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DIVISION II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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**STATE OF WASHINGTON,**

Respondent,

vs.

**VERNON BENNETT,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Was there sufficient evidence presented to the jury to convict Bennett of Count One, Distribute Methamphetamine to a Person Under 18, and Count Four, Possession of Methamphetamine?
- B. Did the trial court violate Bennett's constitutional rights, under United States Constitution, Amendment IV, and Washington State Constitution, Article 22, to an open and public trial?
- C. Did the trial court err when it allowed the State to introduce photographs of Bennett's house that included pictures of naked women on the walls?
- D. Did Bennett's multiple convictions violate his double jeopardy rights, under the Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution?
- E. Did the trial court impose an illegal sentence when it included a school bus stop enhancement as part of the sentence for Count One?
- F. Did the trial court improperly calculate Bennett's offender score by failing to merge Counts One and Two?
- G. Did Bennett receive effective assistance from his trial counsel?

## II. STATEMENT OF THE CASE

The State filed a second amended information, on August 24, 2010, charging Vernon Bennett with Count One, Distribution of a Controlled Substance to Person Under Age 18 (Methamphetamine); Count Two, Delivery of a Controlled

Substance (Methamphetamine); Count Three, Furnishing Liquor to Minor; and Count Four, Possession of a Controlled Substance (Methamphetamine). CP 1-4. The State alleged that Counts One and Two occurred on or about and between November 1, 2008 and November 20, 2008. CP 1-2. The State alleged Count Three occurred on or about and between November 21, 2008 and November 22, 2008. CP 3. The State alleged Count Four occurred on November 23, 2008. CP 4. The State also alleged in Count One that the distribution was to C.R.H.<sup>1</sup>, whose date of birth is October 6, 1991. CP 1. The State alleged the delivery of methamphetamine in Count Two was to Ashleigh Penfield. CP 2. The State also alleged Counts One and Two were within 1000 feet of a school bus stop. CP 1-2.

Sara Ballard testified that Ms. Hensley was staying at Ms. Ballard's house in Centralia, Washington, in November 2008. RP 129-130.<sup>2</sup> Ms. Ballard knew Ms. Hensley's friend, Ashleigh Penfield.<sup>3</sup> RP 130. Ms. Ballard stated that Ms. Hensley and Ms.

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<sup>1</sup> C.R.H. is Chelsea Renee Hensley. The report of proceedings incorrectly spells her last name as Hinsley. The State will refer to her as Ms. Hensley throughout its response.

<sup>2</sup> There are five volumes of report of proceedings for this case. The State will refer to 08-24-10 as RP; the report of proceedings containing 08-25-10, 08-26-10, 10-18-10 and 12-06-10 as 2RP; 12-18-09 as 3RP; 11-24-10 as 4RP; and the report of proceedings containing 12-10-09 and 08-05-10 as 5RP.

<sup>3</sup> Ashleigh Penfield's first name is incorrectly spelled as Ashley in the report of proceedings.

Penfield spent time together. RP 130. Ms. Ballard did not closely monitor Ms. Hensley's comings and goings. RP 130-131. In November 2008 Ms. Hensley was 17 years old. Ex. 2

Ms. Penfield testified that she knew Bennett, whose nickname was Spike, and had actually lived with him for a time from December 2007 to February 2008. RP 60-61. Bennett's house is located at 121 Yew Street in Centralia, Washington. 2RP 20. In November 2008 Bennett was 48 years old. Ex. 3. Ms. Penfield took her friend, Ms. Hensley, over to Bennett's residence on November 2008. RP 62-63. Prior to November 2008 Ms. Penfield had not been at Bennett's residence with Ms. Hensley. RP 63. Ms. Penfield admitted that she had prior to November 2008 used methamphetamine. RP 64. Ms. Penfield stated she last used methamphetamine in January 2008 and had prior to that used methamphetamine every day for a month and a half. 2RP 64-65. Ms. Penfield explained that she was familiar with the sight and smell of methamphetamine and when she used methamphetamine she smoked it. RP 65.

According to Ms. Penfield, the night she and Ms. Hensley went over to Bennett's house Ms. Penfield and Ms. Hensley had discussed wanting to use methamphetamine. RP 66. Ms. Penfield

testified that she and Ms. Hensley went over to Bennett's residence to visit but also in the hopes of getting methamphetamine. RP 66. Ms. Penfield called Bennett and asked if he wanted to hang out with her and Ms. Hensley, he agreed and picked them up. RP 66-67. Ms. Penfield testified that neither she nor Ms. Hensley brought any drugs over to Bennett's house. RP 69-70. Ms. Penfield stated that Bennett gave her and Ms. Hensley methamphetamine and they all used it together. RP 69. Ms. Penfield explained that they went up to Bennett's bedroom where he retrieved a methamphetamine pipe from the top of his dresser drawer on the left. RP 70. Ms. Penfield stated neither she nor Ms. Hensley brought any pipes over the Bennett's house that night. RP 125. Ms. Penfield stated Bennett produced the methamphetamine and it was loaded into the pipe and smoked by all three of them. RP 71-73. Bennett, Ms. Penfield and Ms. Hensley went downstairs into the basement and played music, danced and smoked more methamphetamine. RP 74-75. Several photographs of the inside of Bennett's house were shown to Ms. Penfield and she identified the photographs as being the rooms Ms. Penfield and Ms. Hensley had smoked methamphetamine with Bennett in. RP 85-91; Ex. 31, 32, 33. Some of the photographs, particularly the ones from the basement,

contained pictures of naked women on the walls. RP 76-83.

Bennett's trial counsel objected to the photographs being admitted and the court after hearing arguments outside the presence of the jury overruled the objection. RP 81-82.

Daniel Stone testified that he and Ms. Hensley went over to Bennett's house in November 2008. 2RP 7. Mr. Stone and Ms. Hensley had consumed a couple beers prior to going over to Bennett's residence but they did not bring any alcohol over to Bennett's house. 2RP 9-10. Bennett brought out rum and tequila from a cupboard at his residence. 2RP 10. At Bennett's house Mr. Stone and Ms. Hensley did shots of tequila and rum that Bennett provided for them. 2RP 10-11. Mr. Stone spoke to Detective Beall approximately one day after Mr. Stone and Ms. Hensley had been drinking over at Bennett's house. 2RP 16-17. Detective Beall spoke to Mr. Stone on November 22, 2008. 2RP 76.

Police obtained a search warrant for Bennett's residence and executed the warrant on November 23, 2008. 2RP 76. Detective Beall, Commander Ross, Officer Byrnes and Sergeant Buster all took part in the execution of the search warrant. 2RP 77. Detective Beall testified that Bennett's residence is located at 121 Yew Street in Centralia. 2RP 77. The search of the residence

yielded four methamphetamine pipes located in Bennett's bedroom.

2RP 59. One of the pipes appeared to have never been used.

2RP 59. Two of the pipes were located in the top right dresser drawer and another was found next to the keyboard. 2RP 59. All pipes collected from the house were sent for analysis down to the Washington State Patrol Crime Laboratory. 2RP 81-84. There were also several bottles that appeared to contain alcohol, specifically rum, tequila and Jagermeister. 2RP 84-86.

Washington State Patrol Forensic Scientist Jason Dunn testified regarding the testing of the pipes recovered from Bennett's residence. RP 132-147. Mr. Dunn testified that three of the four pipes recovered from Bennett's residence contained methamphetamine. RP 143.

Detective Beall took two statements from Bennett, one in November 2008 and one in July of 2009. 2RP 85, 90. Bennett told Detective Beall that Ms. Hensley and Mr. Stone had come over to his residence and they brought beer with them. 2RP 87. Bennett also stated that Ms. Hensley and Mr. Stone had two shots of Jagermeister, which belonged to Bennett. 2RP 87. Bennett told Detective Beall that Ms. Hensley and Mr. Stone were doing shots of tequila and rum and that he knew Ms. Hensley was under 21 years

old. 2RP 89. Mr. Bennett stated to Detective Beall that Ms. Hensley and Ms. Penfield had come over to his house and he admitted, albeit in a vague way, that the three of them had consumed methamphetamine together. 2RP 98.

Dale Dunham, the Assistant Director for the Centralia School District Transportation Department, testified that there was a school bus stop in existence in November 2008 located at the northwest corner of Locust and Yew. RP 42-44. The bus that stopped at Yew and Locust was owned and operated by the Centralia School District. RP 47. The bus is designed to carry 78 students and 42 were designated to the route in November 2008. RP 47, 50. The bus was used to transport children to and from school on a regular basis. RP 47.

Steven Spurgeon, a Civil Engineering Technician with the City of Centralia Engineering Department, testified regarding the distance between Bennett's residence and the school bus stop. RP 52-59. Mr. Spurgeon explained he had 30 years of experience with the City of Centralia and 15 years of experience using Autocad software. RP 53. Autocad is a three-dimensional drafting program relied upon by the City of Centralia to design projects, such as roads and utilities. RP 53. Mr. Spurgeon produces maps, or

drawings as they are commonly referred to, in the course of his employment with the City of Centralia. RP 54. Mr. Spurgeon testified that the accuracy of the program is up to two feet at either end of the point of a straight line, for a total of four feet. RP 57. Mr. Spurgeon created a map, designating Bennett's address, 121 Yew Street, and the school bus stop located at the corner of Yew and Locust. RP 58. The distance from Bennett's residence to the bus stop was 109.95 feet, with a maximum error of four feet. RP 59.

Bennett chose to testify on his own behalf. RP 125. Bennett testified that Ms. Penfield brought Ms. Hensley over to his house sometime in November 2008. 2RP 128. Bennett admitted on direct examination that the three of them had smoked methamphetamine together. 2RP 129. Mr. Bennett stated Ms. Penfield and Ms. Hensley brought the methamphetamine with them to his residence. 2RP 130. Bennett admitted to having four methamphetamine pipes in his room on November 23, 2008. 2RP 132. Bennett also admitted he had used the pipes to smoke methamphetamine. 2RP 133.

The jury convicted Bennett on all counts and returned the special verdict yes on both bus stop enhancements. 2RP 193-194.

After a sentencing hearing, Bennett was sentenced to 96 months in prison, which included the sentencing enhancement. CP 12.

### **ARGUMENT**

#### **A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO CONVICT BENNETT ON COUNTS ONE AND FOUR.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial

evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

**1. There Was Sufficient Evidence Submitted To The Trial Court To Convict Bennett Of Distribution Of A Controlled Substance To Person Under Age 18, As Charged In Count One Of the Second Amended Information.**

Bennett argues there is nothing in the record that Bennett personally handed Ms. Hensley the loaded methamphetamine pipe, therefore, without an accomplice liability instruction (which was not given) there was insufficient evidence to prove Bennett committed the offense of Distributing a Controlled Substance to a Person

Under Age 18. Brief of Appellant 8-9. As charged, Count One of the Second Amended Information read:

On or about and between November 1, 2008, and November 20, 2008, in the County of Lewis, State of Washington, the above-named defendant, being a person eighteen (18) years of age or over, did violate RCW 69.50.401 by knowingly distributing a controlled substance listed in Schedules I or II which is a narcotic drug, to-wit: methamphetamine, to a person under eighteen (18) years of age, to wit C.R.H., who was born on (DOB:10/06/1991); contrary to the Revised Code of Washington 69.50.406(1). And Furthermore, the commission of said crime took place within one thousand feet of a school bus route stop designated by the school district; and/or within one thousand feet of the perimeter of the school grounds; contrary to the Revised Code of Washington 69.50.401 and 69.50.435(1).

CP 1-2. According to the testimony of Ms. Penfield, Bennett gave her and Ms. Hensley methamphetamine and the three of them used it together. RP 69. “Deliver or delivery means the **actual or constructive** transfer of a controlled substance from one person to another.” CP 40 (emphasis added); WPIC 50.07. Distribution is defined as “to deliver other than by administering or dispensing a controlled substance.” RCW 69.50.101(j). Distribution can therefore be constructive or actual.

Constructive transfer is when the controlled substance is under a defendant’s control, either directly or indirectly, or belongs to the defendant and the transfer of the controlled substance is

done by a third party or in a manner that is at the direction of the defendant. *State v. Campbell*, 59 Wn. App. 61, 63, 795 P.2d 750 (1990). In *Campbell*, the defendant placed the drugs on the seat of a car and directed another person to pick it up and hand it to the undercover officer. *Id.* at 62. The Court of Appeals affirmed Campbell's conviction for delivery of cocaine. *Id.* at 65.

In the present case Bennett possessed the methamphetamine. RP 69-70. Bennett produced the methamphetamine from his bedroom and provided it to Ms. Penfield and Ms. Hensley. RP 71-73. Whether or not Bennett actually passed the pipe to Ms. Hensley is irrelevant. There was sufficient evidence presented to the trial court to sustain a verdict of guilty on Distributing Methamphetamine to a Person Under 18, therefore Bennett's conviction on Count One must be affirmed.

**2. There Was Sufficient Evidence Submitted To The Trial Court To Convict Bennett Of Possession Of A Controlled Substance In Count Four Of the Second Amended Information.**

Bennett argues to this court that there was insufficient evidence to support his conviction on Count Four, Possession of Methamphetamine, because the methamphetamine was not a measurable quantity. Brief of Appellant 9-16. Bennett urges this court to overturn binding precedent reasoning the common-law

element of requiring proof of a measurable amount should be recognized. Brief of Appellant 15. Bennett does not cite to any Washington case law, statutory language or legislative history that would support a common-law element of a measurable amount.

To convict a person of possession of a controlled substance the State must prove that the person possessed a controlled substance, and specify what the substance is. RCW 69.50.4013; WPIC 50.01; WPIC 50.02. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence that they did not knowingly possess the controlled substance. *State v. Bradshaw*, 152 Wn.2d at 538; WPIC 52.01. The ability to raise an unwitting possession defense lessens the harshness of the strict liability crime. *State v. Bradshaw*, 152 Wn.2d at 538. The defense also alleviates any concern that a person could be convicted for quantities of a controlled substance that were so small that the person could not have been aware they possessed a controlled substance. For example a person who unwittingly possessed a

controlled substance because there was residue found on currency they possessed is protected by the unwitting possession defense.

The State is not required to prove a defendant possessed a minimum amount of a controlled substance to sustain a conviction for unlawful possession of a controlled substance. *State v. Larkins*, 79 Wn.2d 392, 394-95, 486 P.2d 95 (1971); *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008); *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994); *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991), *review denied* 118 Wn.2d 1019 (1992). Larkins was convicted of unlawful possession of a narcotic drug, Demerol, under former RCW 69.33.230, which prohibited possession of any narcotic drug except authorized by law. There was no knowledge or minimum amount required by the statute, as there is no minimum amount required in RCW 69.50.4013. Larkins argued due to the nature of the definition of narcotic, the State must be required to show Larkins unlawfully possessed a usable amount of the drug. The court rejected Larkins's argument, stating:

The standard suggested by the defendant does violence to the clear language of RCW 69.33.230. Although the legislature had the power to do so, it provided no minimum amount of a narcotic drug, possession of which would sustain a conviction. It adopted no "usable amount" test. On the contrary, the legislature provided that possession of *any* narcotic drug is unlawful unless otherwise authorized

by statute...For us to establish the minimum standard suggested would require us to substitute our wisdom for that of the legislature. This we will not do.

*State v. Larkins*, 79 Wn.2d at 394 (emphasis original). The reasoning in *Larkins* applies to cases prosecuted under RCW 69.50.4013 because the current statute is also silent regarding any minimum quantity.

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 652-53, 466 P.3d 508 (1970). Once the Washington State Supreme Court “has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by” the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (citations omitted).

Bennett is asking this court to ignore precedent set by the Supreme Court and make a new requirement that is not found in the plain language of the statute, that some minimum quantity of a controlled substance is a necessary and essential element of the crime of unlawful possession of a controlled substance. The State is respectfully requesting this court not break from the clearly established precedent of not requiring a minimum quantity of a

controlled substance and affirm Bennett's conviction on Count Four, Possession of Methamphetamine.

**B. BENNETT'S PUBLIC TRIAL RIGHT WAS NOT VIOLATED WHEN THE TRIAL COURT CONDUCTED THE CONFERENCE REGARDING JURY INSTRUCTIONS OUTSIDE OF THE COURTROOM.**

The United States Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Constitution, Amend. IV. In Washington State, a criminal defendant has the right to a public trial. Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.2d 212 (2010), *review granted*, 169 Wn.2d 1017 (2010). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005). Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

The right to a public trial extends to evidentiary hearings, voir dire and other adversary proceedings. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). A criminal defendant does not however have a public trial right on purely legal or ministerial matters. *Id.* The Supreme Court has previously held that in-chamber conference between the judge and counsel for legal matters does not trigger a criminal defendant's right to be present.

*In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The wording of jury instructions is a legal matter. *Id.*

In the present case, Bennett argues that the in-chambers conference conducted between counsel and the judge in regards to the jury instructions is a violation of Bennett's right to an open and public trial. Brief of Appellant 19. Bennett urges this Court to reject the exceptions for ministerial or legal matters. Brief of Appellant 19. In Bennett's case the judge met with the attorney's for an in-chambers conference in regards to the jury instructions. 2RP 145. Both parties were given the opportunity to review the proposed instructions and place any objections or exceptions on the record. 2RP 145-46. The State respectfully requests this court to be consistent with its prior holdings in *Sadler* and *State v. Sublett*<sup>4</sup>, and find that an in-chambers conference regarding which jury instructions will be given is a legal proceeding and the right to an open and public trial is not violated by such activity. Bennett's right to an open and public trial was not violated and his convictions should be affirmed.

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<sup>4</sup> *State v. Sublett*, 156 Wn. App. 160, 181-82, 231 P.3d 231 (2010), *review granted*, 170 Wn.2d 1016 (2010).

**C. THE TRIAL COURT DID NOT ERROR WHEN IT ADMITTED PHOTOGRAPHS OF THE INSIDE OF BENNETT'S HOUSE.**

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

Bennett argues to this court that the trial court erred in admitting a few photographs of Bennett's basement that showed there were pictures of naked women on the wall. Brief of Appellant 24. Bennett's argument appears to rest on the premise that the evidence should have been excluded under ER 402, 403 and 404(b). Brief of Appellant 24. Bennett argues that the trial court

failed to conduct an adequate analysis on the record regarding the admission of the photographs. Brief of Appellant 24. Lastly, Bennett argues the trial court's failure to give a limiting instruction materially affected the outcome of the trial. Brief of Appellant 24-25.

Bennett's arguments in regards to the photographs are without merit and misconstrue the record. The State planned to offer the photographs into evidence to show the jury where Ms. Penfield and Ms. Hensley had been smoking methamphetamine with Bennett. RP 77. Bennett's trial counsel objected and argued that three or four of the photographs appeared to have pictures of naked women on the walls and therefore paints Bennett in a bad light. RP 76. The State argued that the photographs showed the location where the methamphetamine was smoked in the house and also showed where alcohol was consumed on a separate day. RP 78-79. Bennett's trial counsel argued to the court that Ms. Penfield had already testified as to where the methamphetamine was smoked and the State only wanted to use the photographs to paint Bennett in a certain light. RP 79. The trial court asked, "Relevance materiality of the pictures is what?" RP 80. The State answered,

One, it does show the exact location in the room in the house, where the delivery of methamphetamine happened on or about between November 1<sup>st</sup>, November 20, 2008.

The pictures show the room in the same condition as this witness will describe it as. It also shows what can be described as a festive or party type setting or atmosphere, which is what the State is alleging happened down in this room. Some of the pictures do show alcohol containers, which do go to the crime of furnishing and Mr. Stone will testify that there was some drinking down in the basement of rum and tequila, so I think it corroborates the State's testimony and it shows the location where it happened.

RP 80. The Court then stated to Bennett's trial counsel, "Your argument is that the pictures are what? Not relevant, not material, and being offered basically to inflame the jury and play into their passion and prejudice?" RP 80. Bennett's trial counsel stated that was exactly his concern and objection. RP 80. The trial court noted that having pictures of naked women on your walls was not an illegal act. RP 79. The trial court ruled that:

[A]s long as the pictures accurately depict what the witness will describe as being the situation or the atmosphere at the basement, where they smoked methamphetamine, I don't see how they are not relevant or how they are not material to what's being presented, and I don't think that the mere fact that this stuff is on the wall in and of itself is so inflammatory to justify keeping it out.

RP 81-82.

The State made it clear its purpose for the admission of the photographs. The State was not trying to introduce the photographs in an effort to prove what Bennett's character is, which would fall under ER 404(b). Therefore, Bennett's argument regarding the necessity for a ER 404(b) hearing prior to admission of the photographs is misplaced. See Brief of Appellant 23. The purpose and scope of ER 404(b) is that it "governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character" 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, §404(b).1 at 239 (2010-2011). There was no allegation of misconduct or other crimes and photographs that include pictures of naked women on the walls would not implicate such conduct.

The trial conducted an extensive examination, outside the presence of the jury, into the purpose, potential prejudice and admissibility of the photographs the State would be seeking to introduce. See RP 76-83. The trial court through its ruling and inquiry of both the State and Bennett's trial counsel, clearly stated why the photographs would be admissible and that the evidence was not so prejudicial as to give a reason to exclude it. RP 76-83. The trial court's evidentiary ruling was not manifestly unreasonable

or based on untenable grounds. Therefore, the trial court did not abuse its discretion when it allowed the admission of the photographs. See, *State v. C.J.*, 148 Wn.2d 672.

While the State does not agree that the trial court erred in its admission of the photographs, assuming arguendo that there was an error, Bennett has not shown that the error prejudiced him. To be prejudicial Bennett would have to show, within a reasonable probability, that the outcome of the trial was materially affected by the trial court's ruling. See, *State v. Bourgeois*, 133 Wn.2d at 403. Bennett was not charged with a crime that was sexual in nature, there was sufficient and there was independent evidence to support the convictions on all four counts. Bennett has not met the required burden of showing the error prejudiced him, therefore it would be harmless and his convictions should be affirmed.

Bennett argues that the court must sua sponte give a limiting jury instruction in regards to the photographs. After reviewing the record it does not appear that Bennett's trial counsel requested a limiting jury instruction. See, RP; 2RP; CP. Bennett's trial counsel had no objections or exceptions to the jury instructions given. 2RP 146. By failing to request the limiting instruction

Bennett failed to preserve the error for review. *State v. Dow*, COA No. 39870-2-II (June 21, 2011).

**D. BENNETT'S MULTIPLE CONVICTIONS DO NOT VIOLATE HIS DOUBLE JEOPARDY RIGHTS.**

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998), citing *State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). Double jeopardy claims are reviewed de novo. *State v. S.S.Y.*, 170 Wn.2d 322, 328, 241 P.3d 781 (2010). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *State v. Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *State v. Marchi*, 158 Wn. App. at 829. "[W]hether the two charged crimes arose from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the

other crime.” *Id.*, citing *In re Organge*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). When a single transaction violates two statutes, the question then becomes, does each require proof of an additional fact? *Blockburger v. United States*, 284 U.S. at 304.

**1. The Convictions For The Crime Distribution Of A Controlled Substance To A Person Under 18 And The Crime Of Delivery, Where Two Different Individuals Received The Methamphetamine From Bennett, Does Not Violate Double Jeopardy.**

Bennett argues that his convictions under Count One and Count Two of the second amended information violate double jeopardy. Brief of Appellant 27. Bennett was charged with Count One, Distribution of a Controlled Substance to Person Under Age 18 (Methamphetamine), and Count Two, Delivery of Methamphetamine. CP 1-2. The allegation in Count One was that Bennett:

On or about and between November 1, 2008, and November 20, 2008, in the County of Lewis, State of Washington, the above-named defendant, being a person eighteen (18) years of age or over, did violate RCW 69.50.401 by knowingly distributing a controlled substance listed in Schedules I or II which is a narcotic drug, to-wit: methamphetamine, to a person under eighteen (18) years of age, to wit C.R.H., who was born on (DOB:10/06/1991)...

CP 1. The charge in Count Two specified that:

On or about and between November 1, 2008, and November 20, 2008, in the County of Lewis, State of

Washington, the above-named defendant did knowingly deliver a controlled substance, to-wit: Methamphetamine, to another, to wit: Ashleigh K. Penfield, (DOB: 02/13/1990)...

CP 2. Ms. Hensley is specified to in the to convict instruction given for the Distribution to a Person Under 18 charge. CP 39. Similarly, Ms. Penfield was specified as the person Bennett had delivered methamphetamine to in the to convict instruction for the Delivery of Methamphetamine charge. CP 1. While the mode of delivery was in essence for Bennett to share his drugs with both Ms. Hensley and Ms. Penfield, a single transaction does not mean that double jeopardy is violated.

Looking at the legislative intent regarding the crime of Distribution of Controlled Substance to a Person Under 18, one needs to look no further than the punishment intended by the offense. Distribution of methamphetamine to a person under 18 is a class A felony. RCW 69.50.406(1). Delivery of methamphetamine is a class B felony. RCW 69.50.401(2)(b). The legislature states in RCW 69.50.406(1) that any person who is over 18 and violates RCW 69.50.401 by selling methamphetamine to a person under 18 years of age, "is guilty of a class A felony punishable by the fine authorized by RCW 69.50.401(2)(a) or (b), by a **term of imprisonment of up to twice that authorized by**

**RCW 69.50.401(2)(a) or (b), or by both.”** RCW 69.50.406 (1) (emphasis added). It is clear the legislature wanted to treat people who deal drugs to children in a much harsher light than to those who deal drugs to adults.

Further, the State had to specifically prove that Bennett delivered the drug to Ms. Penfield and also to Ms. Hensley (and prove Ms. Hensley was under 18 and Bennett was over 18). The two offenses are not the same in law or in fact. If Bennett had been charged with delivery and distribution based on his actions for delivering the drugs to Ms. Hensley, then that would be a double jeopardy issue. That is not the case here. Counts One and Two do not violate Bennett’s double jeopardy rights and therefore the convictions should be affirmed.

**2. The Conviction For Possession Of A Controlled Substance Does Not Violate Double Jeopardy Because The Offense Occurred On A Different Day Than The Delivery And Distribution To A Person Under 18.**

Bennett next argues that double jeopardy was violated by his convictions to Possession of Methamphetamine under Count Four. Brief of Appellant 28. Bennett argues to this court that possession charge was the same in law and in fact as the distribution and

delivery charges Bennett was convicted of in Counts One and Two.

Brief of Appellant 28. This is simply not the case.

The State charged Bennett in Count Four with:

On or about the 23<sup>rd</sup> of November, 2008, in the County of Lewis, State of Washington, the above-named defendant did possess a controlled substance, to-wit: Methamphetamine. . .

CP 4. The date of the delivery and distribution charges for Counts One and Two are “on or about and between November 1, 2008 and November 20, 2008.” CP 1-2. It is inconceivable to the State that Bennett’s possession of methamphetamine on November 23, 2008 could be considered the same in law and fact as crimes that occurred days prior. Bennett is correct that in proving delivery of methamphetamine one necessarily must also prove possession, but the two would have to be contemporaneous to be the same in fact. Bennett’s argument that the methamphetamine seized at his residence was a fraction of the same methamphetamine that he had delivered to Ms. Penfield and Ms. Hensley and therefore the same act is misleading and inaccurate. Brief of Appellant 28.

There is no way to know if the methamphetamine possessed by Bennett on November 23, 2008 was part of the same stash that he distributed and delivered to Ms. Hensley and Ms. Penfield earlier in the month. Bennett’s conviction for possession of

methamphetamine does not violate his double jeopardy rights and Bennett's conviction on Count Four should be affirmed.

**E. THE TRIAL COURT PROPERLY SENTENCED BENNETT ON COUNT ONE, INCLUDING IMPOSING THE BUS STOP ENHANCEMENT.**

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citations omitted). Whether the trial court's sentence exceeded its statutory authority is reviewed de novo. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011). The remedy for an erroneous sentence is remand for resentencing. *State v. Ross*, 152 Wn.2d at 229.

The court reviews issues of statutory interpretation de novo. *Renner v. Marysville*, 168 Wn.2d 540, 545, 230 P.3d 569 (2010). The reviewing court looks to the plain language in the statute to determine legislative intent. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). When a statute is unambiguous the court will not employ judicial interpretation of the statute. *Id.* "A statute is ambiguous when the language is susceptible to more than one interpretation. *Id.* If the court finds that a statute is ambiguous, "the rule of lenity requires [the court] to strictly construe

the statute favorable to the accused.” *State v. Davis*, 160 Wn. App. 471, 476-77, 248 P.3d 121 (2011).

Bennett argues to this court that the sentencing court exceeded its statutory authority by imposing a school bus stop enhancement on Count One, Distribute Methamphetamine to a Person Under 18. Brief of Appellant 31. The State respectfully disagrees with Bennett’s reading of RCW 69.50.435, RCW 9.94A.533(6) and RCW 69.50.406. The sentencing court was within its lawful authority to impose the sentence, with the enhancement, it did for Count One.

A person who delivers drugs within 1000 feet of a school bus stop shall receive an additional 24 months of incarceration. RCW 9.94A.533(6); RCW 69.50.435. Under the Sentencing Reform Act (SRA),

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of 69.50 RCW if the offense was also a violation of RCW 69.50.435 or \*\*9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6). The Uniformed Controlled Substances Act states,

(1) Any 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 marijuana to a person:

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) In a public park;
- (f) In a public housing project designated by a local governing authority as a drug-free zone;
- (g) On a public transit vehicle;
- (h) In a public transit stop shelter;
- (i) At a civic center designated as a drug-free zone by the local governing authority; or
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or

imprisonment otherwise authorized by this chapter for an offense.

RCW 69.50.435(1). This statute specifically refers to RCW 69.50.401, stating a person who violates that statute by delivering a controlled substance is subject to the following enhancement.

RCW 69.50.401 states that it is illegal to deliver, possess with the intent to deliver or manufacture controlled substances. See RCW 69.50.401. Violations of distributing a controlled substance to a person under 18 years of age are codified under RCW 69.50.406.

That statute states,

Any person eighteen years of age or over who violates RCW 69.50.401 by distributing a controlled substance listed in Schedules I or II which is a narcotic drug or methamphetamine, including its salts, isomers, and salts of isomers, or flunitrazepam, including its salts, isomers, and salts of isomers, listed in Schedule IV, to a person under eighteen years of age is guilty of a class A felony punishable by the fine authorized by RCW 69.50.401(2) (a) or (b), by a term of imprisonment of up to twice that authorized by RCW 69.50.401(2) (a) or (b), or by both.

RCW 69.50.406(1). In order to be found guilty of distribution to a person under age 18 a person must first violate RCW 69.50.401. A school bus stop enhancement is available when a person violates RCW 69.50.401. See RCW 69.50.435(1). The key word is violate. RCW 69.50.435 does not state that the person must be charged and convicted under RCW 69.50.401, just that the person must

violate it. Therefore, the provisions of RCW 69.50.435 and RCW 9.94A.533(6), through the plain, unambiguous language of the statutes, apply to violations and convictions for distributing a controlled substance to persons under 18, RCW 69.50.406.

Further, while RCW 69.50.435 does specifically state in subsection (i) that a person has been found to have committed one of the enhancement the doubling provisions do not apply to RCW 69.50.406 convictions, it does not state the enhancement statute as a whole does not apply to RCW 69.50.406. See RCW 69.50.435. The legislature contemplated the effect of the sentencing enhancements on RCW 69.50.406, and given that distribute to a person under 18 already doubled the sentence, the legislature opted to not allow the sentence to be doubled a second time. Yet, it is clear from that language the legislature expected the sentencing enhancements would apply to RCW 69.50.406, otherwise the language excluding the doubling of the sentence would be superfluous and unnecessary. Bennett's sentence for Count One should be affirmed.

**F. COUNT ONE, DISTRIBUTE A CONTROLLED SUBSTANCE TO A PERSON UNDER 18, AND COUNT TWO, DELIVERY OF METHAMPHETAMINE, ARE NOT SAME CRIMINAL CONDUCT, THEREFORE THE TRIAL COURT'S SENTENCE WAS APPROPRIATE.**

When an appellate court reviews the trial court determination whether two offenses count as same criminal conduct it will reverse the trial court's decision only for "a clear abuse of discretion or misapplication of the law." *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citation omitted). Offenses considered same criminal conduct will not be used in a defendant's offender score against each other and will be counted as one crime for sentencing purposes. RCW 9.94A.589(1). Same criminal conduct as used in RCW 9.94A.589(1) "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If one of the elements outlined in RCW 9.94A.589(1) is missing, the offenses are not considered same criminal conduct. *State v. Haddock*, 141 Wn.2d at 110 (citation omitted). While the court will analyze whether one crime furthered the next, the court must look at the specific facts of the case. *State v. Longuskie*, 59 Wn. App. 838, 847, 807 P.2d 1004 (1990).

The victim of delivery of a controlled substance is generally the public at large. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47,

864 P.3d 1378 (1993). In contrast, for the crime of distribution of a controlled substance to a person under 18 the victim is no longer the public at large, but the minor who the person sold the drugs to. *State v. Vanoli*, 86 Wn. App. 643, 651-52, 937 P.2d 1166 (1997).

The court in *Vanoli* held:

[T]he purpose of the age enhancement statute, RCW 69.50.406, is to punish not just deliveries but deliveries to minors. The enhancement of this special statute to separately address deliveries of drugs to minors, and the statute 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.

*Id.* In *Vanoli* the defendant did three successive transactions of LSD to minors within 1000 feet of a school bus stop. *Vanoli* argued that because the deliveries were the same place, time and victim they merged for sentencing purposes. The court rejected this argument, basing its decision on the analysis above.

Bennett argues the trial court abused its discretion by failing to consider whether or not to score the crimes as same criminal conduct. Brief of Appellant 35. In Bennett's case, similar to *Vanoli*, he simultaneously delivered a controlled substance to two different people. Bennett was convicted of distributing methamphetamine to Ms. Hensley, a person under 18 years of age. 2RP 193-94; CP 39.

Bennett was also convicted of delivery of methamphetamine. 2RP 194; CP 41. These two crimes do not merge because there is a different victim for each crime. *State v. Vanoli*, 86 Wn. App. at 651-52. There was no reason for the trial court to engage in a merger analysis because the two crimes do not merge. Bennett's sentence should be affirmed.

**G. BENNETT RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT THE PROCEEDINGS, INCLUDING HIS SENTENCING HEARING.**

To prevail on an ineffective assistance of counsel claim Bennett must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the

only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Bennett argues to this court that his trial counsel was ineffective for failing to argue counts one and two merge. Brief of Appellant 39. Bennett’s trial counsel made a different merger argument regarding the deliveries and the possession count. 4RP 4-9. Bennett’s trial counsel also filed a motion to arrest judgment. 4RP 4. If Bennett’s trial took the time to make the other motions, perhaps the reason he did not argue merger of counts one and two was because he knew the law was not on his side. Bennett has not met the requisite burden of showing his trial counsel’s performance was deficient. When looking at trial counsel’s performance throughout the trial, it is clear trial counsel was competent and effectively advocated for Bennett. Further, even if for the sake of argument, Bennett did show his trial counsel was deficient, Bennett has not shown that he is prejudiced by any deficiency in his trial counsel. Bennett’s sentence should be affirmed.

**CONCLUSION**

For the foregoing reasons, this court should affirm Bennett's convictions. Bennett's sentence should be affirmed because there is no double jeopardy issue and none of the counts merge.

RESPECTFULLY submitted this 12<sup>th</sup> day of July, 2011.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

by:   
\_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
VERNON BENNETT, )  
Appellant. )  
\_\_\_\_\_ )

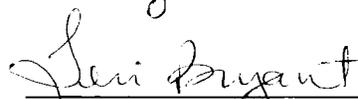
NO. 41564-0-II BY \_\_\_\_\_  
DEPUTY

DECLARATION OF  
MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 13, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund & Manek R. Mistry  
Attorneys for Vernon Bennett  
PO Box 6490  
Olympia, WA 98507

DATED this 13 day of July, 2011, at Chehalis, Washington.



\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office