sentence must be vacated and the case remanded for resentencing. *Id.*

Certain drug offenses are subject to enhancement if committed within 1000 feet of a school bus route stop. RCW 9.94A.533(6); RCW 69.50.435. Specifically,

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of

chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435...

RCW 9.94A.533(6).¹⁷ The enhanced penalties are applicable to “[a]ny person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person...” RCW 69.50.435.

1. The statutes are unambiguous, and do not increase the penalty when the offender is convicted of violating RCW 69.50.406.

When interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wash.App. 170, 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997). The court may not add

¹⁷ In addition, the maximum fine and period of confinement are doubled. RCW 69.50.435.

language to a clearly worded statute, even if it believes the legislature intended more. *Id.*

By their plain terms, the two statutes (RCW 9.94A.533(6) and RCW 69.50.435) apply only to certain violations of RCW 69.50.401 and RCW 69.50.410. Omitted from this short list of qualifying offenses are violations of RCW 69.50.406. Because omissions from a statute are deemed to be exclusions, the enhanced penalties cannot be applied to such crimes. *See In re Detention of Martin*, 163 Wash.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim *expressio unius est exclusio alterius*). It follows that the trial court lacked the authority to enhance Mr. Bennett's sentence on Count I. RCW 9.94A.533(6); *Steen*.

The legislature did not expressly confer upon trial courts the authority to sentence persons convicted under RCW 69.50.406 to the enhanced penalties set forth in RCW 9.94A.533(6) and RCW 69.50.435. Accordingly, the trial court erred by applying the enhanced penalties to Count I in this case. The enhancement must be vacated and the case remanded for correction of the judgment and sentence. *Steen, supra*.

2. Even if the statutes are ambiguous, they must be interpreted to prohibit application of the enhanced penalties for crimes occurring within 1000 feet of a school bus route stop.

A statute is ambiguous if it is "amenable to more than one reasonable interpretation." *State v. Mendoza*, 165 Wash.2d 913, 921, 205

P.3d 113 (2009). In such cases, to determine legislative intent, courts turn to rules of statutory construction. *Delyria v. State*, 165 Wash.2d 559, 563, 199 P.3d 980 (2009). Under the rule of lenity, a criminal statute must be construed in the manner most favorable to the accused person. *State v. Flores*, 164 Wash.2d 1, 17, 186 P.3d 1038 (2008). The policy underlying the rule of lenity is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *State v. Jackson*, 61 Wash.App. 86, 93, 809 P.2d 221 (1991).

If RCW 9.94A.533(6) and RCW 69.50.435 are held to be ambiguous,¹⁸ the rule of lenity mandates that they be interpreted in Mr. Bennett’s favor. *Flores*, at 17. This interpretation makes sense. The legislature may well have decided that the much higher penalties¹⁹ imposed for violations of RCW 69.50.406 are sufficient to punish and

¹⁸ The potential for ambiguity arises only if convictions entered under section .406 are also considered to be convictions of section .401. Under this view, anyone who is guilty of distributing methamphetamine to a person less than 18 years old (section .406) would necessarily also be guilty of the crime of delivery of methamphetamine (section .401), and thus eligible for the enhanced sentence. Of course, this truism—that any person found guilty under .406 has necessarily committed the crime of delivery—applies to any lesser included or inferior degree offense. Conviction of a greater offense generally does establish guilt for the lesser offense. However, adopting this interpretation would require the sentencing judge to ignore the actual crime charged in the Information and found by the jury.

¹⁹ The offense is a Class A felony and a level III drug offense. RCW 9.94A.518; RCW 69.50.406.

deter commission of that crime, without additional enhancements for offenses occurring near school bus stops.

Because the legislature did not unambiguously give sentencing courts the authority to apply enhanced penalties for violations of RCW 69.50.406, the sentence imposed on Count I in this case is erroneous and illegal. The enhancement must be vacated and the case remanded for correction of the judgment and sentence. *Steen, supra*.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DETERMINE WHETHER OR NOT COUNTS TWO AND THREE SCORED AS THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000). Failure to exercise discretion requires reversal. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

B. Two offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a

sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court "should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next...." *State v. Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)). A continuing, uninterrupted sequence of

conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

C. The sentencing court should have analyzed Counts I and II under the “same criminal conduct” test to determine whether or not they scored together.

Here, Mr. Bennett was convicted of distributing methamphetamine to a person under 18 and delivery of methamphetamine. The two offenses took place at the same time and place, with the same overall criminal purpose (sharing methamphetamine), and involved the same victim—the public at large.²⁰ *Garza-Villarreal*, at 47. Because of this, the court should have considered whether or not to score the two crimes as the same criminal conduct. RCW 9.94A.589(1)(a); *Garza-Villarreal*.

The court’s failure to exercise discretion constituted an abuse of discretion. *Grayson, supra*. Accordingly, Mr. Bennett’s sentence must be vacated and the case remanded for a new sentencing hearing.²¹ *Id.*

²⁰ Division I has held that a conviction under RCW 69.50.406 involves a victim other than the public at large: the minor who receives drugs. *State v. Vanoli*, 86 Wash.App. 643, 652, 937 P.2d 1166 (1997); *see also State v. Hollis*, 93 Wash.App. 804, 818, 970 P.2d 813 (1999) (addressing crime of involving minor in drug transaction under former RCW 69.50.401(f) (1999)). However, the Supreme Court has yet to rule on this issue.

²¹ If, following resolution of all the issues raised, Mr. Bennett’s offender score remains at three or higher, the standard range will remain unchanged. RCW 9.94A.517. Nonetheless, a lower offender score could convince the sentencing judge that Mr. Bennett should receive a lower sentence within the standard range.

D. Division II should not follow Division I's decision in *Vanoli*.

Division I's opinion in *Vanoli* was wrongly decided, and should not be followed by Division II. *Vanoli, supra*. In *Vanoli*, Division I concluded that the victim of a delivery charged under RCW 69.50.406 was the minor recipient of the controlled substance. *Id, at 652*. According to Division I,

The enactment of this special statute [RCW 69.50.406] to separately address deliveries of drugs to minors, and the statute's provision for enhanced penalties for such deliveries, demonstrates the Legislature's recognition that minors are indeed victims, as well as participants, when they are given illegal drugs.

Vanoli, at 652-653.

This reasoning is flawed. The legislature's recognition of the special harm stemming from underage drug use does not mean that the legislature intended underage recipients of controlled substances to be considered victims for purposes of RCW 9.94A.589(1)(a).

Offenders convicted under RCW 69.50.406—a Class A felony—already receive vastly higher penalties than those convicted of ordinary delivery. *See* RCW 9.94A.517 and RCW 9.94A.518. There is no indication that the legislature also intended to increase the offender score, standard range, and time in prison for other current offenses that comprise the same criminal conduct.

Accordingly, this Court should reject the approach taken by Division I in *Vanoli*.

VII. MR. BENNETT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental

and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that

counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel provided ineffective assistance by failing to argue that Counts I and II comprised the same criminal conduct.

Counts I and II occurred at the same time and place, with the same overall criminal purpose, and involved the same victim. Despite this, defense counsel did not ask the sentencing court to find that they comprised the same criminal conduct.

Had the trial court scored the two offenses as one, Mr. Bennett would have had a lower offender score. There is a reasonable possibility that the trial judge would have imposed a lower sentence within the standard range.

Counsel’s unreasonable failure to request a “same criminal conduct” finding prejudiced Mr. Bennett. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, Mr. Bennett’s convictions in Counts I and IV must be reversed and the charges dismissed with prejudice. His convictions on the remaining counts must be reversed, and the charges remanded to the trial court for a new trial.

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Vernon Bennett
PO Box 1132
South Bend, WA 98586

and to:

Lewis County Prosecutors Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 18, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 18, 2011.



Jodi R. Backlund, WSBA No. 22917
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