

NO. 48329-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL E. REA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Daniel L. Godell, Judge
Cause No. 14-1-00425-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Rea's motion to dismiss both charges for insufficient evidence.
02. The trial court erred in granting the State's motion to reopen its case.
03. The trial court erred in permitting Rea to be represented by counsel who provided ineffective assistance by failing to request a cautionary instruction based on K.L.C.'s testimony as an accomplice.
04. The trial court erred in permitting Rea to be represented by counsel who provided ineffective assistance by failing to request an instruction on the lesser included offense of possession of less than 40 grams of marijuana.
05. The trial court erred in permitting Rea to be represented by counsel who provided ineffective assistance by failing to argue that his two offenses constituted the same criminal conduct for sentencing purposes.
06. The trial court erred in imposing a community custody condition prohibiting Rea from frequenting places whose primary business is the sale of liquor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in granting the State's motion to reopen its case after it had rested in order to add additional evidence that the court used to deny Rea's motion to dismiss both charges for insufficient evidence? [Assignment of Error Nos. 1 and 2].

01. Whether Rea was prejudiced as a result of his counsel's failure to request a cautionary instruction based on K.L.C.'s testimony as an accomplice?
[Assignment of Error No. 3].
02. Whether Rea was prejudiced as a result of his counsel's failure to request an instruction on the lesser included offense of possession of less than 40 grams of marijuana?
[Assignment of Error No. 4].
03. Whether Rea was prejudiced as a result of his counsel's failure to argue that his offenses for involving a person under eighteen in an unlawful controlled substance transaction and delivery of marijuana constituted the same criminal conduct for sentencing purposes?
[Assignment of Error No. 5].
04. Whether the trial court acted without authority in ordering Rea not to frequent places whose primary business is the sale of liquor?
[Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Michael E. Rea was charged by second amended information filed in Mason County Superior Court November 4, 2015, with involving a person under eighteen in an unlawful controlled substance transaction, count I, and delivery of marijuana, count II, contrary to RCWs 69.50.4015 and 69.50.401(1). [CP 93-94].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing, and trial to a jury commenced November 4, the Honorable Daniel L. Goodell presiding. [CP 118]. Rea was found guilty, sentenced within his standard range, and timely notice of this appeal followed. [RP 385; CP 8, 25-42].

02. Substantive Facts

On October 7, 2014, at 9:30 in the morning, Sergeant Harry Heldreth came in contact with Rea who was standing in front of the civic center in Shelton, Washington. [RP 97].

[I] asked him if he had come in contact with other officers and any allegations of him dealing drugs, and he said he had. So I asked, do you have any drugs on you. And he said, yeah, do you want to see? Sure. So he opened a fanny pack that he had on and counted out about 21 bindles. Now a bindle is an individually packaged item

[RP 98].

And in each one of these individually packaged items were (sic) appeared to be bud, marijuana bud. Not just the leaf, it's brown vegetable – or greenish-brown vegetable matter, easily recognized as marijuana from my training and experience. And he agreed that that's what it was.

....

I asked him if he had anything else, and he said that he did ... I asked what it was, and he said it was hashish oil. So he opened it up, and he showed me five individually packaged balls, or containers, that had what appeared to be an oily substance, tarry. And he said that each contained a gram of hash oil.

[RP 99].

[H]e said he'd just purchased it on the way that morning for his own personal use. He says he regularly smokes and medicates himself with marijuana and hash oil. He'll put some hash oil on top of the marijuana when he smokes it.

[RP 100].

Rea told Heldreth that by that afternoon he'd be down a few bindles "because I'm going to go off into the woods and medicate myself and smoke some of it." [RP 100]. He said he paid \$240 for the marijuana and \$20 per gram for the hashish oil. [RP 101,117]. He further said that "he wants to keep the kids safe, and part of what he's out there for every day is to point out pedophiles to the kids to keep them safe." [RP 100].

When Heldreth returned to the center a couple of hours later, Rea showed him that he had only 15 bindles left. [RP 101]. At that point, Heldreth told Rea that he believed he was selling marijuana out there and that if he found out "that's what you're doing, we're going to have a problem." [RP 101].

About 1:30 the next afternoon, Heldreth returned to the center and observed Rea through binoculars from a distance of 60 to 70 feet. [RP 102-03, 105]. He observed 17-year-old K.L.C. talk to Rea for a few seconds before walking away. [RP 103-04, 156, 161]. Heldreth continued to monitor K.L.C. and "saw him exchange something in the parking lot

hand-to-hand. Appeared to be a bindle of marijuana. With the binoculars again, I could see that, and then money exchanged back. And then [K.L.C.] walked back to Mr. Rea, handed Mr. Rea the money that Mr. Rea took in his right hand and put into his pocket.” [RP 104].

And then (K.L.C.) walked away again, and same thing with a different person, made another hand-to-hand transaction within a minute or two. And then he came back after I saw the exchange for the bindle and the - - and the money, and gave the money to Mr. Rea who then put the money in his right pocket again.

[RP 104].

When approached by Heldreth, K.L.C. produced a CD case containing multiple bindles, samples of which subsequently tested positive for marijuana, and four containers of suspected hash oil. [RP 125-26, 182].

K.L.C. testified that Rea had given him the suspected marijuana to sell in exchange for some marijuana and a few dollars. [RP 160, 170-71]. He admitted to doing two deals and giving the proceeds to Rea. [RP 158-59]. He also admitted that he owed Rea some money but couldn't remember if it was for marijuana or a phone card. [RP 160, 169-170].

Rea denied he had given K.L.C. the marijuana but admitted it was his marijuana and said the \$40 K.L.C. had handed to him was payment for a loan he had made to K.L.C. to buy a \$50 phone card. [RP 112, 115, 119]. He had “no clue” how K.L.C. had come into possession of his

marijuana. [RP 120]. "I don't know anything about the hash oil in there." [RP 118]. He denied he had given K.L.C. marijuana to sell for him. [RP 119]. "I did not make any deal with anybody to sell any weed for me. I have not sold any weed." [RP 119]. At the time of his arrest, Rea was in possession of a tin containing 1½ grams of what subsequently tested positive for marijuana, a container of less than half a gram of suspected hash oil, and \$566. [RP 113, 118, 123-25, 183-84].

Rea testified that he had been on medical marijuana for over 10 years and uses it for medication. [RP 248]. On October 7, he purchased 28 grams in multiple bindles because his seller "didn't have a solid ounce." [RP 250]. He had known K.L.C. since the previous May or June and had loaned him money on four occasions, \$50 the last time in September. [RP 254, 259-60]. K.L.C. had been at his house the previous evening in the living room when Rea put his CD case under his coffee table. [RP 260-62]. Right before he was arrested, K.L.C. handed him \$10 as payment on the last loan. [RP 264-65]. Heldreth then approached him and waived over K.L.C. [RP 266].

And then the Sergeant asked him if he had anything else. And then hesitantly he pulled out my CD case. And of course at that point I recognized my CD case. And of course, I claimed, that's my CD case. And –

....

And then when he opens it up, yes, that's my medication.
And then he pulls that out, there's four containers that's
foreign to me.

[RP 266].

Rea could not say how K.L.C. had come into possession of his CD case but denied ever giving it to him. [RP 267]. He also denied K.L.C.'s claim that he was selling marijuana for him and then giving him the proceeds. [RP 269]. During cross-examination, Rea admitted that he had no prescription for medical marijuana on the day of his arrest. [RP 275]. "At that point, October 8, 2014, my - - my card had lapsed. Okay, six years - -" [RP 276].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO REOPEN ITS CASE AFTER IT HAD RESTED IN ORDER ADD ADDITIONAL EVIDENCE THAT THE COURT USED TO DENY REA'S MOTION TO DISMISS BOTH FOR INSUFFICIENT EVIDENCE.

"A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court." State v. Luvane, 127 Wn.2d 690, 711, 903 P.2d 960 (1995) (quoting State v. Sanchez, 60 Wn. App. 687, 696, 806 P.2d 782 (1991)). A trial court's decision allowing a party to reopen its case will be reviewed where it is a manifest abuse of discretion that results in prejudice

to the complaining party. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

After the State informed the court that it has rested [RP 200, 206], Rea moved for dismissal of the two charges, both of which required proof that Rea had involved K.L.C. in the sale of marijuana, arguing that the

State had failed to prove that marijuana was involved in either offense because it had failed to present evidence that the substance in question met the statutory definition of marijuana. [RP 201]. “The Statutory (sic) definition of marijuana actually requires over .03% (sic) by dry weight of the substance.” [RP 201]. Under the statute in effect at the time, the State was required to prove that the substance fit the following definition:

“Marijuana” or “marihuana” means all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin....

Former RCW 69.50.101(t). Catherine Dunn, the State’s forensic scientist, had failed to establish this during her testimony. [RP 176-185].

Over objection [RP 212], the court granted the State’s motion to reopen:

[A]nd I think all parties recognize, that there is in the definition of marijuana, an additional threshold of evidence that needs to be provided. And what I heard yesterday was that that evidence does exist. And it appears that there was an omission, an inadvertent omission by the State, by not providing that evidence from a witness who otherwise apparently would have that evidence.

And based upon that omission, and the availability of that evidence, and it not being any new evidence, or a new witness, the Court is going to grant the State’s motion to reopen.

[RP 212-13].

The State's forensic scientist then testified that the substance she tested "contained greater than 0.3% total THC." [RP 235]. The THC concentration is the amount of THC per a weight of plant material. [RP 236]. Following this, the court denied Rea's motion to dismiss: "[B]ased upon the additional evidence that was provided, the Court is denying the motion." [RP 288].

While it is true that Washington courts have upheld trial court decisions to reopen to present further evidence after the defense has moved for dismissal on the basis of insufficient evidence, see Brinkley, 66 Wn. App. at 848, appellate counsel could find no Washington case permitting this where the State moved to reopen to add evidence it had admitted it didn't believe it had to prove, which happened in this case.

THE COURT: Is it the State's position that you do not have to prove the .03% (sic) as set forth in the definition?

(PROSECUTOR): Yes, your Honor.

THE COURT: That's the State's position?

(PROSECUTOR): That's the State's position....

[RP 204].

An [a]buse of discretion is discretion exercised for untenable grounds for untenable reasons. State v. Sanchez, 60 Wn. App. at 696. It is

submitted that this standard is satisfied when a trial court allows a prosecutor to reopen his or her case to add evidence needed to convict a defendant where the prosecutor was apparently unaware that such evidence was necessary to prove the elements of the charges, which is what happened in this case.

Under RCWs 69.50.4015 and 69.50.401(1), both charges required the State to prove that Rea involved K.L.C. in the delivery of marijuana. Without proof that the substance was marijuana as defined by statute, there was insufficient evidence to convict Rea of either involving K.L.C. in an unlawful controlled substance transaction or the delivery of marijuana. It is telling that the trial court based its decision to deny Rea's motion to dismiss the charges "based upon the additional evidence that was provided." [RP 288].

The trial court abused its discretion in allowing the State to reopen its case to add this evidence, which it then used to deny Rea's motion to dismiss for insufficient evidence, with the result that both of Rea's convictions should be dismissed.

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02. REA WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO REQUEST A CAUTIONARY INSTRUCTION BASED ON K.L.C.'S TESTIMONY AS AN ACCOMPLICE.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. 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). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

A cautionary accomplice testimony jury instruction is required when the accomplice testimony is not “substantially corroborated” by other evidence. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds by, State v. Brown, 111 Wn.2d 124, 155-57, 761 P.2d 588 (1988); State v. McKinsey, 116 Wn.2d 911, 10 P.2d 907 (1991).

We hold: (1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d at 155.

WPIC 6.05 states:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

K.L.C. was not charged with any offense and testified under a Memorandum Agreement of Immunity [State's Exhibit 15], which he understood to mean "that if I tell the truth I can't be charged with anything I did." [RP 165]. To prove either offense, which required sufficient evidence that Rea involved K.L.C. in the delivery of marijuana, the State had to establish that Rea had provided K.L.C. was the marijuana used in the drug transactions, for without that, the other evidence is of little consequence. As Rea claimed he had "no clue" as to how K.L.C. had come into possession of his marijuana, and because Sergeant Heldreth presented no testimony on this issue, the State offered K.L.C.'s uncorroborated testimony that Rea had provided him with the marijuana. [RP 160, 170-71]. Predictably, during closing the State asserted that Rea was involved in and responsible for K.L.C.'s crime of delivery [RP 343], arguing that "we had (K.L.C.) in possession of the marijuana that he testified was given to him by Mr. Rea." [RP 342]. K.L.C.'s testimony

created the connection between his possession of the marijuana and Rea, which was the crux of the State's case on both charges.

Under these facts, where the State relied solely on the accomplice testimony of K.L.C. as to how he acquired the marijuana, which was not substantially corroborated by other evidence, WPIC 6.05 would have been mandatory. If Rea's counsel had proposed the instruction, the trial court's denial would have constituted reversible error. Rea's counsel's failure to exercise due diligence in this regard cannot be deemed a tactical decision, falls below an objective standard of reasonableness and was prejudicial as it materially affected the outcome of the trial to the point that there is a reasonable probability that the result of the proceedings would have been different but for counsel's failure to propose the instruction. Counsel's inaction in this regard allowed the jury to consider a version of events as to how K.L.C. had come into possession of the marijuana supported only by the testimony of K.L.C., a self-interested party. See State v. Harris, 102 Wn.2d at 155.

Rea's convictions must therefore be reversed and remanded for a new trial.

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03. REA WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF POSSESSION OF LESS THAN 40 GRAMS OF MARIJUANA.¹

Rea proposed no lesser included instructions.

[RP 81-92, 100-115]. A defendant is entitled to an instruction on the elements of a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal test); and (2) the evidence supports an inference that only the lesser crime was committed. (factual test). State v. Berlin, 133 Wn.2d 541, 545-46, 548, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

The first or legal test of Workman is satisfied as to the crime at issue. "A misdemeanor charge of possession of (less than 40 grams) of marijuana is a lesser included offense of the crime of delivery of marijuana." State v. Wilson, 41 Wn. App. 397, 398-99, 704 P.2d 1217, review denied, 105 Wn.2d 1003 (1985); State v. Rhodes, 18 Wn. App. 191, 193, 567 P.2d 249 (1977). While Rea was in possession of marijuana,

¹ For the purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

at no time did he possess anywhere near 40 grams. [RP 125, 184, 250].

Former RCW 60.50.4014, eff. July 1, 2004, provides:

Except as provided in RCW 69.50.401(2)(c), any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor.

Evidence in this case also satisfies the Workman factual test.

Under this prong, “(t)he test is whether there is evidence supporting an inference that the defendant is guilty of the lesser included offense instead of the greater one.” State v. Bergeson, 64 Wn. App. 366, 369, 824 P.2d 515 (1992). And this evidence need not come from the defendant; it may also come from the State’s evidence. State v. Fernandez-Medina, 141 Wn. 2d 448, 456, 6 P.3d 1150 (2000). The record supports a rational inference that Rea committed only the offense of misdemeanor possession of marijuana, especially in light of the lack of evidence that he had provided K.L.C. with the marijuana used in the drug transactions. In this context, the evidence must be viewed in the light most favorable to the party requesting the instruction. Id. Moreover, “(i)n evaluating the adequacy of the evidence (to support a proposed instruction), the court cannot weigh the evidence.” State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1034 (1999), abrogated on other grounds, State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013).

Rea was clearly in possession of less than 40 grams of marijuana. The evidence did not prove, however, that he had supplied K.L.C. with the marijuana used in the drug transactions, as addressed in the preceding argument. Construing the evidence in Rea's favor, the jury could have found that while he did possess less than 40 grams of marijuana, he had not provided the marijuana eventually seized from K.L.C. Rea was entitled to an instruction possession of less than 40 grams of marijuana because both the legal and factual prongs of the Workman test were satisfied.

While the State may contend that counsel's failure to request the lesser included instruction was legitimate trial strategy—an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser—an examination of the record does not support such a claim. Though our Supreme Court, in State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), did explain that an "all or nothing" strategy may constitute a legitimate trial tactic, this is not that case, given that a failure to request a lesser included instruction may constitute ineffective assistance if the failure was objectively unreasonable. State v. Hassen, 151 Wn. App. 209, 218-219, 211 P.3d 441 (2009). The potential jeopardy for Rea included the "stigma of a felony conviction," State v. Radan, 143 Wn.2d 323, 331, 21

P.3d 255 (2001), in addition to future consequences should he reoffend, such as the potential impact on his future offender score under the Sentencing Reform Act, which scores prior felonies in determining a defendant's standard range sentence. In contrast, possession of less than 40 grams of marijuana is an unscored misdemeanor.

Under these circumstances, trial counsel was ineffective in failing to request an instruction on the lesser included misdemeanor of possession of less than 40 grams of marijuana. The "all or nothing strategy" unreasonably exposed Rea to a substantial risk that the jury would convict on the only option presented, delivery of marijuana. It was objectively unreasonable to rely on such a strategy.

As the United States Supreme Court has stated:

(I)t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed.

2d. 844 (1973).

The prejudice here is self-evident and it is reasonably probable that the outcome would have been different had counsel requested an instruction on the lesser included offense of possession of less than 40 grams of marijuana. Counsel's performance was deficient, which was highly prejudicial to Rea, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for delivery of marijuana.

04. REA WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO ARGUE THAT HIS OFFENSES FOR INVOLVING A PERSON UNDER EIGHTEEN IN AN UNLAWFUL CONTROLLED SUBSTANCE TRANSACTION AND DELIVERY OF MARIJUANA CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.²

When two or more offenses constitute the same criminal conduct, the sentencing court must count them as one offense in computing the defendant's offender score. RCW 9.94A.589(1)(a). As used in this subsection, "same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). This court construes same criminal conduct "narrowly to disallow most

² Again, for the purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

claims that multiple offenses constitute the same criminal act.” State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. In making this determination, this court considers “how intimately related the crimes committed are,” State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990), whether the intent, as objectively viewed, changed from one crime to the next, State v. Wright, 183 Wn. App. 719, 734, 334 P.3d 22 (2014), and whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411-12, 885 P.2d 824 (1994). Moreover, this court may consider whether the crimes were part of the same scheme or plan and whether the defendant’s objectives changed. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995). Our courts have also held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. See e.g., State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here the crimes occurred at the same time and place, with the same victim (the public). In addition, they were intimately related (Rea involving K.L.C. in the delivery of marijuana), shared the same objective intent, furthered one another, and were part of a single plan to sell marijuana. The two offenses constitute the same criminal conduct.

There is a reasonable probability that the sentencing court would have determined the offenses constituted the same criminal conduct, and counsel's failure to argue same criminal conduct at sentencing constituted deficient performance. This court should vacate Rea's sentence and remand for recalculation of his offender score and resentencing.

05. THE TRIAL COURT ACTED WITHOUT
AUTHORITY IN ORDERING REA
NOT TO FREQUENT PLACES WHOSE
PRIMARY BUSINESS IS THE SALE OF
LIQUOR.

As a condition of community custody, the court ordered that Rea:

... shall not go into bars, taverns, lounges,
or other places whose primary business is
the sale of liquor;

[CP 22].

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

There was no evidence at trial that alcohol played any part in Rea's crime. In State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the record indicated that alcohol contributed to Jones's offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant "to participate in alcohol counseling(,)" Id. at 208, reasoning that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which

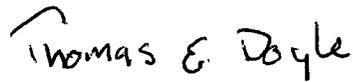
constitutes “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....” RCW 9.94A.030(10).

The condition prohibiting Rea from frequenting places selling liquor is invalid because there was no evidence that alcohol played any part in her offense, with the result that it is not a crime-related prohibition and must be stricken.

E. CONCLUSION

Based on the above, Rea respectfully requests this court to reverse and dismiss his convictions and/or to remand for a new trial and resentencing.

DATED this 26th day of July 2016.



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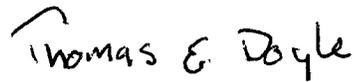
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 26th day of July 2016.



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