

No. 48329-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL E. REA, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 14-1-00425-7

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. After the State said outside the presence of the jury that intended to rest, the trial court allowed the State to reopen and present evidence that the marijuana at issue in this case had a THC content of 0.3% or more as required by for proof that the marijuana at issue fit the recently enacted statutory of marijuana. Because Rea did not suffer any undue prejudice from the additional testimony, the trial court did not abuse its discretion by granting the State's motion to reopen.
2. The State's evidence in this case was based in part on the testimony of an accomplice was granted immunity in exchange for his testimony. Defense counsel did not request a WPIC 6.05 cautionary instruction based on the accomplice testimony. Because counsel did not request this instruction, Rea claims that he his counsel was ineffective. However, because substantial evidence corroborated the accomplice's testimony, Rea cannot show prejudice based on his counsel's failure to request the cautionary instruction, and because Rea cannot show prejudice his claim of ineffective assistance of counsel should fail.
3. Rea contends on appeal that his counsel was ineffective at trial because he did not request a jury instruction for the crime of misdemeanor possession of marijuana as a lesser included instruction to the crime of delivery of a controlled substance. But possession of marijuana was not a crime on the date of Rea's offense unless the quantity of marijuana possessed was more than one ounce, and there was insufficient evidence in this case to prove that the quantity of marijuana possessed by Rea was more than one ounce. Additionally, Rea cannot make the required showing of prejudice that is necessary for him to meet his burden for his claim of ineffective assistance of counsel, because the jury convicted him of the greater offense of delivery of a controlled substance, and on review of a claim of ineffective assistance of counsel reviewing courts assume that the jury based its verdict on sufficient evidence and that it

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would not otherwise opt for a compromise verdict.

4. Rea contends that his trial counsel was ineffective for not arguing at sentencing that Rea's conviction for involving a minor in a drug transaction and his conviction for delivery of a controlled substance constituted the same criminal conduct for calculation of his offender score and sentencing purposes. However, because the victim for each conviction was different, Rea cannot show that these offenses constituted same criminal conduct; therefore, he cannot show prejudice from his counsel's failure to argue same criminal conduct in regards to these offenses.
5. Rea contends that the trial court erred when it ordered as a condition of his judgment and sentence that he not go to bars or taverns or places where alcohol is sold. Because there is no evidence in the record that Rea's patronage of bars, taverns or places where alcohol is sold or served in any way contributed to his crimes of conviction, the State respectfully concedes that this prohibition should be removed from Rea's judgment and sentence.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Rea's statement of facts, except where the State offers contrary or additional facts as needed to develop its arguments below. RAP 10.3(b).

C. ARGUMENT

1. After the State said outside the presence of the jury that intended to rest, the trial court allowed the State to reopen and present evidence that the marijuana at issue in this case had a THC content of 0.3% or more as required by for proof that the

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marijuana at issue fit the recently enacted statutory of marijuana. Because Rea did not suffer any undue prejudice from the additional testimony, the trial court did not abuse its discretion by granting the State's motion to reopen.

After the completion of the testimony of what the parties expected to be the State's final witness, the trial court ordered a 15-minute recess, and the jury retired to the jury room. RP 199-200. In the jury's absence the prosecutor then said that the State was resting. RP 200. Rea's counsel then moved for dismissal because the State had not proved that the marijuana at issue was marijuana as defined by RCW 69.50.101(t) (2014), as follows:

(t) "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. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

Id. In response to the defense motion, the prosecutor stated his belief that because marijuana is a statutorily defined schedule 1 controlled substance and because the State's witnesses testified that the substance at issue in the case was in fact marijuana, it was unnecessary to also separately prove the

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THC concentration of the substance as required by RCW 69.50.101(t) (2014). RP 202. Nevertheless, the State moved to reopen so that it could present evidence that the marijuana at issue in the case was marijuana as defined by RCW 69.50.101(t) (2014). RP 205.

Rea objected to the prosecutor's motion to reopen, stating that allowing the State to reopen "obviously would prejudice the defense." RP 206. But Rea could not point to any specific prejudice beyond the fact that allowing the State to reopen would upset Rea's motion for dismissal. RP 205-06, 211. After hearing argument and considering the applicable legal standards, the trial court allowed the State to reopen and recall its marijuana analyst, who then testified that the marijuana at issue had a THC content that was greater than 0.3 percent on a dry weight basis. RP 211-12, 234-37, 240-43.

On appeal, Rea contends that the trial court's ruling allowing the State to reopen was an abuse of discretion. Br. of Appellant at 7-11. A trial court's decision allowing the State to reopen is reviewed for prejudice to the defendant and for abuse of discretion. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Even when the trial court allows the State to reopen after the defense has moved to dismiss for insufficiency of the evidence, the trial court's ruling is generally upheld on appeal. *Id.* To

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show that the trial court's decision was an abuse of discretion, the defendant must show prejudice beyond any prejudice that is inherent in the introduction of new evidence. *Id.* at 850. To show such prejudice, the defense must show prejudice resulting from the manner in which the State introduced the additional evidence, such as that for tactical reasons the State deliberately withheld the evidence or that the State placed an unfair emphasis on the evidence due to the timing of its introduction. *Id.* at 850-51.

In the instant case, Rea has not shown such prejudice. It is apparent in the instant case that the prosecutor did not omit the evidence for tactical reasons; instead, it is apparent that he inadvertently omitted the evidence because he did not initially think it was necessary to prove the THC content of the marijuana at issue. RP 202. Still more, the timing of the additional evidence was not prejudicial, because the State introduced the evidence before the prosecutor had rested in front of the jury. RP 199-200. The State contends that in these circumstances, the trial court did not abuse its discretion when it allowed the State to reopen. *State v. Brinkley*, 66 Wn. App. 844, 837 P.2d 20 (1992).

2. The State's evidence in this case was based in part on the testimony of an accomplice was granted immunity in exchange

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for his testimony. Defense counsel did not request a WPIC 6.05 cautionary instruction based on the accomplice testimony. Because counsel did not request this instruction, Rea claims that he his counsel was ineffective. However, because substantial evidence corroborated the accomplice's testimony, Rea cannot show prejudice based on his counsel's failure to request the cautionary instruction, and because Rea cannot show prejudice his claim of ineffective assistance of counsel should fail.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, the appellant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Rea contends that his trial counsel was ineffective because counsel did not propose a cautionary jury instruction after Rea's accomplice, K.L.C., testified when called as a witness by the State. Br. of Appellant at 12-15. Our state supreme court has ruled that "it is always the better practice for a trial court to give the cautionary instruction

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whenever accomplice testimony is introduced.” *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). And, “failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony.” *Id.* (emphasis in original). However,

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.

Id.

Corroborating evidence is sufficient if it fairly connects the defendant with the crime, and independent evidence is not needed to corroborate every part of the accomplice’s testimony. *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975). The State contends that sufficient corroborating evidence connects Rea to the crimes of conviction in the instant case.

First, Sergeant Heldreth contacted Rea on October 7 at a bus stop where Rea was hanging out, and when contacted by Sergeant Heldreth, Rea voluntarily showed him his marijuana, which was individually packaged into 20 or 21 small, individual Ziploc bags. RP 97-98. Rea also

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had five individually packaged balls of a tar-like, oily substance. RP 99.

Rea said that each ball contained a gram of hash oil. RP 99.

On following day, October 8, Sergeant Heldreth returned to the bus stop and saw Rea hanging out there again. RP 102. Sergeant Heldreth found a position nearby and began to surveil with the assistance of a pair of binoculars. RP 102-03. Sergeant Heldreth surveilled the area for about five minutes, and during this time he saw K.L.C. approach Rea, speak for a few seconds, and then walk away. RP 103-04. Sergeant Heldreth watched K.L.C. walk away and then engage in a hand-to-hand transaction, or what appeared to be a bundle of marijuana for an exchange of money, with a third person. RP 104. Sergeant Heldreth then saw Rea walk back to Rea and hand him the money, which Rea then put into his pocket. RP 104. Sergeant Heldreth then watched K.L.C. walk off again and engage in a hand-to-hand transaction with yet another person and then return and give the money to Rea. RP 104.

Sergeant Heldreth then contacted K.L.C. and Rea. RP 104, 307. K.L.C had a CD case that contained 11 bindles of marijuana and four containers of hash oil that were similar to those that Rea had shown to Sergeant Heldreth the day before. RP 105. Rea eventually admitted that the CD case and the marijuana in it were his, but he denied giving it

K.L.C. RP 107, 307. Rea admitted that K.L.C. had given him money, but he claimed that it was for repayment of a debt. RP 115. Rea had \$566 in his possession. RP 123, 307.

“[A] defendant does not establish ineffective assistance simply by identifying an instruction that would have likely been given had it been requested.” *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011), citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2011). As in *Hayes*, it is likely that had a cautionary accomplice testimony instruction been requested the court would have given it. But, where there is evidence to corroborate the accomplice’s testimony, as in the instant case, in order to prevail on a claim of ineffective assistance of counsel based upon counsel’s failure to request the instruction, Rea must show prejudice. *Id.* Here, as in *Hayes*, counsel “was able to argue extensively that [K.L.C.’s] testimony was self-serving.” *Id.*; RP 348-49.

Here, substantial evidence corroborated K.L.C.’s testimony, and Rea has not shown prejudice from counsel’s failure to request the WPIC 6.05 cautionary instruction; therefore, counsel’s failure to request this instruction is not reversible error. *State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989).

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3. Rea contends on appeal that his counsel was ineffective at trial because he did not request a jury instruction for the crime of misdemeanor possession of marijuana as a lesser included instruction to the crime of delivery of a controlled substance. But possession of marijuana was not a crime on the date of Rea's offense unless the quantity of marijuana possessed was more than one ounce, and there was insufficient evidence in this case to prove that the quantity of marijuana possessed by Rea was more than one ounce. Additionally, Rea cannot make the required showing of prejudice that is necessary for him to meet his burden for his claim of ineffective assistance of counsel, because the jury convicted him of the greater offense of delivery of a controlled substance, and on review of a claim of ineffective assistance of counsel reviewing courts assume that the jury based its verdict on sufficient evidence and that it would not otherwise opt for a compromise verdict.

An offense is not a lesser included offense to another offense unless all of the elements of the lesser offense are also elements of the greater offense. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Here, Rea contends that the misdemeanor offense of possession of less than 40 grams of marijuana is a lesser included offense to the offense of delivery of marijuana. Br. of Appellant at 16. To support his contention, Rea cites cases that predate Initiative Measure No. 502 (effective Dec. 6, 2012) and its legalization of small amounts of marijuana by aged 21 or older. As codified at RCW 69.50.4013(2014) and RCW 69.50.360(3)(2014), possession of the following quantity of marijuana by

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a person aged 21 or older was not illegal in Washington on the date of the instant case:

- (a) One ounce of useable marijuana;
- (b) Sixteen ounces of marijuana-infused product in solid form;
- (c) Seventy-two ounces of marijuana-infused product in liquid form; or
- (d) Seven grams of marijuana concentrate....

RCW 69.50.360(3); *see also* RCW 69.50.4013(3)(a).

Thus, in the instant case, the evidence was insufficient to prove that Rea possessed a quantity of marijuana that would exceed the quantity that he could legally possess. Rea said that he had initially purchased 28 grams of marijuana and 5 grams of what he described as hash oil. RP 117. But the marijuana that was seized from Rea at the time of his arrest and was subsequently proved to fit the statutory definition of marijuana was less than one ounce. RP 131-32, 295-96. On these facts the State contends that the evidence would have been insufficient to convict Rea for possession of more than one ounce of marijuana and that, therefore, Rea was not entitled to a jury instruction for the crime of possession of less than 40 grams of marijuana.

Still more, even if there would have been sufficient evidence for the jury to convict Rea for possession of more than one ounce of marijuana, Rea cannot show prejudice from his counsel's failure to

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propose a lesser included jury instruction. *State v. Grier*, 171 Wn.2d 17, 43-44, 246 P.3d 1260, 1274 (2011). Here, as in *Grier*, this Court must assume that the jury would not have convicted for the greater offense “unless the State had met its burden of proof” on the greater offense and that “the availability of a compromise verdict would not have changed the outcome of [defendant’s] trial.” *Id.* On this basis, also, Rea’s claim of ineffective assistance of counsel should fail.

4. Rea contends that his trial counsel was ineffective for not arguing at sentencing that Rea’s conviction for involving a minor in a drug transaction and his conviction for delivery of a controlled substance constituted the same criminal conduct for calculation of his offender score and sentencing purposes. However, because the victim for each conviction was different, Rea cannot show that these offenses constituted same criminal conduct; therefore, he cannot show prejudice from his counsel’s failure to argue same criminal conduct in regards to these offenses.

Rea contends that his trial counsel was ineffective for failing to argue that his conviction for involving a minor in a drug transaction and his conviction for delivery of a controlled substance constituted the same criminal conduct for the purposes of calculation of his offender score and sentencing. Br. of Appellant at 20-22. “Same criminal conduct” means “two or more crimes that require the same criminal intent, are committed

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at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

In the instant case, however, the two crimes at issue each had a different victim. The victim in the crime of involving a minor in a drug transaction was K.L.C. *State v. Hollis*, 93 Wn. App. 804, 818, 970 P.2d 813 (1999). The victim in the crime of delivery of a controlled substance was the public at large. *Id.*, citing *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993).

Because the victims were different in regards to each offense, the two crimes were not same criminal conduct. *State v. Hollis*, 93 Wn. App. 804, 818, 970 P.2d 813 (1999). Therefore, Rea cannot show prejudice, and his claim of ineffective assistance on this basis should be denied. *State v. Grier*, 171 Wn.2d 17, 43–44, 246 P.3d 1260, 1274 (2011).

5. Rea contends that the trial court erred when it ordered as a condition of his judgment and sentence that he not go to bars or taverns or places where alcohol is sold. Because there is no evidence in the record that Rea’s patronage of bars, taverns or places where alcohol is sold or served in any way contributed to his crimes of conviction, the State respectfully concedes that this prohibition should be removed from Rea’s judgment and sentence.

At sentencing, the court imposed community custody conditions that included that Rea “not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor[.]” CP 38. However, no citation to the record was located where there are facts or circumstances that indicate that the use of alcohol contributed to the instant offense.

The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

Pursuant to RCW 9.94A.703(3)(e) the sentencing court had statutory authority to require Rea, as a condition of community custody, to “[r]efrain from consuming alcohol.” Additionally, the sentencing court had discretionary authority to impose crime related prohibitions. RCW 9.94A.703(3)(f). Because there is no citation to the record to support a finding that alcohol or the patronizing of “bars, taverns, lounges, or other places whose primary business is the sale of liquor” contributed to Rea’s criminal offense, the court lacked statutory authority to impose this community custody condition. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

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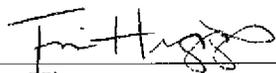
Therefore, the State respectfully concedes that this condition should be stricken from Rea's judgment and sentence.

D. CONCLUSION

For the reasons argued above, the State contends that Rea's appeal should be denied, except that this case should be returned to the trial court for removal of the sentencing condition that Rea not go to bars, taverns, or places where alcohol is sold or served.

DATED: September 30, 2016.

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