

NO. 44763-1-II

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

STATE OF WASHINGTON, Respondent

v.

LARONZO DESHON MURPHY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01393-4

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. THE TRIAL COURT DID NOT VIOLATE MURPHY’S
 RIGHT TO PRESENT A DEFENSE..... 1

 a. MURPHY PRESENTED NO ADMISSIBLE EVIDENCE
 TO SUPPORT HIS MEDICAL MARIJUANA
 DEFENSE..... 1

 b. MURPHY DOES NOT QUALIFY FOR THE MEDICAL
 MARIJUANA PROVIDER DEFENSE AS HE
 TESTIFIED HE USED HIS PATIENT’S MARIJUANA
 FOR HIS OWN PERSONAL USE IN VIOLATION OF
 RCW 69.51A.040. 1

 c. THE TRIAL COURT DID NOT ERR IN PROHIBITING
 DUROSIMI FROM TESTIFYING TO HEARSAY..... 1

 d. THE TRIAL COURT PROPERLY DENIED
 MURPHY’S REQUEST TO INSTRUCT THE JURY ON
 THE MEDICAL MARIJUANA PROVIDER
 AFFIRMATIVE DEFENSE..... 1

 II. MURPHY’S CONVICTIONS WERE BASED ON
 PROPERLY ADMITTED EVIDENCE..... 1

 a. MURPHY IS BARRED FROM RAISING THE
 VALIDITY OF THE SEARCH WARRANT FOR THE
 FIRST TIME ON APPEAL..... 1

 b. THE SEARCH WARRANT WAS VALID AND THERE
 WAS NO BASIS TO SUPPRESS THE EVIDENCE..... 1

 c. ANY POTENTIALLY OVERBROAD PORTION OF
 THE SEARCH WARRANT WAS SEVERABLE AND
 NO TAINTED EVIDENCE WAS USED TO CONVICT
 MURPHY 1

 III. MURPHY WAS NOT DENIED A UNANIMOUS VERDICT
 AS HE WAS CONVICTED OF A CRIME THAT
 CONSTITUTED A CONTINUOUS COURSE OF CONDUCT
 2

 IV. MURPHY RECEIVED EFFECTIVE ASSISTANCE OF
 COUNSEL..... 2

V.	THE STATE AGREES AND CONCEDES THAT THE ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE CONVICTIONS MERGE DUE TO DOUBLE JEOPARDY	2
VI.	THE TRIAL COURT PROPERLY SENTENCED MURPHY	2
	a. THE TRIAL COURT PROPERLY INCLUDED MURPHY’S OUT-OF-STATE CONVICTIONS IN HIS OFFENDER SCORE AFTER FINDING THEY COMPARED TO A WASHINGTON FELONY	2
	b. MURPHY’S OVERALL SENTENCE WAS PROPER, BUT DUE TO A SCRIVENER’S ERROR THE CASE SHOULD BE REMANDED FOR CORRECTION TO THE JUDGMENT AND SENTENCE.....	2
B.	STATEMENT OF THE CASE.....	2
C.	ARGUMENT	7
I.	THE TRIAL COURT DID NOT VIOLATE MURPHY’S RIGHT TO PRESENT A DEFENSE.....	7
	a. MURPHY PRESENTED NO ADMISSIBLE EVIDENCE TO SUPPORT HIS MEDICAL MARIJUANA DEFENSE.....	7
	b. MURPHY DOES NOT QUALIFY FOR THE MEDICAL MARIJUANA PROVIDER DEFENSE AS HE TESTIFIED HE USED HIS PATIENT’S MARIJUANA FOR HIS OWN PERSONAL USE IN VIOLATION OF RCW 69.51A.040.	10
	c. THE TRIAL COURT DID NOT ERR IN PROHIBITING DUROSIMI FROM TESTIFYING TO HEARSAY.....	11
	d. THE TRIAL COURT PROPERLY DENIED MURPHY’S REQUEST TO INSTRUCT THE JURY ON THE MEDICAL MARIJUANA PROVIDER AFFIRMATIVE DEFENSE.....	13
II.	MURPHY’S CONVICTIONS WERE BASED ON PROPERLY ADMITTED EVIDENCE.....	14
	a. MURPHY IS BARRED FROM RAISING THE VALIDITY OF THE SEARCH WARRANT FOR THE FIRST TIME ON APPEAL.....	14

b.	THE SEARCH WARRANT WAS VALID AND THERE WAS NO BASIS TO SUPPRESS THE EVIDENCE....	16
c.	ANY POTENTIALLY OVERBROAD PORTION OF THE SEARCH WARRANT WAS SEVERABLE AND NO TAINTED EVIDENCE WAS USED TO CONVICT MURPHY	22
III.	MURPHY WAS NOT DENIED A UNANIMOUS VERDICT AS HE WAS CONVICTED OF A CRIME THAT CONSTITUTED A CONTINUOUS COURSE OF CONDUCT	23
IV.	MURPHY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	26
V.	THE STATE AGREES AND CONCEDES THAT THE ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE CONVICTIONS MERGE DUE TO DOUBLE JEOPARDY	32
VI.	THE TRIAL COURT PROPERLY SENTENCED MURPHY	35
a.	THE TRIAL COURT PROPERLY INCLUDED MURPHY’S OUT-OF-STATE CONVICTIONS IN HIS OFFENDER SCORE AFTER FINDING THEY COMPARED TO A WASHINGTON FELONY	35
b.	MURPHY’S OVERALL SENTENCE WAS PROPER, BUT DUE TO A SCRIVENER’S ERROR THE CASE SHOULD BE REMANDED FOR CORRECTION TO THE JUDGMENT AND SENTENCE.....	37
D.	CONCLUSION.....	39

TABLE OF AUTHORITIES

Cases

<i>Andresen v. Maryland</i> , 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976).....	20
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	12
<i>In re Pers. Restraint of Yim</i> , 139 Wn.2d 581, 989 P.2d 512 (1999).....	18
<i>Montana v. Egelhoff</i> , 518 U.S. 37, 116 S. Ct. 2013, 135 L.Ed.2d 361 (1996).....	8
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	28
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	28
<i>State v. Beals</i> , 100 Wn.App. 189, 997 P.2d 941 (2000)	35
<i>State v. Cameron</i> , 80 Wn.App. 374, 909 P.2d 309 (1996)	35
<i>State v. Castro</i> , 39 Wn.App. 229, 692 P.2d 890 (1984)	18
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2011)	27
<i>State v. Cole</i> , 128 Wn.2d 262, 906 P.2d 925 (1995).....	17, 18
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (1983).....	11
<i>State v. Estorga</i> , 60 Wn.App. 298, 803 P.2d 813 (1991).....	18
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743, <i>cert. denied</i> , 457 U.S. 1137 (1982).....	16
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	32, 33, 34
<i>State v. Frohs</i> , 83 Wn.App. 803, 924 P.2d 384 (1996).....	33
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	27, 28
<i>State v. Gooden</i> , 51 Wn.App. 615, 754 P.2d 1000, <i>rev. denied</i> , 111 Wn.2d 1012 (1988).....	24
<i>State v. Griffith</i> , 129 Wn.App. 482, 120 P.3d 610 (2005)	18, 23
<i>State v. Handran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	24
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	14
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979).....	33
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	8
<i>State v. J-R Distribs., Inc.</i> , 111 Wn.2d 764, 765 P.2d 281 (1988).....	17
<i>State v. Karpenski</i> , 94 Wn.App. 80, 971 P.2d 553 (1999).....	10
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	33, 34
<i>State v. King</i> , 75 Wn.App. 899, 878 P.2d 466 (1994), <i>rev. denied</i> , 125 Wn.2d 1021, 890 P.2d 463 (1995).....	24
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	27, 28
<i>State v. Love</i> , 80 Wn.App. 357, 908 P.2d 395 (1996)	25
<i>State v. Lynn</i> , 67 Wn.App. 339, 835 P.2d 251 (1992)	15
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	8

<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	15, 16, 27
<i>State v. Michael</i> , 160 Wn.App. 522, 247 P.3d 842 (2011)	29
<i>State v. Morely</i> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	36
<i>State v. Perez</i> , 92 Wn.App. 1, 963 P.2d 881 (1998)	17
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	18, 22, 23
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	24
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	28
<i>State v. Renfro</i> , 96 Wn.2d 902, 639 P.2d 737 (1982)	28
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	19, 20
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	15
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981)	18
<i>State v. Shepherd</i> , 110 Wn.App. 544, 41 P.3d 1235, <i>rev. denied</i> , 147 Wn.2d 1017, 56 P.3d 992 (2002).....	14
<i>State v. Smith</i> , 50 Wn.2d 408, 314 P.2d 1024 (1957).....	16
<i>State v. Strizheus</i> , 163 Wn.App. 820, 262 P.3d 100 (2011).....	8
<i>State v. Thien</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	19, 20, 22
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	26, 27, 28
<i>State v. Trasvina</i> , 16 Wn.App. 519, 557 P.2d 368 (1976)	16
<i>State v. Wiley</i> , 124 Wn.2d 679, 880 P.2d 983 (1994).....	35
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	34
<i>State v. Withers</i> , 8 Wn.App. 123, 504 P.2d 1151 (1972).....	18
<i>State v. Yokley</i> , 139 Wn.2d 581, 989 P.2d 512 (1999)	17
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	26, 27, 28, 29
<i>U.S. v. Fitzgerald</i> , 724 F.2d 633, 637 (8th Cir. 1983).....	22
<i>U.S. v. Harris</i> , 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971)....	16
<i>U.S. v. Krasaway</i> , 881 F.2d 550, 553 (8th Cir. 1989).....	18
<i>U.S. v. Schultz</i> , 14 F.3d 1093, 1097 (6th Cir. 1994)	20
<i>U.S. v. Ventresca</i> , 380 U.S. 102, 13 L. Ed. 2d 284, 85 S. Ct. 741 (1965)	16
<i>Warden v. Hayden</i> , 387 U.S. 294, 307, 18 L.Ed.2d 782, 87 S. Ct. 1642 (1967).....	20

Statutes

ORS 475.912(2)	37
RCW 69.50.435(4).....	30
RCW 69.51A.010(4).....	9
RCW 69.51A.040.....	9, 10
RCW 69.52.030	36
RCW 9.94A.360(3) (1990)	35
RCW 9.94A.533(6).....	38
RCW 9A.36.021(1)(c)	34

RCW 9A.56.190.....	34
RCW 9A.56.200(1)(a)(i)-(ii)	34

Rules

CrR 2.3(b)	16
ER 801(c).....	8
ER 803(a)(3)	9
ER 901	8
RAP 2.5(a)	15, 16

Constitutional Provisions

United States Constitutional Amendments V	32
United States Constitutional Amendments XIV	32
Washington Constitution. Article I, Section 9	32

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT VIOLATE MURPHY'S RIGHT TO PRESENT A DEFENSE

- a. MURPHY PRESENTED NO ADMISSIBLE EVIDENCE TO SUPPORT HIS MEDICAL MARIJUANA DEFENSE
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- c. THE TRIAL COURT DID NOT ERR IN PROHIBITING DUROSIMI FROM TESTIFYING TO HEARSAY
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- a. MURPHY IS BARRED FROM RAISING THE VALIDITY OF THE SEARCH WARRANT FOR THE FIRST TIME ON APPEAL
- b. THE SEARCH WARRANT WAS VALID AND THERE WAS NO BASIS TO SUPPRESS THE EVIDENCE
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- IV. MURPHY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL
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 - a. THE TRIAL COURT PROPERLY INCLUDED MURPHY'S OUT-OF-STATE CONVICTIONS IN HIS OFFENDER SCORE AFTER FINDING THEY COMPARED TO A WASHINGTON FELONY
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B. STATEMENT OF THE CASE

Laronzo Murphy (hereafter 'Murphy') was charged by Amended Information with Robbery in the First Degree, Assault in the Second Degree, and Possession of a Controlled Substance with Intent to Deliver. CP 1-2. These charges arose from an incident that occurred on August 1,

2012, involving Ricky Charles McKeen as the victim. Mr. McKeen is married to Murphy's cousin, Sharonda McKeen. RP 131.

On that date, Mr. McKeen came home from work between 7:30 and 8:00 p.m. to his home in Vancouver, Washington. RP 132-33. When he arrived, Murphy was in a vehicle blocking his driveway. RP 133. Mr. McKeen asked Murphy to move his car and then he pulled his truck into the driveway. RP 133. Mr. McKeen did not know why Murphy was at his home that night. RP 133. Mr. McKeen went up to Murphy's car as Murphy sat inside. RP 134. Murphy told Mr. McKeen that his wife owed Murphy \$150.00. RP 134. Mr. McKeen did not know anything about a debt owed to Murphy and was at that time separated from his wife and living separately. RP 133-34. Mr. McKeen attempted to call his wife to discuss the matter with her, but he could not reach her. RP 134. Murphy appeared antsy and angry and again told Mr. McKeen that his wife owed him \$150.00. RP 135. Mr. McKeen did not believe his wife owed Murphy a debt but gave him \$100.00 anyway. RP 135. Murphy was not satisfied with Mr. McKeen's response and said "I'm getting all my \$150" and pulled out a gun. RP 136. Upon seeing the gun, Mr. McKeen gave Murphy an additional \$50.00 and then backed up with his hands above his head. RP 136. Mr. McKeen feared Murphy could shoot him with the gun.

RP 137. Murphy then said he would be back to rob him and then drove away. RP 136. Mr. McKeen identified the gun police later found in Murphy's residence as the gun used by Murphy on him that evening. RP 137.

Mr. McKeen continued trying to get a hold of his wife that evening, but did not hear from her until the next day. RP 138-39. Mr. McKeen wanted to speak to his wife before calling the police on her cousin. RP 138-39. The next morning, on August 2, 2012, Mr. McKeen spoke with his wife, and they decided to call 911. RP 140. Police responded and took his statement. RP 140.

Later that day, police found the vehicle used by Murphy in the robbery and set up surveillance. RP 350. Police observed Murphy and a female come out of their apartment residence and get into the car. RP 350. Police executed a stop of the vehicle and arrested Murphy. RP 351. Upon searching him incident to arrest, police found an amount of marijuana in a plastic baggie in his pocket. RP 351. Sariat Durosimi, Murphy's girlfriend

was in the vehicle with Murphy and contacted by police. RP 422-23; CP 42; Supp CP ___ (Appendix).¹ Durosimi told police that she and Murphy had shot guns with friends about a week prior and that there were marijuana plants in the trunk of the Ford Focus and in their residence. Supp CP ___; Appendix.

After contacting Murphy and Durosimi, police applied for a search warrant to search the Ford Focus and their residence for evidence of the Robbery and Unlawful Possession of a Firearm, as well as for evidence of marijuana possession. RP 352; CP 38-43. The search warrant was granted. CP 37. The residence that was searched was Durosimi's apartment, but Murphy lived there "most of the time" according to Durosimi. RP 256. Murphy kept clothes at the apartment and received mail at the apartment. RP 256. During the service of the search warrant police found several growing marijuana plants, a digital scale, plastic baggies, and the gun used in the robbery against McKeen. RP 197-200; 207.

At trial, Murphy testified and indicated that he would give marijuana to Sharonda and Ricky McKeen sometimes, and that they would sometimes give him money. RP 445-46. Murphy testified this was

¹ It appears the Superior Court neglected to include page 6 of the search warrant affidavit in its transfer of the clerk's papers. The clerk's papers as initially done have the Search Warrant Affidavit as CP 38-43, however it does not include page 6 of the affidavit. This page is integral to the Court's review of the search warrant, an issue Murphy raises on appeal. The State has therefore designated this document again as supplemental clerk's papers and has attached the missing page of the affidavit to this brief as an appendix.

with the understanding that they reimburse him or give him what it is worth. RP 448. Murphy further testified that he was satisfied knowing the McKeens would be giving him money in exchange for marijuana he had given them. RP 452. Murphy also testified that he grows marijuana as a medical marijuana provider for Durosimi. RP 461. He testified that he uses Durosimi's marijuana personally. RP 461.

At trial, Murphy attempted to pursue an affirmative defense to the possession of marijuana charge for being a medical marijuana provider. RP 214-37. He attempted to admit a letter from a doctor which stated that Durosimi had a certain illness and was a qualifying patient; he also attempted to present a letter authorizing him to be Durosimi's provider. RP 70-72; 220-27. The trial court refused to admit the letters as hearsay. RP 231, 235. Murphy also attempted to have the trial court instruct the jury on the affirmative defense, but the trial court refused to instruct the jury on the medical marijuana provider defense. RP 487, 513.

A jury returned verdicts of guilty for Robbery in the First Degree, Assault in the Second Degree and Possession of a Controlled Substance with Intent to Deliver. CP 82-84. The jury returned special verdicts finding that Murphy was armed with a firearm at the time of the commission of the Robbery and the Assault and that he Possessed the

Controlled Substance with Intent to Deliver within a thousand feet of a school but stop. CP 85-87.

At sentencing, the parties agreed the Robbery and Assault convictions merged for sentencing purposes and did not count the offenses against each other for scoring purposes. RP 634. The trial court found Murphy's prior Oregon convictions for Delivery and Attempted Delivery of Imitation Controlled Substances were comparable to the Washington felony of Delivery of an Imitation Controlled Substance. RP 644; CP 18. The trial court sentenced Murphy to a standard range sentence on each count, concurrent to each other, and ran the firearm enhancement and the school bus stop enhancement consecutive to his sentence and each other. CP 8-9.

C. ARGUMENT

I. THE TRIAL COURT DID NOT VIOLATE MURPHY'S RIGHT TO PRESENT A DEFENSE

a. MURPHY PRESENTED NO ADMISSIBLE EVIDENCE TO SUPPORT HIS MEDICAL MARIJUANA DEFENSE

Murphy alleges the trial court violated his right to present a defense because the trial court did not allow Murphy to present unauthenticated hearsay documents as evidence at trial. Murphy's right to present a defense is not absolute, and the trial court did not violate his

right to present such a defense as the evidence Murphy intended to present to support this defense was inadmissible. Murphy's claim fails.

A criminal defendant has the right under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). This right, however, is not absolute. *State v. Strizheus*, 163 Wn.App. 820, 830, 262 P.3d 100 (2011) (citing *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L.Ed.2d 361 (1996) and *Maupin*, 128 Wn.2d at 924). A defendant's right to present a defense does not allow the presentation of irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

At trial, Murphy wished to admit evidence in the form of a letter purportedly from Sariat Dorisimi's doctor indicating she had a qualifying disease and was considered a qualifying patient. RP 214-37. However, Murphy did not authenticate this document which is required prior to admissibility. ER 901. Murphy also did not offer a hearsay exception which would allow admission of these documents and still cannot show that these documents are admissible.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). In order to present a prima facie

case that Murphy was entitled to the medical marijuana provider affirmative defense, he had to show that Murphy's patient was a "qualifying patient." RCW 69.51A.040. A "qualifying patient" is someone who has been diagnosed by a licensed physician as having a terminal or debilitating medical condition. RCW 69.51A.010(4). Therefore, in order for Murphy to establish his affirmative defense, he had to show that Sariat Durosimi had a qualifying medical condition. Murphy attempted to admit this fact through a letter from a doctor. RP 214-37. Murphy's attempt to admit this letter was to show that Durosimi did indeed suffer from a certain illness. This is a clear attempt to admit the statements in the letter for the truth of what the statements assert. This is classic hearsay. This is not, as Murphy now asserts, simply a "verbal act" which is important only for the fact that the letter was written. It was not the fact of the existence of the letter that was necessary for Murphy to establish his defense; he had to show Durosimi suffered from a terminal or debilitating medical condition.

Murphy also asserts this letter would have been admissible as a statement of then-existing physical condition under ER 803(a)(3). However, that rule is clear from its plain language, the statement must be about the declarant's then-existing physical condition. ER 803(a)(3). The "declarant" of this document is the doctor who authored it. The doctor

who authored it does not discuss his own physical condition in this letter, he discusses Durosimi's. A statement by one person about another person does not have the reliability inherent in statements admissible as hearsay exceptions. *See State v. Karpenski*, 94 Wn.App. 80, 108, 971 P.2d 553 (1999) (finding the proponent of admission of a hearsay statement must show sufficient indicia of reliability). An out-of-court statement of Durosimi relating to her then-existing physical condition may have been admissible under ER 803(a)(3), but an out-of-court statement by her doctor about Durosimi's condition does not fit within that hearsay exception. Murphy did not present admissible evidence to support his defense.

b. MURPHY DOES NOT QUALIFY FOR THE MEDICAL MARIJUANA PROVIDER DEFENSE AS HE TESTIFIED HE USED HIS PATIENT'S MARIJUANA FOR HIS OWN PERSONAL USE IN VIOLATION OF RCW 69.51A.040.

From Murphy's own admissions at trial, there was evidence that Murphy had converted some of the marijuana he claimed to grow for Durosimi's benefit for his own personal use. RP 461. This is a violation specifically prohibited by RCW 69.51A.040(4)(a), which prohibits a designated provider from converting marijuana that is meant for the patient for his own personal use or benefit. This specifically shows Murphy did not meet the prima facie case for meeting the medical

marijuana designated provider defense. WPIC 52.11 is the instruction which sets forth the pattern instruction on this defense. It shows that the defendant must not have consumed any marijuana obtained for the patient, and this is in compliance with RCW 69.51A.040. Murphy, by statute, did not qualify for the affirmative defense that he was a medical marijuana provider.

Murphy did not establish this defense through admissible evidence. Further, Murphy's own admissions disqualify him from this affirmative defense, thus rendering moot the issue of whether the doctor's letter is hearsay. The trial court did not err in finding Murphy had not presented sufficient evidence to justify the giving of the affirmative defense instruction to the jury. Murphy's claim fails.

c. THE TRIAL COURT DID NOT ERR IN PROHIBITING DUROSIMI FROM TESTIFYING TO HEARSAY

Murphy claims the trial court erred in prohibiting Durosimi from testifying about what her doctor diagnosed her as having. However, this statement was properly excluded as it is hearsay. The trial court did not err and Murphy's claim fails.

The trial court's admission or exclusion of evidence is reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (1983). A trial court abuses its discretion when its decision is

manifestly unreasonable or based upon untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Here the trial court clearly based this decision on the evidence rules, the definition of hearsay and the purpose for which the statements were sought to be admitted. Murphy attempted to admit these statements from Durosimi about what her doctor told her her diagnosis was in an attempt to prove that Durosimi suffered from a particular illness which qualified under the Medical Marijuana Act. This is clear hearsay because it was a question to which the only source of the witness' knowledge was based on hearsay. The trial court's exercise of its discretion in this situation was appropriate and was not an abuse of discretion.

Further, even if the trial court did err in refusing to admit this testimony, Murphy was still not qualified to have the jury instructed on the medical marijuana defense as he admitted at trial to using his patient's marijuana for his personal use. RP 461. This is a violation of the statute and disqualifies him from the defense. Any potential error in refusing to allow Durosimi to testify to hearsay was harmless.

d. THE TRIAL COURT PROPERLY DENIED MURPHY'S REQUEST TO INSTRUCT THE JURY ON THE MEDICAL MARIJUANA PROVIDER AFFIRMATIVE DEFENSE

Murphy alleges the trial court erred in failing to instruct the jury on affirmative defense. As discussed above, Murphy did not qualify for the affirmative defense instruction. In order to receive this instruction, Murphy had to have admitted evidence at trial which established the prima facie case that he met the affirmative defense. Murphy clearly admitted during his own direct testimony that he used the marijuana he grew for Durosimi for his own personal benefit. RP 461. This disqualified him from receiving this instruction. Further, as discussed above, the evidence in the form of letters was properly excluded on hearsay grounds. Murphy therefore did not present sufficient evidence that Durosimi was a qualifying patient that had been diagnosed by a licensed physician of a qualifying illness.

A defendant is not entitled to any instruction he may want. The instructions must be based on the evidence presented and conform with the law. In order to affirmatively defend a criminal prosecution for possessing marijuana, a defendant must show by a preponderance of the evidence that he has met the requirements of the Medical Marijuana Act. *State v. Shepherd*, 110 Wn.App. 544, 550, 41 P.3d 1235, *rev. denied*, 147

Wn.2d 1017, 56 P.3d 992 (2002). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving the jury an instruction on that defense. *See E.g. State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). Here Murphy did not present sufficient *admissible* evidence of Durosimi's medical condition or her diagnosis. Further, evidence was admitted by Murphy which showed he personally used the marijuana he grew for Durosimi. This alone precludes him from qualifying for the affirmative defense instruction. The trial court did not err in failing to give this instruction.

II. MURPHY'S CONVICTIONS WERE BASED ON PROPERLY ADMITTED EVIDENCE

a. MURPHY IS BARRED FROM RAISING THE VALIDITY OF THE SEARCH WARRANT FOR THE FIRST TIME ON APPEAL

Murphy claims for the first time on appeal that the search warrant issued in this case, which resulted in some evidence which was used at trial, was constitutionally overbroad and was not supported by probable cause. This Court should not review this issue for the first time on appeal. However, even if this Court reaches the merits of Murphy's argument, the search warrant was not overbroad and any portions he now complains of could be severed from the search warrant with no prejudice to Murphy.

This Court should affirm the admission of the evidence obtained from the search warrant.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). But if there is a manifest error affecting a constitutional right, it can be raised for the first time on appeal. RP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). Not every constitutional error can be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To raise it for the first time on appeal, it must be a “manifest” error. *Id.* (citing *State v. Scott*, *supra* at 688). To show an error is manifest, actual prejudice must be shown. *Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn.App. at 346.

When a defendant raises a suppression issue for the first time on appeal, he must show the trial court likely would have granted the motion if it was made. *McFarland*, 127 Wn.2d at 333-34. It is not enough that a defendant allege prejudice, he must show actual prejudice from the record. *Id.* at 334.

As in *McFarland*, Murphy did not move to suppress the evidence he now complains of at the trial court level. He must therefore show actual prejudice for this Court to grant his request to reverse his convictions. Absent a showing of actual prejudice, the error is not “manifest” and is

therefore not reviewable under RAP 2.5(a)(3). *See McFarland*, 127 Wn.2d at 334.

b. THE SEARCH WARRANT WAS VALID AND THERE WAS NO BASIS TO SUPPRESS THE EVIDENCE

Even if this Court finds Murphy's assignment of error is properly before this Court, his claim fails as the search warrant was validly issued and was not overbroad.

Washington Court Rules specifically authorize warrants to search for and seize evidence of a crime, contraband, the fruits of a crime, or things otherwise criminally possessed, weapons or other things by means of which a crime has been committed or reasonably appears about to be committed. CrR 2.3(b). Case law has held that search warrants are the favored means of police investigation and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. *U.S. v. Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971); *U.S. v. Ventresca*, 380 U.S. 102, 108-09, 13 L. Ed. 2d 284, 85 S. Ct. 741 (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn.App. 519, 557 P.2d 368 (1976). A magistrate's determination that a

warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination should be given great deference by a reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). And further, doubt as to the existence of probable cause will be resolved in favor of the warrant. *State v. J-R Distributions, Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). In reviewing the search warrant affidavit and making a determination as to whether to authorize the search warrant, the magistrate is to operate in a common sense and realistic fashion and is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

In determining the validity of a search warrant, the court considers whether the affidavit, on its face, established probable cause. *State v. Perez*, 92 Wn.App. 1, 4, 963 P.2d 881 (1998). A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit is sufficient to support probable cause if it contains information from which an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. *Id.* The

standard of probable cause is governed by the probability, rather than a prima facie showing, of criminal activity. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 594-95, 989 P.2d 512 (1999) (quoting *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)). The determination of probable cause is given great deference. *Id.* (quoting *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Affidavits are to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the warrant. *State v. Griffith*, 129 Wn.App. 482, 120 P.3d 610 (2005) (citing *State v. Castro*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984)). The determination of probable cause is reviewed for an abuse of discretion. *Id.* (citing *State v. Estorga*, 60 Wn.App. 298, 303, 803 P.2d 813 (1991)).

In general, the degree of specificity required in a search warrant varies according to the circumstances and the type of items involved. *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992) (citing *U.S. v. Krasaway*, 881 F.2d 550, 553 (8th Cir. 1989)). The particularity requirements of the Fourth Amendment are met if the item to be seized is described with “‘reasonable particularity’ which in turn, is to be evaluated in the light of ‘the rules of practicality, necessity and common sense.’” *Id.* at 546 (citing *State v. Withers*, 8 Wn.App. 123, 126, 504 P.2d 1151 (1972)). Each case should be reviewed on a case by case basis as to whether a search warrant is particular enough is a factual question unique

to each search warrant. Furthermore, a search warrant must either limit the items to be seized or circumscribe the search by referencing the crime under investigation. *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Here, the search warrant listed the crimes under investigation which then allows for less descriptive itemization of the items to be searched for as the search is circumscribed by reference to the crime under investigation. CP 36. Therefore Murphy's argument that this search warrant lacked particularity is without merit.

Murphy argues the search warrant. in this case, is overbroad because it authorized police to search for and seize photos, videos, slides, etc.; things that are protected by the First Amendment and which were not described with sufficient particularity. Murphy also claims error because the affidavit did not provide probable cause to search for firearms. Murphy also contests the language he describes as boilerplate and generalizations in the search warrant affidavit, citing to *State v. Thien*, 138 Wn.2d 133, 977 P.2d 582 (1999) to support his argument. However, *Thien* does not stand for the proposition that no generalized language can appear in a search warrant affidavit as Murphy appears to argue. On the contrary, an officer's training and experience and generalizations from that can be considered in determining probable cause; there simply must be an evidentiary nexus between the items to be seized and the location to be

searched. *Thien*, 138 Wn.2d at 145 (citing *U.S. v. Schultz*, 14 F.3d 1093, 1097 (6th Cir. 1994)). Further, as discussed above, this search warrant specifies the crimes under investigation which by itself circumscribes the scope of the allowable search so that the items described in the search warrant affidavit do not require as much particularity as a warrant without the crimes listed would. *Riley*, 121 Wn.2d at 28. Murphy also claims that the warrant authorized things that are not themselves illegal. But warrants are not required to be limited only to items which themselves are contraband. A warrant may authorize seizure of evidence that establishes a nexus between the suspect and the crime. *See Warden v. Hayden*, 387 U.S. 294, 307, 18 L.Ed.2d 782, 87 S. Ct. 1642 (1967). For example courts will generally uphold search warrants that allow for searches of evidence of dominion and control where a list of items follows. *See Andresen v. Maryland*, 427 U.S. 463, 479-82, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). The list of items here satisfies these requirements. The search warrant was properly authorized and noted the crimes under investigation and the items to be searched with sufficient particularity.

In this case, there are detailed facts contained within the search warrant affidavit which would satisfy any reasonable magistrate that it was likely the evidence of the crimes under investigation would be found at Murphy's residence. The search warrant affidavit set forth the facts that

Murphy had robbed Mr. McKeen at gunpoint on August 1, 2012, in the evening hours. CP 41. Murphy was in a blue Ford Focus during the commission of this robbery. *Id.* Per witnesses, Murphy admitted to the robbery and said he would come back and do it again. *Id.* During the next day, police observed Murphy leave the residence in the blue Ford Focus. CP 42. Murphy was arrested, and his girlfriend Durosimi was in the vehicle with him at the time. *Id.* She told police that there was marijuana in the vehicle and at the residence. CP 43. She claimed to have medical marijuana paperwork but did not have copies to present to the police. *Id.* Durosimi told police she and Murphy had shot guns within the prior week. *Id.* Murphy was a convicted felon. *Id.* Given this information contained in the search warrant affidavit, it is clear there was probable cause that Murphy had committed the crime of robbery and unlawful possession of a firearm and that there was a likelihood that evidence of those crimes and drugs and drug paraphernalia would be found in the vehicle and the residence. These facts combined with the officer's training and experience and knowledge regarding these crimes gives a sufficient probable cause for the issuance of the search warrant to search for evidence of the crime of robbery, unlawful possession of firearm, and possession or manufacture of marijuana.

The fact that there was probable cause that Murphy used a gun in committing the robbery against Mr. McKeen gave the court sufficient reason to allow a search of Murphy's residence for any gun as to determine and search for the gun that was used in the robbery. This portion of the search warrant is not overbroad or violative of Murphy's constitutional rights as there was probable cause he had committed the crime and a sufficient factual nexus between the crime and the location to be searched. *See Thien*, 138 Wn.2d at 145.

Given all the facts and information contained in the search warrant affidavit, it is clear that the search warrant was properly authorized, noting the crimes under investigation and the items to be searched with sufficient particularity. Murphy's claims of overbreadth and improper issuance fail.

c. ANY POTENTIALLY OVERBROAD PORTION OF THE SEARCH WARRANT WAS SEVERABLE AND NO TAINTED EVIDENCE WAS USED TO CONVICT MURPHY

Assuming without conceding that the search warrant here was overbroad or insufficiently particular, under the severability doctrine, only the invalid portions of the warrant must be suppressed unless the valid portions of the warrant cannot be meaningfully severed from the warrant as a whole. *State v. Perrone*, 119 Wn.2d 538, 556-57, 834 P.2d 611 (1992) (quoting *U.S. v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983)). Murphy

contends the portion of the search warrant which authorized search and seizure of photos, negatives, digital images, digital video, video tapes, slides, films, and undeveloped film is overbroad and lacked sufficient particularity as these items are protected by the First Amendment. When a search warrant authorizes search for items protected by the First Amendment, the degree of particularity must be greater. *Perrone*, 119 Wn.2d at 547. However, no photographs found in Murphy's residence or negatives or digital images or videos found in his residence were admitted as evidence at trial. Therefore, even if the trial court should have suppressed this portion of the warrant as overbroad or lacking particularity, the evidence that supported Murphy's conviction was validly seized. *See State v. Griffith*, 129 Wn.App. 482, 489, 120 P.3d 610 (2005). This is not a basis to reverse the convictions. *See id.* Even if this Court finds the search warrant was overbroad in relation to the photographs and videos section, reversal is not warranted as the search warrant could be properly severed and no tainted evidence was used to convict Murphy.

III. MURPHY WAS NOT DENIED A UNANIMOUS VERDICT AS HE WAS CONVICTED OF A CRIME THAT CONSTITUTED A CONTINUOUS COURSE OF CONDUCT

Murphy claims he was denied a unanimous verdict on the Possession with Intent to Deliver charge because he claims there was

evidence of two incidents of possession and no unanimity instruction was given. The evidence of possession of marijuana was a continuing course of conduct and therefore a unanimity instruction was not required. Murphy's claim fails.

A defendant has the right to be convicted only when a jury unanimously concludes that he committed the criminal act charged. *State v. King*, 75 Wn.App. 899, 902, 878 P.2d 466 (1994), *rev. denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995). If the State presents evidence of more than one act that could constitute the crime charged, the State must elect a single act upon which it relies for conviction or the jury must be instructed as to unanimity. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). However, when the state presents evidence of multiple acts that constitute a continuing course of conduct, the State does not need to elect upon which act it relies nor does the court need to give a unanimity instruction. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). A continuing course of conduct requires an ongoing enterprise with a single objective. *State v. Gooden*, 51 Wn.App. 615, 619-20, 754 P.2d 1000, *rev. denied*, 111 Wn.2d 1012 (1988). Common sense must be used in determining whether multiple acts constitute a continuing course of conduct. *Handran*, 113 Wn.2d at 17.

This case is directly on point with *State v. Love*, 80 Wn.App. 357, 908 P.2d 395 (1996). In *Love*, the defendant was stopped just after leaving his residence and was found with five rocks of cocaine on his person. *Love*, 357 Wn.App. at 359. That same day, police served a search warrant on his residence and found 40 more rocks of cocaine. *Id.* Love was convicted of one count of Possession with Intent to Deliver and no unanimity instruction was given. *Id.* at 397. On appeal, Love argued that the trial court erred in failing to give a unanimity instruction to the jury. *Id.* The Court of Appeals disagreed with Love and found that when the evidence was considered together the two instances of possession constituted a continuous course of conduct. *Id.* at 362.

The holding in *Love* and the reasoning of the Court should apply to Murphy's case. The State alleged Murphy possessed the marijuana with the intent to deliver. Murphy was stopped after leaving his residence and found to possess a small amount of marijuana in a baggie, and a same day service of the search warrant at his residence showed a larger amount of marijuana. This is directly on point with *Love, supra*. As in *Love*, Murphy's actions constituted one continuous course of conduct, and the marijuana he possessed on his person is evidence of his intent to deliver what was on his person as well as what was in his house. The trial court

did not err in giving a unanimity instruction. Murphy's conviction for Possession with Intent to Deliver should be affirmed.

IV. MURPHY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Murphy claims he received ineffective assistance of counsel because his attorney failed to move to suppress the evidence obtained from the search warrant, failed to raise the affirmative defense to Murphy's school bus stop aggravator, and by failing to request a unanimity instruction. Murphy's counsel was effective and had no duty to file frivolous motions or request improper instructions on this case. Murphy's claim of ineffective assistance fails.

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made

errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel’s performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney’s performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not

ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable). To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according

to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance *Strickland*, 466 U.S. at 689-91.

Murphy’s claim that defense counsel was ineffective for failing to request an affirmative defense instruction on the school bus stop enhancement is without merit. Murphy was not entitled to such an instruction; the trial court would not have given the instruction and therefore Murphy cannot demonstrate any prejudice from his counsel’s failure to request this instruction. Defense counsel need not request improper instructions in order to be effective. It is clear from the evidence, direct evidence from Murphy himself, no less, that he profited from the sale or “bartering” of the marijuana. RP 448. Murphy testified that when

he would deliver the marijuana to family members, “the understanding was either you reimburse me what I gave you or – or you give me what it’s worth.” RP 448. This is clearly for “profit.” The defense to the school bus stop aggravator Murphy contends his attorney should have fought for at trial requires that the possession not involve selling or possessing with intent to sell for profit. *See* RCW 69.50.435(4). It is clear that Murphy profited from his deliveries of the marijuana, even to his family members. By requiring a quid pro quo, or a return of favor or service, and especially a return of money, to Murphy, this is profiting. Murphy’s argument that he did not profit from selling marijuana is disingenuous as he admitted to doing so in his testimony.

Defense counsel was not ineffective for failing to argue for this defense to the school bus stop enhancement.

Murphy also contends his counsel was ineffective for failing to bring forth a motion to suppress the evidence obtained in the search warrant. It is clear that this issue was on defense counsel’s radar as he did file a motion to suppress in this case. CP 24; 44. That motion resulted in the State conceding certain evidence was not admissible. CP 19. Defense counsel is allowed to weigh the legal issues and determine whether issues may or may not be frivolous. As discussed above in subsection 2, this search warrant was valid and the evidence obtained from it was properly

admitted at trial. Even if the warrant was overbroad in the respects that Murphy now claims, those portions of the warrant are severable and no tainted evidence was admitted or used to convict Murphy. Murphy therefore cannot establish prejudice in the failure of his attorney to move to suppress more evidence than he did.

Murphy also contends that his attorney was ineffective for failing to request a unanimity instruction on the Possession with Intent to Deliver charge. However, as discussed above in subsection 3, a unanimity instruction was not appropriate here as Murphy was convicted of a continuing course of conduct. Murphy cannot establish any prejudice as the trial court surely would have denied any request for this type of instruction as it was not necessary given the facts of the case. It is clear Murphy received a unanimous verdict.

Murphy's claims of ineffective assistance of counsel are without merit. His attorney had no duty and no requirement to bring forth frivolous motions or defenses in order to be effective. Murphy has established no ineffectiveness and no prejudice; therefore his claims fail.

V. THE STATE AGREES AND CONCEDES THAT THE ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE CONVICTIONS MERGE DUE TO DOUBLE JEOPARDY

Murphy claims his convictions for both Robbery in the First Degree and Assault in the Second Degree are improper because it violates double jeopardy. The State agrees, under the facts of this case, that Murphy's Assault in the Second Degree conviction should merge with Robbery in the First Degree under a double jeopardy analysis. This case should be remanded to the trial court for vacation of the Assault in the Second Degree and to strike the Assault conviction from the judgment and sentence.

Both Washington and federal constitutions prohibit multiple punishments for a single offense. Wash. Const. art. I, sec. 9; U.S. Const. Amends V, XIV. Based on case law, it is clear that the facts of this case preclude separate convictions for both Robbery and Assault.

In *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), the Supreme Court found there is no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery. *Freeman*, 153 Wn.2d at 776. There, the Supreme Court concluded that a case by case approach is required to determine whether first degree robbery and second degree assault are the

same for double jeopardy purposes. *Id.* at 780. The Court held, “Generally, it appears these two crimes will merge unless they have an independent purpose or effect.” *Id.*

There is an exception to double jeopardy in assault and robbery convictions, where there is separate injury to “the person or property of the victim, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *State v. Frohs*, 83 Wn.App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)). This exception focuses on the facts of the case. *Freeman*, 153 Wn.2d at 779. This exception may apply, for example, to situations where the defendant assaults the victim after he completes the robbery, or where the assault did not forward the robbery. *Id.*

So the question here is whether the actions of Murphy in committing the robbery and assault had independent purposes or effects from each other. This case is factually similar to *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008). In *Kier*, the Court affirmed the holding in *Freeman, supra* where Assault in the Second Degree and Robbery in the First Degree usually merge due to double jeopardy. In that case, the defendant used a gun, pointing it at the victims, to forcibly take their property—a vehicle. *Kier*, 164 Wn.2d at 802. In analyzing this case from a double jeopardy standpoint, the Supreme Court found that “the merger

doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation. *Id.* at 806 (citing RCW 9A.56.200(1)(a)(i)-(ii), RCW 9A.56.190, RCW 9A.36.021(1)(c), *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) and *Freeman*, 153 Wn.2d at 780).

The facts of *Kier* are quite similar to what we have here in Murphy's case. The defendant pointed a gun to at the victim to accomplish the taking of the victim's property. As in *Kier*, the second degree assault elevated the robbery to a robbery in the first degree. As such, the Assault conviction should merge with the Robbery.

The parties at the trial court level had already agreed these convictions would not count against each other for scoring purposes as they constituted same criminal conduct. RP 634. The convictions also ran concurrently with each other. CP 8-9. Therefore, Murphy's overall sentence will not change due to this issue, but this case should be remanded for vacation of the Assault conviction and correction of the judgment and sentence.

VI. THE TRIAL COURT PROPERLY SENTENCED MURPHY

a. THE TRIAL COURT PROPERLY INCLUDED MURPHY'S OUT-OF-STATE CONVICTIONS IN HIS OFFENDER SCORE AFTER FINDING THEY COMPARED TO A WASHINGTON FELONY

Murphy contends the trial court erred in counting his prior convictions from the State of Oregon in his offender score. Murphy's analysis of the comparability of the statutes is incorrect, and his prior convictions are comparable to a Washington felony. The trial court correctly determined Murphy's offender score.

This Court reviews de novo a challenge to the classification of an out-of-state conviction as a comparable Washington offense. *State v. Beals*, 100 Wn.App. 189, 196, 997 P.2d 941 (2000). A defendant's out-of-state convictions must be classified "according to the comparable offense definitions and sentences provided by Washington law." *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994) (quoting former RCW 9.94A.360(3) (1990)). To calculate an offender score which includes convictions from out-of-state, the trial court must first identify the comparable Washington offense, classify that comparable Washington offense and treat the out-of-state conviction as if it were a conviction for the comparable Washington offense. *State v. Cameron*, 80 Wn.App. 374, 378-79, 909 P.2d 309 (1996). A court first compares the elements of the

out-of-state offense with the elements of comparable Washington offenses. *State v. Morely*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements are not identical, or if the Washington statute defines the offense more narrowly, then the trial court reviews the record of the out-of-state convictions to determine if the defendant's conduct would have violated a comparable Washington offense. *Id.*

Murphy's prior convictions are for Unlawful Delivery of an Imitation Controlled Substance and Attempted Unlawful Delivery of an Imitation Controlled Substance, in violation of ORS 475.912(1). The information charging Murphy with his Oregon crime indicated that on a certain date he did "unlawfully and knowingly deliver a substance that was not a controlled substance upon the express and implied representation that the substance was Crack cocaine, a controlled substance, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon." CP 97. His other counts of the same crime indicated almost the exact same language in the information. CP 94; 103; 108. Each information charged Murphy with making an express or implied representation that the substance was a controlled substance.

The comparable Washington statute, RCW 69.52.030 prohibits a person from distributing an imitation controlled substance. In Oregon the

term “deliver” means “the actual or constructive transfer, or offer or agreement to transfer, from one person to another of a substance, whether or not there is an agency relationship.” ORS 475.912(2). In Washington, the term “distribute” means “the actual or constructive transfer (or attempted transfer) or delivery or dispensing to another of an imitation controlled substance.” RCW 69.52.020(2). It is clear from a legal comparability stand point that these crimes are comparable and proscribe the same conduct. The trial court was correct in counting Murphy’s prior Oregon convictions as Washington felonies for scoring purposes.

b. MURPHY’S OVERALL SENTENCE WAS PROPER, BUT DUE TO A SCRIVENER’S ERROR THE CASE SHOULD BE REMANDED FOR CORRECTION TO THE JUDGMENT AND SENTENCE

Murphy contends the trial court erred because it added 24 months to Murphy’s robbery and assault sentences for his drug charge enhancement. Murphy further argues that this violated his right to a jury trial by increasing the sentence of his robbery and assault convictions based upon facts that were not proven to the jury. Murphy’s issue is more appropriately recharacterized as a scrivener’s error in the judgment and sentence, or at worst, a trial court’s misunderstanding of how to accurately reflect the defendant’s sentence in the judgment and sentence. This matter

is easily resolved with remand for correction of the judgment and sentence.

RCW 9.94A.533(6) provides that,

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 or 9.94A.827. 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).

This statute not only authorizes but requires the trial court run the school zone enhancement found by the jury on Murphy's drug charge consecutive with the sentences on his assault and robbery convictions as well as the enhancements on those counts. Therefore, Murphy's actual amount of time sentenced is appropriate. It appears the trial court and parties were unaware of how to appropriately notate the judgment and sentence to have two separate enhancements (the firearm and the school zone) on separate charges, but all running consecutively. Murphy has not been prejudiced by this error on the judgment and sentence as his sentence is lawful.

As Murphy asserts in his brief, the trial court sentenced Murphy to 173 months total confinement. CP 8. Knowing that the statutes require Murphy's two enhancements to be served consecutively, we subtract 24

months for the school zone enhancement on the drug offense and 60 months on the firearm enhancement, that leaves Murphy with an 89 month sentence on the robbery. Murphy's standard range on the robbery was 77-102 months. He received a sentence just under the mid-range of the robbery standard range. This is a legal and appropriate sentence, and well within the trial court's discretion. The notation on the judgment and sentence of 173 months may be an erroneous way of memorializing the enhancements and how they run, but the end result was appropriate.

Given the issue here, it would be appropriate to remand this case for correction of the judgment and sentence to clarify Murphy's sentence.

D. CONCLUSION

Murphy's convictions for Robbery in the First Degree and Unlawful Possession of a Controlled Substance with Intent to Deliver should be affirmed. The trial court did not err in refusing to admit evidence, and Murphy did not qualify for the medical marijuana affirmative defense he sought. The trial court properly instructed the jury, properly allowed admission of evidence obtained from the search warrant, and Murphy received effective assistance of trial counsel. This case should be remanded for vacation of the Assault in the Second Degree conviction

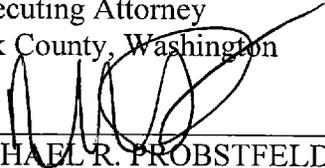
as it violates double jeopardy and for correction of the judgment and sentence. The trial court should be affirmed in all other respects.

DATED this 7th day of March, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL R. PROBSTFELD,
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

March 07, 2014 - 5:00 PM

Transmittal Letter

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