

No. 62706-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON SULLIVAN,

Appellant.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chris Washington

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The police search of the defendant was incident to an illegal arrest on “drug charges” that was unsupported by probable cause, requiring suppression of the evidence of cocaine and currency found on his person.

2. The trial court erred in ruling that it was the defendant’s burden to prove that his warrantless search and seizure were illegal.

3. The defendant’s conviction must be reversed and the charge dismissed where the cocaine and currency evidence supporting the conviction were obtained in a search incident to an illegal arrest unsupported by probable cause.

4. There was insufficient evidence of possession of cocaine with intent to deliver.

5. The inclusion of language requiring proof of “delivery of a controlled substance,” in the jury instruction regarding the charge of a school bus route stop enhancement placed the prosecutor under a burden to prove delivery of a controlled substance under the law of the case doctrine, which the State failed to meet.

6. The evidence of delivery was constitutionally insufficient where the State failed to prove the identity of the thing delivered, if

any, as a controlled substance, or as the controlled substance cocaine.

7. The evidence of delivery was constitutionally insufficient where the State failed to prove that Mr. Sullivan knew the thing delivered was a controlled substance.

8. Absent an accomplice liability instruction, there was insufficient evidence of delivery of a controlled substance where one of the defendant's alleged acts of delivery supposedly involved a transfer by one of his alleged compatriots, and where there was no election or unanimity instruction.

9. The evidence required to prove the school bus route stop enhancement was constitutionally insufficient.

10. The jury instructions were deficient for failure to include the essential element of knowledge.

11. The jury instructions were deficient for failure to include a definition of "knowledge."

12. The State unlawfully procured a conviction on an uncharged crime, or on an uncharged alternative of the crime specified in the information.

13. Mr. Sullivan was unlawfully sentenced for conviction on a non-existent offense.

14. The conviction on the delivery charge must be reversed for failure of the prosecutor to elect one of the alleged deliveries as the basis for the conviction.

#### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the search of the defendant was incident to an illegal arrest unsupported by probable cause to believe the defendant was involved in illegal drug activity, where the police observed the defendant and some friends speak briefly with several individuals the police recognized as drug users, in an area of high drug activity (outside the King County Courthouse), and where he and his friends made some hand-to-hand contact or possible exchanges with the persons, including exchange of apparent money, but the police observed no drugs, either in the defendant's hand, in his friends' hands, or at any time during the entirety of the incident.

2. Whether the trial court erred in ruling, contrary to State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999), that it was the defendant's burden to prove that his warrantless search and seizure were illegal.

3. Whether the defendant's conviction must be reversed and the charge dismissed where the cocaine and currency evidence

supporting the conviction and located on the defendant's person were obtained in a search incident to an illegal arrest unsupported by probable cause.

4. Whether there was insufficient evidence of possession of cocaine with intent to deliver.

5. Whether the prosecutor's inclusion of language requiring proof of "delivery of a controlled substance," in the jury instruction regarding the school bus stop enhancement under RCW 69.50.453, placed the prosecutor under a burden to prove delivery of a controlled substance under the law of the case doctrine of State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

6. Whether the evidence of delivery was constitutionally insufficient under State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002), where the State, in the absence of a field test, laboratory testing, or any testimony about some appearance or packaging of whatever was allegedly delivered, failed to prove the identity of the thing delivered, if any, as a controlled substance, or as the controlled substance cocaine.

7. Whether the evidence of delivery was constitutionally insufficient under State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151

(1979), where the State failed to prove that Mr. Sullivan knew the thing delivered was a controlled substance.

8. Whether, absent an accomplice liability instruction, there was sufficient evidence of delivery of a controlled substance under State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990), where one of the defendant's alleged acts of delivery supposedly involved a transfer by one of his alleged compatriots.

9. Whether the evidence required to prove the school bus route stop enhancement of RCW 69.50.435 was constitutionally insufficient under State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992), where the State failed to prove that information showing there was a bus stop at 4th and James was readily available to the public, and failed to prove that the bus stop in question was active and in regular use at the time of the defendant's offense, in August of 2008.

10. Whether the jury instructions were deficient under State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005), for failure to include the essential element of knowledge that the thing delivered was a controlled substance.

11. Whether the jury instructions were deficient for failure to include a definition of "knowledge."

12. Whether the State unlawfully procured a conviction on an uncharged crime under State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988), or on an uncharged alternative of the crime specified in the information under State v. Doogan, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996).

13. Whether Mr. Sullivan was unlawfully sentenced for conviction on a non-existent offense, relying on In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

14. Whether the conviction on the delivery charge must be reversed under State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984), for failure of the prosecutor to elect one of the alleged deliveries as the basis for the conviction, where the trial court did not instruct the jury on the requirement of “unanimity.”

### **C. STATEMENT OF THE CASE**

**1. Procedural history.** Brandon Sullivan was charged with possession of a controlled substance, cocaine, with intent to deliver, pursuant to RCW 69.50.401(1)(2)(a). CP 1. According to the affidavit of probable cause, a Seattle police officer observed the defendant, and two alleged compatriots, complete transactions and/or hand something unidentified to persons approaching them on the street near the King County courthouse in downtown

Seattle. CP 2-3. Mr. Sullivan's conduct was filmed on videotape. CP 3; see Supp. CP \_\_\_\_, Sub # 88 (exhibit list, exhibit 1).

Mr. Sullivan was arrested, and a search incident to arrest located cocaine, and several hundred dollars in cash on his person. CP 2-3. One of the alleged compatriots was also arrested, and the cocaine located on his person was field-tested, showing it to potentially be cocaine. CP 3. The defendant stipulated that the substance found on his person was cocaine, CP 30, but whatever was delivered to the three persons on the street, if anything, was never located, tested, or described by any witness.<sup>1</sup>

The State subsequently filed an amended information adding the special allegation of RCW 69.50.435(a), alleging that the offense of possession with intent to deliver was committed within 1,000 feet of a school bus route stop located at 4th and James. CP 23.

Following a CrR 3.6 hearing, the trial court denied Mr. Sullivan's motion to suppress, ruling that the officer's observations of the defendant, his alleged compatriots, and the persons with

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<sup>1</sup>This fact becomes significant because the most notable (although not the only) errors in Mr. Sullivan's trial arise out of the State's consequential, if inadvertent, transformation of the case into one requiring the prosecution, under the "law of the case" doctrine, to prove actual delivery of a controlled substance. See Part D.3, infra.

whom he interacted established probable cause to arrest the defendant on “drug charges,” despite the fact that the observing officer could not see what Mr. Sullivan held in his hand or what he or the other individuals handed to the persons who approached them. 8/26/08RP at 62;<sup>2</sup> CP 61-64 (Findings of fact).<sup>3</sup>

The defendant was found guilty by jury verdicts on the underlying offense of possession with intent to deliver, and the school bus route stop enhancement. CP 31, CP 32. He was sentenced within the standard range to 30 months incarceration on the drug offense, and an additional 24 month term on the school bus stop enhancement. CP 65-74. He timely appealed. CP 75.

**2. CrR 3.6 Facts.** The State established the following at the CrR 3.6 hearing: On August 16, 2007, Seattle police officer Donald Johnson was on duty at the King County Courthouse, monitoring the nearby streets with a multi-camera surveillance system.<sup>4</sup>

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<sup>2</sup>The verbatim report of proceedings consists of multiple separately-paginated volumes of transcript, which will be referred to by the date covered by each volume, followed by the appropriate page reference(s).

<sup>3</sup>The State-drafted CrR 3.6 findings of fact and conclusions of law were filed on September 26, 2008. CP 61.

<sup>4</sup>The State’s evidence at the CrR 3.6 hearing and at trial was elicited primarily from Officer Donald Johnson; material differences in the evidence adduced in the two proceedings are discussed at Part C.3, and where pertinent in the argument sections with respect to the trial issues raised, as are additional facts adduced by the defense in cross-examination at trial.

8/26/08RP at 9; Supp. CP \_\_\_\_, Sub # 87 (pre-trial exhibit list, exhibit 1). Johnson was experienced in investigating narcotics-related activity and had received specialized training pertaining to illegal drugs. He had made hundreds of drug-related arrests. Officer Johnson also knew the area of downtown Seattle that he was monitoring on that day was a SODA (Stay out of Drug Area) zone and a high narcotics area. 8/26/08RP at 7-10, 12; pre-trial exhibit 1.

Officer Johnson observed three African-American males walking northbound on 3rd Avenue in front of the courthouse: Mr. Sullivan, a second individual later identified as Dontaye Savare, and a third individual later identified as Francis Gathauri.

8/26/08RP at 13-14; pre-trial exhibit 1. Mr. Sullivan sat down on a ledge, and appeared to be holding small objects in his hand. At one point, he behaved as though he had dropped whatever was in his hand. Based on his experience with drugs and his knowledge of the area, Officer Johnson became suspicious that Mr. Sullivan was holding drugs in his hand. 8/26/08RP at 13-15; pre-trial exhibit 1.

Mr. Sullivan was contacted by an unknown African-American female. 8/26/08RP at 14; pre-trial exhibit 1. Mr. Sullivan gave the

female a hug, and then she gave paper currency to Mr. Sullivan with her left hand while receiving an unknown object from Mr. Sullivan in her right hand. Mr. Sullivan did not look down during the transaction, but instead looked up over the female's shoulder. During the apparent exchange, Gathauri stood in front of Mr. Sullivan and the woman. Based on his training and experience, Officer Johnson believed he had witnessed a drug deal between Mr. Sullivan and the female. 8/26/08RP at 14-15; pre-trial exhibit 1. Johnson also believed that Gathauri was acting as a blocker and a lookout for Mr. Sullivan during the transaction, which is behavior consistent with a drug deal. 8/26/08RP at 15 ; pre-trial exhibit 1.

Mr. Sullivan was then contacted by a woman Officer Johnson recognized as Jacquelyn Jackson. 8/26/08RP at 16; pre-trial exhibit 1. Johnson knew Jackson to be a drug user due to his direct experience with her in the past. Jackson spoke to Mr. Sullivan, and then positioned an unknown Caucasian male in front of Mr. Sullivan and Savare. 8/26/08RP at 16-17; pre-trial exhibit 1. Officer Johnson observed Savare give an unknown object to Jackson, and then accept what appeared to be money from the unknown male. Mr. Sullivan was directly next to Savare, Jackson, and the unknown male during this exchange. Johnson suspected

that he had witnessed another drug deal based on his knowledge of Jackson and the exchange. 8/26/08RP at 17-18; pre-trial exhibit 1. Johnson also believed that Jackson positioned the unknown male to block the view of a drug exchange between Savare and Jackson. 8/26/08RP at 16; pre-trial exhibit 1. Mr. Sullivan, Savare, and Gathauri then walked down to the corner of 3rd Avenue and James Street. 8/26/08RP at 18; pre-trial exhibit 1. At the corner, Mr. Sullivan was contacted by a woman Officer Johnson recognized as Angelina Cotter. Officer Johnson knew Cotter to be a drug user based on his direct contact with her in the past. 8/26/08RP at 18-19; pre-trial exhibit 1. After a short discussion, Mr. Sullivan, his two companions, and Cotter crossed to the west side of 3rd Avenue. Mr. Sullivan went into a market on the corner, and Savare and Gathauri went with Cotter. Officer Johnson continued to observe Savare and Cotter, and witnessed an exchange between the two of them. 8/26/08RP at 19-21; pre-trial exhibit 1.

Mr. Sullivan then met up with Savare and Gathauri at the barber shop near the west side of 3rd Avenue and James Street. 8/26/08RP at 19-20; pre-trial exhibit 1. Mr. Sullivan and Savare went into the barber shop, and Gathauri stood outside. 8/26/08RP

at 22; pre-trial exhibit 1. Prior to Mr. Sullivan and his companions entering the barber shop, Officer Johnson called in an arrest team based on Mr. Sullivan's behavior consistent with an individual involved in drug dealing, Mr. Sullivan's direct contact with known drug users, and the fact that Mr. Sullivan was operating in an high narcotics area. 8/26/08RP at 23; (pre-trial exhibit 1). Seattle police officers Frank Poblocki and Matthew Pasquan answered the call and traveled to the barber shop. Officer Johnson relayed a description of the three individuals, and informed the officers that they were suspected of selling drugs. 8/26/08RP at 23; (pre-trial exhibit 1).

Officer Poblocki arrested Gathauri outside of the barber shop and was then directed by Officer Pasquan to arrest Mr. Sullivan inside of the barber shop. Mr. Sullivan was sitting in a barber chair, about to get a haircut. In a search incident to arrest, Officer Poblocki found suspected crack cocaine on his person, as well as \$349 in paper currency. 8/26/08RP at 35; (pre-trial exhibit 1).

**3. Trial testimony.** Officer Johnson testified in substance for the most part identically to his testimony at the CrR 3.6 hearing. The officer repeated his admission that he never saw what, if

anything, Mr. Sullivan was holding in his hand at any time.

8/28/08RP at 28. None of the three alleged “buyers” were ever arrested, 8/28/08RP at 28, 30, and there was no evidence as to what, if anything, they obtained from Mr. Sullivan or his friends.

#### **D. ARGUMENT**

1. **OFFICER JOHNSON LACKED PROBABLE CAUSE TO ARREST MR. SULLIVAN AND THE RESULTING SEARCH INCIDENT TO ARREST WAS WITHOUT AUTHORITY OF LAW, REQUIRING SUPPRESSION OF THE COCAINE AND EVIDENCE OF THE CURRENCY, AND REVERSAL OF THE DEFENDANT’S CONVICTION.**

**(a) The trial court erred in ruling that the defendant bore the burden, at the CrR 3.6 hearing, of proving that his arrest and search were unsupported by probable cause.** In a ruling that casts doubt on its resolution of the critical legal issues presented at the CrR 3.6 suppression hearing, the trial court in this case appeared to hold that the defense bears the burden of proving that a warrantless search and seizure was not supported by probable cause. The court stated:

I do believe that the defense has not met its burden as to challenge the legal basis to admit it in this particular case into evidence.

8/26/08RP at 62.<sup>5</sup> This was incorrect; the rule, under the Fourth Amendment, is the opposite. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Mance, 82 Wn. App. 539, 544, 918 P.2d 527 (1996); U.S. Const. Amend. 4. Indeed,

[t]he rationale for placing the burden on the prosecution is particularly compelling where the issue is the existence of probable cause.

Mance, 82 Wn. App. at 544 (citing 5 Wayne LaFave, Search and Seizure, § 11.2(b), at 40 (3rd ed. 1996) (in turn quoting United States v. Longmire, 761 F.2d 411 (7th Cir. 1985)). Mr. Sullivan believes, however, that when assessed de novo against the relevant legal standard, the facts found at the CrR 3.6 hearing do not amount to probable cause.

**(b) The arrest of the defendant on “drug charges” was not supported by probable cause.** The drug and currency evidence supporting Mr. Sullivan’s conviction for possession of cocaine with intent to deliver under RCW 69.50.401 was obtained as the product of an arrest unsupported by probable cause and

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<sup>5</sup>Appellant is compelled to raise this issue because he believes in good faith that it does not appear that the court was making this statement with regard to some question of the admissibility of the police videotape; in fact, defense counsel specifically relied on the videotape of the events in front of the courthouse as strongly supporting his argument that the arrest of Mr. Sullivan was not supported by probable cause. 8/26/08RP at 53.

therefore invalid pursuant to the Fourth Amendment to the federal constitution, and Article 1, § 7 of the Washington Constitution.<sup>6</sup>

Constitutional protections limit searches of citizens by the police. The Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." Minnesota v. Dickerson, 508 U.S. 366, 124 L.Ed.2d 334, 113 S.Ct. 2130, 2135 (1993). Article 1, § 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A search or seizure without a warrant is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." Dickerson, 113 S.Ct. at 2135; State v. Leach, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989). Whether or not a warrant exists, any search conducted by the state in pursuit of evidence must be founded on probable cause. Dunaway v. New York, 442 U.S. 200, 208, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979);

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<sup>6</sup>The question of the constitutional reasonableness of a seizure is a legal determination that is analyzed *de novo* by the reviewing court, based on the trial court's supported factual findings. State v. Hoffman, 116 Wn.2d 51, 98, 804 P.2d 577 (1991).

Henry v. United States, 277 U.S. 438, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959); State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1990).

For a warrantless arrest, probable cause exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to permit a person of reasonable caution to believe that an offense has been or is being committed.

State v. Conner, 58 Wn. App. 90, 97-98, 791 P.2d 261 (1990).

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. Probable cause is not a technical inquiry. A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest.

(Footnotes omitted.) State v. Terranova, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The probable cause requirement is intended "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." Cady v. Dombrowski, 413 U.S. 433, 439, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973). Thus, the validity of an arrest is determined by objective facts and circumstances. Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). An arrest not supported by probable cause is not made lawful by the officer's subjective but

objectively unreasonable belief that an offense has been committed. Carroll v. United States, 267 U.S. 132, 161-62, 69 L.Ed.2d 543, 45 S.Ct. 280 (1925); State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992).

Here, there was no probable cause to justify an arrest of Mr. Sullivan. Case law from the Washington Courts indicates the trial court's determination of the existence of probable cause was in error. Amongst drug delivery, drug possession, and drug traffic loitering, the least culpable offense of which Mr. Sullivan might have been suspected and arrested under the trial court's reasoning that there was probable cause to arrest him on "drug charges," was pursuant to the drug traffic loitering statute, SMC 12A.20.050, which provides in pertinent part:

B. A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50[.]

C. . . . Among the circumstances which may be considered in determining whether the actor intends such prohibited conduct are that he or she:

1. Is seen by the officer to be in possession of drug paraphernalia; or
2. Is a known drug trafficker . . . ; or
3. Repeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation; or
4. Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture; or

5. Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to stop pedestrians;  
or

6. Is the subject of any court order, which directs the person to stay out of any specified area . . . ; or

7. Has been evicted as the result of his or her illegal drug activity and ordered to stay out of a specified area affected by drug-related activity.

D. No person may be arrested for drug-traffic loitering unless probable cause exists to believe that he has remained in a public place and intentionally solicited, induced, enticed or procured another to engage in unlawful conduct contrary to Chapter 69.50 . . . .

SMC 12A.20.050. Initially, it must be said that the fact that the police observe the defendant in a high “drug” or crime area is a relevant consideration for suspicion, but is not sufficient, by itself, to justify a seizure of a person. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

In the present incident, Officer Johnson’s observations, and the absence of a sighting of any drugs or anything that looked like drugs, were more consistent with Sullivan conducting some sort of innocent exchange with one person, and neither his or his friends’ conduct did not appear to involve drug exchanges. The police officer lacked probable cause to direct that the defendant be arrested by Office Poblocki for drug-traffic loitering, because Mr. Sullivan’s conduct matched none of the pertinent considerations in

the drug loitering statute except being in a “SODA” area - a fact that would implicate every citizen, litigant, lawyer and judge approaching the King County courthouse and lingering for more than a moment. Notably, Mr. Sullivan did not wave at persons or flag anyone down. He was not seen to be in possession of drug paraphernalia, and he was not known to be a drug trafficker.

In addition, the officer lacked probable cause to arrest the defendant on an investigation of delivery of a controlled substance. Mr. Sullivan's situation is somewhat similar to the facts in State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983). In Poirier, officers observed the defendant and another man actually exchange envelopes in a parking lot. Poirier, at 842. But the Poirier Court held such circumstances were insufficient to establish probable cause to arrest the defendant. Poirier, at 843. Here, Officer Elias was observing Mr. Sullivan through a videocamera, but he never saw any drugs exchanged. RP1/26/05 at 16, 25. There was no more reason to believe Mr. Sullivan held drugs in his hand than there was to believe the envelopes in Poirier contained drugs.

This case differs from State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995). In Rodriguez-Torres, a police officer was on bicycle patrol in Pike Place Market when he saw the

defendant and another man standing across the street, each with their hand out. Rodriguez-Torres, at 689. The officer saw the defendant receive money from the other man, hold his hand out in a cupped fashion, and the other man pick an item out and examine it. The officer approached the two men to investigate. As the officer approached, someone yelled "Police." The other man grabbed money out of defendant's hand, dropped the item he was examining and walked away. Defendant bent over, picked up the item, placed it in his pocket and hurried away. The officer followed defendant for a short distance, then grabbed him and immediately retrieved narcotics from defendant's pocket. Rodriguez-Torres, 77 Wn. App. at 689. On these facts, this Court determined the officer had probable cause to arrest defendant for a narcotics offense based upon his observations, coupled with his experience. Rodriguez-Torres, 77 Wn. App. at 693-94.

The officer in Rodriguez-Torres observed substantially more than Officer Johnson in the instant matter. In Rodriguez-Torres, the officer saw money exchanged for an item that had been cupped in the person's hand, a very typical manner of holding rocks of cocaine on the street. Here, no drugs, or drug-like manner of holding an item, were seen. Officer Johnson's subjective belief

that the defendant was engaged in drug activity does not make an arrest lawful if there was no probable cause. See Carroll, 267 U.S. at 161-63; Huff, 64 Wn. App. at 645. The officer did not have probable cause to arrest Mr. Sullivan and subsequently search him.

For comparison, in the case of State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989), so much evidence of a possible drug transaction existed, this Court was "hard pressed to conceive of any innocent explanation for the circumstances observed by Officer Williams." State v. Fore, 56 Wn. App. at 344. In Fore,

1. three drug transactions were observed,
2. the transactions involved the defendants approaching cars,
3. packets of "green vegetable matter" were exchanged for what appeared to be "green paper currency,"
4. the defendant returned to his vehicle where he removed a large baggie with smaller packets of green vegetable matter inside,
5. after taking out several of the smaller packets, the larger baggie was replaced into the dashboard area.

State v. Fore, 56 Wn. App. at 341, 343. The facts in Fore clearly showed drug activity. Thus, the officer had probable cause to arrest the defendant. The instant case is much more similar to Poirier than Fore, despite the fact that Mr. Sullivan was interacting with known drug users in a SODA area.

Mr. Sullivan should not have been arrested merely for “hanging around” and greeting persons in a high drug area. As noted in Larson, 93 Wn.2d at 645, “many members of our society live, [and] work . . . in high crime areas . . . . That does not automatically make those individuals proper subjects for criminal investigation.” Furthermore, the act of loitering is itself a constitutionally protected activity. As the United States Supreme Court has noted:

The freedom to loiter for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this “right to remove from one place to another according to inclination” as “an attribute of personal liberty” protected by the Constitution.

City of Chicago v. Morales, 527 U.S. 41, 53, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

**(c) Suppression is required.** Evidence which is the product of an illegal seizure is inadmissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be “excluded as ‘fruit’ unless the illegality is [not] the ‘but for’ cause of the discovery of the evidence” and “‘the challenged evidence is in some sense the product of illegal governmental activity.’” Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599,

615 (1984) (quoting United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)).

Here, the described evidence of drugs and money would not have been obtained but for the illegal arrest of Mr. Sullivan. In determining whether there is a nexus between the evidence and the police conduct, the court makes a common sense evaluation of the facts and circumstances of the case. United States v. Kapperman, 764 F.2d 786 (11th Cir.1985). Here, all of the evidence was discovered as a product of the improper arrest.

**(d) Reversal is required.** The constitutional error standard applies to evidence obtained from illegal arrests. State v. Knighten, 109 Wn.2d 896, 897, 748 P.2d 1118 (1988). The State bears the burden of showing a constitutional error was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error is harmless if the appellate court is “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result” in the absence of the illegally seized evidence. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). The error is harmless only when the untainted

evidence "is so overwhelming that it necessarily leads to a finding of guilt." State v. Guloy, at 426.

At trial in this case, absent the physical evidence of drugs and the officer's testimony about the money found on Mr. Sullivan, there was certainly no evidence of guilt on the charge of possession with intent to deliver that is "so overwhelming that it necessarily leads to a finding of guilt" on the charge even without the illegally obtained evidence. State v. Guloy, at 426. The defendant's conviction must be reversed and the charge, along with the school bus stop allegation, must be dismissed.

**2. THE CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DELIVER MUST BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE, AND THE CHARGE DISMISSED WITH PREJUDICE.**

Mr. Sullivan argues that the trial court erred in entering judgment on the jury's verdict on the count of possession of cocaine with intent to deliver. U.S. Const. Amend 14; see Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn. 2d 216, 220-22, 616 P.2d 628 (1980). Here, the mere fact of " 'bare possession . . . absent other facts and circumstances' " is not enough for a trier of fact to infer an intent to deliver, absent additional factors not present in this case.

See State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (quoting State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976)). Having a substantial amount of cash is an additional factor indicating an intent to deliver, but Mr. Sullivan did not possess an unusual amount of cash, and the officer could not testify if the cash was possessed in small bills. 8/28/08RP at 48; see State v. Campos, 100 Wn. App. 218, 224, 998 P.2d 893 (defendant possessed \$1,750 cash), review denied, 142 Wn.2d 1006, 34 P.3d 1232 (2000).

**3. THE WORDING OF THE JURY INSTRUCTION ON THE SCHOOL BUS STOP ALLEGATION BECAME “THE LAW OF THE CASE,” AND THE INSUFFICIENCY OF THE EVIDENCE TO PROVE THE ALLEGATION AS SO DEFINED REQUIRES REVERSAL OF THE SENTENCE ENHANCEMENT, AND DISMISSAL WITH PREJUDICE.**

**a. The State amended the information in Mr. Sullivan’s case to add the special allegation of RCW 69.50.453, which requires proof that the defendant committed the underlying drug crime within 1,000 feet of a school bus route stop.**

Brandon Sullivan was originally charged under RCW Title 69, Chapter 50 with Possession of a Controlled Substance with Intent

to Deliver, pursuant to RCW 69.50.401(1). CP 1. The information, read together with the Schedule I and II lists of illegal drugs referenced in subsection .401 of the chapter, specifically charged the defendant with “possession of Cocaine with intent to deliver” RCW 69.50.401(1),(2)(a).

Following Mr. Sullivan’s decision to exercise his right to a jury trial, the State filed an amended information adding the special allegation of RCW 69.50.435. CP 23. Charges brought under subsection .435 of the drug crimes chapter, the “Additional Penalty” provision, institute a supplemental accusation in a drug case that the defendant committed the underlying drug crime charged within 1,000 feet of a school bus route stop. RCW 69.50.435(1)(c). Read together with the sentencing provisions applicable to Mr. Sullivan by operation of RCW 9.94A.510(6), the statute provides as follows with regard to the supplemental charge, and additional punishment:

**RCW 69.50.435. Violations committed in or on certain public places or facilities - Additional Penalty - Defenses - Construction - Definitions**

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering or possessing with intent to manufacture, sell or deliver a controlled substance [in certain specified locations including]  
(c) Within one thousand feet of a school bus route stop designated by the school district [is subject to a sentence enhancement of an additional 24 months incarceration].

(Emphasis added.) RCW 69.50.435(1)(c), RCW 9.94A.510(6).

The special allegation of subsection .435 is comprised of essential element(s) which the State, under the due process guarantee of the 14th Amendment, “must prove beyond a reasonable doubt” in order to secure the enhanced penalty. State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588 (1991) (regarding school zone enhancement); U.S. Const. Amend 14; see Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn. 2d 216, 220-22, 616 P.2d 628 (1980). For example, proof of the school bus stop allegation specifically requires a showing that the school bus stop is one that was designated by a school district, and is actively in use. State v. Jones, 140 Wn. App. 431, 437-438, 166 P.3d 782 (2007).

The statutory language of the school bus stop enhancement provision, including the language of the entire statutory scheme of special allegations under .435 and its context within the drug laws of subsection Title 69 Chapter 50, make clear that the bus stop provision enhances punishment by imposing a further term of incarceration where the crime charged is committed with special circumstances. Accordingly, the amended information in Mr. Sullivan’s case did not add an additional count; rather it

supplemented the original count of possession with intent to deliver under .401 with a special allegation under .435:

And I, Daniel T. Satterburg, Prosecuting Attorney . . . further do accuse the defendant BRANDON RASHAD SULLIVAN at said time of being within 1,000 feet of a school bus route stop, to wit: Fourth Avenue and James Street, under the authority of RCW 69.50.435(a).

(Emphasis added.) CP 23.

However, at the end of trial, the prosecution submitted, and the court employed, a jury instruction regarding the special allegation of subsection .435 that alleged, along with language regarding possession with intent to deliver, that Mr. Sullivan delivered cocaine within 1,000 feet or less from a school bus stop. CP 54. This jury instruction was submitted by the State, and became the “law of the case” in the absence of any objection, with consequences for the State’s case against Mr. Sullivan as described herein. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); 9/2/08RP at 7-9; see Appendix A (Jury instruction 16).

**b. The trial evidence was insufficient to prove beyond a reasonable doubt that the defendant delivered a controlled substance, or that he did so with knowledge that it was a controlled substance.**

*(i). The State assumed the burden of proving the crime of delivery of a controlled substance, and all of that offense's essential elements.*

By the wording of Jury instruction 16, the prosecutor transformed his case, charged as possession with intent to deliver, into one in which the State also assumed the burden of proving the crime of "delivery" of a controlled substance as part of its proof of the school bus stop enhancement. CP 54. Jury instructions not objected to become the law of the case. Hickman, 135 Wn.2d at 103-04; State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) ("[I]f no exception is taken to jury instructions, those instructions become the law of the case").

In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of an offense when such added elements are included without objection in the "to convict" instruction. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case . . . when they are included in instructions to the jury") (citing State v. Hobbs,

71 Wn. App. 419, 423, 859 P.2d 73 (1993); State v. Barringer, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982)).

The likely fact that the deputy prosecuting attorney only inadvertently included the "delivery" requirement in the language of the school bus stop enhancement jury instruction in Mr. Sullivan's case is of no consequence. Hickman, 135 Wn.2d at 103 (quoting Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)).<sup>7</sup>

*(ii). The State failed to prove that whatever was delivered, if anything, was a controlled substance.*

Mr. Sullivan was arrested following what appeared to be delivery of a controlled something to three persons on the street near the King County courthouse, and a search incident to arrest, conducted by an arrest team at Officer Johnson's direction, located cocaine and currency on his person. 8/28/08RP at 46-48

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<sup>7</sup>Mr. Sullivan may assign error to elements added under the law of the case doctrine. State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to the jury instructions they "are the law of the case and we will consider error predicated on them"). Such assignment of error may of course include a challenge to the sufficiency of the evidence to prove the added element(s). Hickman, 135 Wn.2d at 103-04; Barringer, 32 Wn. App. at 887-88. And just like a routine challenge to the sufficiency of the evidence, such challenge may be raised for the first time on appeal. Hickman, 135 Wn.2d at 103 n. 3 (citing State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995)). Thus in Hickman, where the jury instructions included an unnecessary element of venue, and the State failed to prove that element, the conviction was reversed and the charge dismissed with prejudice. Hickman, 135 Wn.2d at 104-05.

(testimony of Officer Frank Poblocki). The State's theory of prosecution on the charge of possession with intent to deliver was that the previous alleged transactions showed that Mr. Sullivan possessed the cocaine later found on his person with intent to deliver it in the future.<sup>8</sup> 9/2/08RP at 15-16, 19 (State's closing argument).

As part of the State's proof, the prosecution proved that the substance found on Mr. Sullivan's person was cocaine. 8/28/08RP at 75-76; CP 30. The persons to whom Mr. Sullivan had previously, allegedly, delivered something were either not arrested, or were simply not called as witnesses; in any event, the prosecution case included no evidence with regard to the nature or appearance of any thing allegedly delivered to them.

However, the State, by the wording of the jury instruction on the enhancement, had assumed the burden of proving delivery of a controlled substance and all of the elements of that crime. No evidence at trial was adduced on the issue of what was delivered to these three, earlier persons. In the absence of proof, either by

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<sup>8</sup>The Supreme Court has stated that when the underlying drug crime is possession with intent to deliver, only the "possession" element of the enhancement needs to take place within the demarcated zone such as 1,000 feet from a school bus stop; the intended delivery location of the controlled substance may be anywhere. State v. McGee, 122 Wn. 2d 783, 864 P.2d 912 (1993).

laboratory testing or even field testing, that the thing delivered to these persons was a controlled substance, the evidence was insufficient to prove “delivery of a controlled substance.” See WPIC 50.06 (requiring use of WPIC 50.50 (Controlled Substance—Definition) in a delivery prosecution).

The trial court’s entry of judgment on the enhancement therefore violated due process, which requires the State to prove, beyond a reasonable doubt, all the necessary elements of the allegation charged. State v. Lua, 62 Wn. App. at 42; Jackson v. Virginia, 443 U.S. at 319; State v. Green, 94 Wn. 2d at 220-22; U.S. Const. Amend. 14. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Bryant, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998) (citing State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990), review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999)).

In a sufficiency of the evidence case, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, Mr. Sullivan stipulated that the substance found on his person was cocaine. 8/28/08RP at 75-76; CP 30. The police report completed by Officer Poblocki indicated that one field test was performed, on the substance found on Mr. Savare (one of the defendant's alleged compatriots), which suggested the substance found on that individual was cocaine; that report was not admitted as evidence at Mr. Sullivan's trial, nor did Officer Poblocki, or any other witness, testify regarding that field test. CP 2 (police report of Poblocki); see Supp. CP \_\_\_\_, Sub # 88 (exhibit list).

In total, the controlled substance evidence admitted at trial all pertained to the substance subsequently found on Mr. Sullivan's person; there was no direct evidence, of field testing, laboratory testing, or otherwise, with regard to whatever it was that was delivered to the alleged three buyers.

In cases where the identity of the substance at issue at trial involved the very substance actually possessed or delivered, and then taken into evidence by police and forming the basis for the drug charge -- not the circumstances here -- the Washington courts have found that the absence of laboratory testing on the substance rendered the evidence insufficient to prove its identity. In State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002), this Court of

Appeals reversed a conviction for possession of a controlled substance, even with a police officer's testimony and a positive field test for methamphetamine. Roche, 114 Wn. App. at 431, 440. Roche appealed his conviction after it was discovered that the State crime lab chemist who tested Roche's substance tampered with evidence to hide his own heroin addiction. Roche, 114 Wn. App. at 428. The officer's testimony and a positive field test were insufficient to prove the substance was a controlled substance; therefore, the Court of Appeals reversed the conviction. Roche, 114 Wn. App. at 440.

This was the result in Roche despite other evidence which pointed to the product being a controlled substance. A search at Roche's home disclosed the following: a pouch containing a substance that looked like methamphetamine, along with a razor blade and a paper rolled into a device commonly used to ingest drugs; several baggies of powdery substance that appeared to be methamphetamine; a ledger of drug sales; a scale; and \$3,000 in cash. Roche, 114 Wn. App. at 431. In addition, the chemist testified that the substances located there were methamphetamine. Roche, 114 Wn. App. at 432. At trial, a deputy testified that the substance actually in question: (1) looked like methamphetamine;

(2) was packaged in a manner common in the methamphetamine trade; and (3) tested positive for methamphetamine in a field test. Roche, 114 Wn. App. at 431-32.

Roche of course involved the identity of the substance that formed the basis for the drug charge. No similar testimony, not even police testimony regarding the appearance of whatever was delivered to the alleged three buyers, was adduced at Mr. Sullivan's trial. With regard to that "substance," there was no field test, no laboratory test, and not even police testimony that the "thing" Mr. Sullivan and his compatriots appeared to be handling was in a package, or looked like white chunks of drugs. See 8/28/08RP at 27-28 (testimony of Officer Johnson that he could not see what anyone was holding).

In another case, evidence provided to the trial court was held sufficient to find that a substance was cocaine beyond a reasonable doubt, even without reliable laboratory reports. In re Pers. Restraint of Delmarter, 124 Wn. App. 154, 163-64, 101 P.3d 111 (2004). There, the Court upheld Delmarter's conviction for possession of cocaine even after it was discovered that the same crime lab chemist in the Roche case tested Delmarter's evidence. Delmarter, 124 Wn. App. at 157. In Delmarter, however, not only

did a field test support Delmarter's conviction, but Delmarter admitted that he had in fact possessed cocaine as charged.

Delmarter, 124 Wn. App. at 163-64.

But in the present case, of course, there was neither a field test, nor any confession, with regard to whatever was delivered to the alleged three buyers. This is completely inadequate to satisfy the burden of proving delivery of a controlled substance. The existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972) (citing State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971), review denied, 80 Wn.2d 1004 (1972)). Only such conjecture could support a jury verdict that whatever was delivered to the alleged buyers was a controlled substance.

*(iii). The State failed to prove that Mr. Sullivan knew the thing allegedly delivered was a controlled substance.*

An additional element not proved was that Mr. Sullivan knew that what he allegedly delivered was a controlled substance. Because the State submitted a jury instruction on the school bus stop enhancement that required proof of actual delivery of a controlled substance, the State assumed the burden of proving

every essential element of that charge. Hickman, 135 Wn.2d at 103-04.

The crime of delivery of a controlled substance includes an essential element of knowledge that the substance delivered was a controlled substance.<sup>9</sup> Guilty knowledge, i.e., an understanding of the identity of the product being delivered, is an element of the crime of delivery of a controlled substance under RCW 69.50.401(1), even though knowledge is not specified as an element in the statute. State v. DeVries, 149 Wn.2d 842, 849-50, 72 P.3d 748 (2003); State v. Ong, 88 Wn. App. 572, 573, 945 P.2d 749 (1997); State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979).

The jury is permitted to find “knowledge” if there is sufficient information which would lead a reasonable person to believe that a fact exists. State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). But no evidence whatsoever supports a finding of knowledge on Mr. Sullivan’s part in the present case that whatever was delivered was a controlled substance. As with the question of whether the thing allegedly delivered to the three alleged buyers

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<sup>9</sup>This is in contrast to the crime of possession of a controlled substance with intent to deliver, the underlying offense charged in Mr. Sullivan’s case, which does not require proof of knowledge. State v. Sims, 119 Wn.2d 138, 829 P.2d 1075 (1992); State v. Johnson, 119 Wn.2d 143, 829 P.2d 1078 (1992); see also WPIC 50.13 (Possession with Intent to Manufacture or Deliver—Definition); WPIC 50.14 (Possession with Intent to Manufacture or Deliver—Elements).

was in fact a controlled substance, the trial evidence simply did not address this issue. Although this is most likely because the prosecutor did not recognize his burden under Jury instruction 16, that fact does not lessen the State's burden. There was no evidence regarding whatever was delivered that would provide circumstantial evidence of knowledge. There was no evidence adduced regarding the manner of the transactions that would distinguish the defendant's conduct from delivery of "bunk," or a false controlled substance. See RCW 69.50.4012 (delivery of a material in lieu of a controlled substance). There was no evidence that the defendant delivered anything illegal; in fact, Officer Johnson admitted that the defendant could have been holding candy in his hand. 8/28/08RP at 28.

*(iv). The State failed to prove that Mr. Sullivan delivered a controlled substance, absent jury instructions on accomplice liability.*

There was also insufficient evidence to convict Mr. Sullivan of the charge of delivery of a controlled substance, for the further reason of the absence of any jury instructions on accomplice liability, and entry of judgment violated due process. U.S. Const. Amend. 14. Even viewing the evidence in the light most favorable to the State, no rational trier of fact have found the essential

elements of the crime of delivery of a controlled substance beyond a reasonable doubt. State v. Green, 94 Wn.2d at 221-22.

A conviction for delivery of a controlled substance requires proof beyond a reasonable doubt that a person delivered a controlled substance through either “actual or constructive transfer from one person to another.” CP 46; RCW 69.50.401(a); RCW 69.50.101(f). Neither transfer nor constructive transfer are defined by RCW Title 69, Chapter 50; however, case law defines “transfer” as “ ‘to cause to pass from one person or thing to another’ “ or “ ‘to carry or take from one person or place to another.’ ” State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990) (quoting Webster's Third New International Dictionary 2426-27 (1971)); see also State v. Morris, 77 Wn. App. 948, 951, 896 P.2d 81 (1995). “Constructive transfer” is defined as “ ‘the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.’ “ Campbell, 59 Wn. App. at 63 (quoting Davila v. State, 664 S.W.2d 722, 724 (Tex.Crim.App.1984)).

The evidence at trial showed that in one of the alleged deliveries,<sup>10</sup> Mr. Sullivan never touched anything that was delivered between a friend near him and Ms. Jackson -- conceding for argument only that the evidence showed a transfer. The facts also did not establish that Sullivan owned the thing supposedly delivered or exerted control over whatever, if anything, this thing was. Unlike the defendant in State v. Campbell, where the defendant was observed to place a controlled substance in a specific location and direct a third person to hand it to another, the conduct observed by Officer Johnson did not support such action by Mr. Sullivan. Campbell, 59 Wn. App. at 63. Because the record does not show that Mr. Sullivan had control over the supposed drugs in any manner, the record does not support either constructive or actual transfer of the drugs by him to another person.

This renders the evidence of delivery insufficient. Accomplice liability under RCW 9A.08.020(3)(a)(i)-(ii) is a distinct theory of criminal culpability, not incorporated with the concept of constructive transfer of a controlled substance under the

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<sup>10</sup>The prosecutor did not elect one of the alleged deliveries as the basis for the drug delivery allegation, and there was no unanimity instruction given. See Part D.4(d), infra.

Washington Uniform Controlled Substances Act. State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). Thus, where this jury was not instructed on the theory of accomplice liability, there was insufficient evidence to convict Mr. Sullivan of delivery of a controlled substance.

*(v). The enhancement must be reversed and the special allegation dismissed with prejudice.*

Because insufficient evidence supported the jury's verdict on the enhancement as its elements were stated in the jury instructions, the remedy is to reverse and dismiss the school bus stop allegation with prejudice - the allegation may not be refiled. State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002) (if evidence is insufficient as to a matter of law, double jeopardy requires dismissal of enhancement with prejudice); State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993) (same); State v. Lua, supra, 62 Wn. App. at 42.

4. THE STATE'S PROOF ON THE SCHOOL BUS STOP ALLEGATION WAS INSUFFICIENT WITH REGARD TO WHETHER THE PUBLIC COULD ASCERTAIN THE FACT OF A SCHOOL BUS STOP LOCATED AT 4TH AND JAMES, AND WHETHER THE BUS STOP WAS REGULARLY USED DURING THE TIME OF THE OFFENSE, REQUIRING REVERSAL OF THE SENTENCE ENHANCEMENT, AND DISMISSAL WITH PREJUDICE.

a. The State failed to prove that the public could easily ascertain the fact that there was a school bus route stop at 4th

and James. While a defendant's actual knowledge of the proximity of a school bus stop is irrelevant to culpability under RCW 69.50.435, a readily understandable and available means to determine the existence of a protected school bus stop zone is a constitutional necessity under the Fourteenth Amendment. See State v. Becker, 132 Wn.2d 54, 63, 935 P.2d 1321 (1997); U.S. Const. Amend 14. Therefore, Mr. Sullivan may raise the issue of the State's failure to prove this fact for the first time on appeal, as manifest constitutional error. RAP 2.5(a)(3); State v. Johnson, 116 Wn. App. 851, 862 n.19, 68 P.3d 290 (2003).

The substantive issue is one of sufficiency of the evidence to prove the special allegation. State v. Lua, 62 Wn. App. at 42;

Jackson v. Virginia, 443 U.S. at 319; State v. Green, 94 Wn. 2d at 220-22; U.S. Const. Amend. 14.

RCW 69.50.435(a) prescribes an enhanced penalty for persons selling drugs within 1000 feet of a school bus route stop designated by the school district. The term "school bus route stop" means "a school bus stop as designated on maps submitted by school districts to the office of the superintendent of public instruction." RCW 69.50.435(f)(3).

First, the State did not produce sufficient evidence that the location of the school bus stop upon which the State premised the special allegation in Mr. Sullivan's case was information that was adequately available to the public. In State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992), the Supreme Court held that RCW 69.50.435(a) is not unconstitutionally vague because it does not forbid conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. State v. Coria, 120 Wn.2d at 164. It is not fatal to the statute that a defendant need not have actual knowledge that he or she is within a protected drug-free zone before this sentence enhancement may be applied. Coria, 120 Wn.2d at 166. However, there must be a readily understandable or available

means to determine the proximity of illegal activities to a school bus route stop. Coria, 120 Wn.2d at 169. Among the means identified in the Washington cases as sufficient to warrant adequate notice are the gathering of school children waiting for their buses, the ability to contact local schools or the director of transportation for the school district, or the ability to obtain a map of school bus stops. State v. Becker, 132 Wn.2d at 54 (citing Coria, 120 Wn.2d at 167); see also State v. Davis, 93 Wn. App. 648, 650, 970 P.2d 336 (1999) (same).

In the present case, Thomas Bishop, a transportation manager for the Seattle Public Schools, testified that the school bus stop in question, located at 4th and James, was a school bus stop as of the date of the defendant's offense, which served Chief Sealth High School, and Washington and Garfield Middle Schools. 8/28/08RP at 64-66. Mr. Thomas testified that this information was gleaned from "official Seattle public school district records." 8/28/08RP at 68. This was inadequate. In State v. Becker, the defendants' due process rights were violated by their enhancement of their sentences for drug offenses based on the proximity of their offenses to a school, because there was no readily ascertainable means by which they could have discovered that their actions took

place near a school since the school was located in an office building without exterior signs or playgrounds. State v. Becker, 132 Wn.2d at 63. At trial in Becker, the State produced no evidence that a person calling the Seattle School District would be informed that the school in question existed, or was located where it was; the Supreme Court noted that this was the exact opposite of the situation in State v. Coria, where the defendants could have readily telephoned the Seattle Public Schools and obtained the specific locations of bus stops. Becker, 132 Wn.2d at 63. This fact was specifically testified to in the earlier case. State v. Coria, 120 Wn.2d at 164.

Here, there was no evidence whatsoever contained in Mr. Bishop's testimony, described above, with regard to any possible means that might be used by the public to ascertain the fact that there was a school bus stop at 4th and James. There was no evidence from which a trier of fact could infer that a member of the public could call the Seattle Public Schools and obtain this information. And Bishop also stated, in cross-examination, that he had no "specific knowledge" with regard to the actual, active use of the bus stop during August of 2008, and admitted that these schools are "not in session" during that month. 8/28/08RP at 67.

Thus a member of the public, according to the State's own evidence, could not even glean the fact of the existence of a school bus stop at that location from observing school children gathering at the bus stop, one of the means of obtaining this knowledge deemed adequate in Coria, 120 Wn.2d at 167.

**b. The State failed to prove that the school bus route stop at 4th and James was active on the date of Mr. Sullivan's offense.** This total state of the prosecution's evidence regarding the school bus route stop at 4th and James also was insufficient to prove that this school bus stop was active on the date of Mr. Sullivan's offense, which is further fatal to the school bus stop enhancement on sufficiency grounds. See Lua, 62 Wn. App. at 42; Green, 94 Wn. 2d at 220-22; Jackson v. Virginia, 443 U.S. at 319; U.S. Const. Amend. 14. Proof under RCW 69.50.435 must also include constitutionally sufficient evidence that the stop was one that was "regularly used" as a school bus stop. Coria, 120 Wn.2d at 167-68. The State's witness in this case expressly could not testify that this stop was regularly used when school was not in session during the summer month of August. 8/28/08RP at 67. The school bus stop allegation fails for insufficiency of the evidence on this front, also.

**c. Reversal and dismissal are required.** Insufficiency of the State's evidence on a special allegation under RCW 69.50.435 requires reversal of the allegation, and dismissal with prejudice.

State v. Lua, 62 Wn. App. at 42.

**5. THE INCLUSION OF AN ELEMENT OF "DELIVERY OF A CONTROLLED SUBSTANCE" IN THE JURY INSTRUCTION ON THE SCHOOL BUS STOP ALLEGATION REQUIRES REVERSAL OF MR. SULLIVAN'S SENTENCE ENHANCEMENT.**

The prosecution's wording of the jury instruction on the enhancement, to include a requirement of proof of actual delivery of a controlled substance, in addition to raising issues of sufficiency which require reversal and dismissal of the special school route bus stop allegation with prejudice, also presents additional significant issues that must result in reversal and dismissal of the special verdict.<sup>11</sup>

**a. The prosecutor obtained a conviction on an uncharged crime, or an uncharged alternative.** Mr. Sullivan may appeal on this basis because a challenge to a conviction procured

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<sup>11</sup>Each of the appellant's arguments in Part D.1 through D.4, *supra*, involve errors that require reversal, and if reversed, unquestionably require dismissal of the drug charge and/or the enhancement with prejudice. The issues raised in Part D.5 require reversal, and dismissal with prejudice where argued within each subsection.

by instructing the jury on an uncharged crime may be raised for the first time on appeal, since such a conviction is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

In the present case, the amended information charged Mr. Sullivan with a special allegation under RCW 69.50.435, alleging that the defendant, who had been accused of possession with intent to deliver, committed this offense while also

at said time of being within 1,000 feet of a school bus route stop, to wit: Fourth Avenue and James Street, under the authority of RCW 69.50.435(a).

(Emphasis added.) CP 23. The jury instructions, however, alleged that Mr. Sullivan delivered cocaine within 1,000 feet or less from a school bus stop. CP 54. Jury instruction 16 served to charge the defendant with this offense. But actual delivery of cocaine is a separate drug offense from possession with intent to deliver, the offense charged. See RCW 69.50.401.

In addition, the State also obtained a conviction on a special school bus stop allegation premised on the alternative means in RCW 69.50.435 of delivery of a controlled substance, whereas the amended information had alleged that the defendant committed the crime of possession with intent to deliver under the special

circumstance. CP 23 (alleging that the defendant “did possess with intent to manufacture or deliver Cocaine, a controlled substance” and “at said time” was “within 1,000 feet” of a school bus route stop). In either event, Mr. Sullivan was convicted on the basis of an essential fact not charged in the information or the amended information. CP 1, CP 23.

An accused person must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. U.S. Const. Amend. 6;<sup>12</sup> State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The procurement of a conviction on an offense not charged in the information is an outright violation of these constitutional provisions, and such a conviction must be reversed. State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Lutman, 26 Wn. App. 766, 767, 614 P.2d 224 (1980); see also State v. Kitchen, 61 Wn. App. 915, 812 P.2d 888 (1991) (holding that it is reversible error not to include guilty knowledge in an information charging delivery of a controlled substance).

These same constitutional guaranties provide that when a statute sets forth alternative means by which a crime can be

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<sup>12</sup>The Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation.”

committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). But if the information alleges a particular alternative, it is error for the factfinder to consider uncharged alternatives, regardless of the range of evidence presented at trial. Severns, 13 Wn.2d at 548; State v. Doogan, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (holding trial court committed prejudicial error when it instructed jury on uncharged alternative means of committing second degree prostitution); Bray, 52 Wn. App. at 34 (prejudicial error where jury instructed on uncharged alternative means of committing forgery).

Where the jury instructions include an uncharged alternative means in a "to convict" instruction, the State must affirmatively show the jury could not have found the defendant violated that surplus statutory means. Doogan, 82 Wn. App. at 189; Bray, 52 Wn. App. at 34; Severns, 13 Wn.2d at 549. If it is impossible to discern whether the jury found the defendant violated the surplus

provision, the instructional error cannot be deemed harmless.

State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2001).

The State cannot meet its burden of showing the error was harmless in this case. It is impossible to know whether the jury found Mr. Sullivan committed the enhancement in the manner that was not alleged in the information, but was included in jury instruction 16 along with language regarding possession with intent to deliver, because the trial evidence regarding apparent deliveries, although intended to be circumstantial evidence of possession with intent to deliver, occupied the great portion of the testimony regarding Mr. Sullivan's conduct. It also constituted the great portion of the videotape evidence taken by Officer Johnson from the court-house, see Supp. CP \_\_\_\_, Sub # 88 (exhibit list, exhibit 1), and the bulk of the State's closing argument, see 9/2/08RP at 11-20, all of which likely resulted in the jury finding the enhancement was committed by "delivery" - a fact not charged. Reversal is required.

**b. The jury instruction submitted by the prosecutor permitted Mr. Sullivan to be found guilty of either a non-existent crime or a statutorily unauthorized sentencing enhancement.** The trial court's entry of judgment on the jury's

verdict on the sentencing enhancement in this case is manifest constitutional error that may be raised for the first time on appeal. See RAP 2.5(a)(3). An error is “manifest” if it had “practical and identifiable consequences in the trial of the case.” State v. Davis, 141 Wn.2d 798, 866 and n. 366, 10 P.3d 977 (2000) (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). The trial court’s entry of judgment, and imposition of punishment premised on a verdict based on an instruction on a “crime” crafted without statutory authorization, is error that has the practical effect of dramatically increasing Mr. Sullivan’s sentence of incarceration.

Here, at the close of the defendant’s trial on the charge of possession with intent to deliver, the prosecutor submitted a jury instruction that purported to be drafted in accordance with RCW 69.50.435, but in fact instructed the jury that, if it found the defendant guilty of possessing a controlled substance with intent to deliver, it should determine, for purposes of the special verdict,

whether or not the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop[.]

(Emphasis added.) CP 54 (Jury instruction no. 16). Thus the instruction also directed the jury, if it

found from the evidence that the state has proved beyond a reasonable doubt that the defendant

delivered the controlled substance to a person within one thousand feet of a school bus route stop [to] answer the special verdict “yes.”

(Emphasis added.) CP 54 (Jury instruction no. 16). The jury found the special allegation, filling out the verdict form to indicate that it had found the defendant “guilty” of

the delivering [sic] a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance.

CP 31 (Special verdict form).

This jury instruction, and the special verdict form, are not in the substance of any special allegation authorized by RCW 69.50.435. They relate to an entirely different drug offense under subsection .401 than the underlying “possession with intent to deliver” count charged in the original, and amended informations.

There is no such crime, or enhancement. Like all the location-based enhancements established by RCW 69.50.435, the school bus stop enhancement provides for an “additional penalty” where its elements are proved, establishing that an underlying drug crime occurred in a protected area. RCW 69.50.435. As the Court of Appeals has stated in ruling on a challenge to the constitutionality of the drug crime enhancement statute, its purpose and mechanism are to counteract substance abuse crimes by

attaching “enhanced penalties” for drug offenses when they are committed within an area deemed to be protected, such as within 1000 feet of a school or a school bus stop. State v. Acevedo, 78 Wn. App. 886, 889, 899 P.2d 31 (1995).

The special allegations of the drug crime enhancement statute are plainly not independent offenses which can be charged either alone, or without direct reference to the substantive drug offense they accompany in a charging document. Mr. Sullivan was therefore effectively found guilty of a non-existent offense or a special sentencing finding absent any statutory authorization. It does not matter that viewed in isolation, a school bus stop enhancement could be drafted that aggravated an underlying crime of delivery. For example, the Supreme Court has held that second-degree felony murder with assault as the predicate under former RCW 9A.32.050 is a non-existent crime under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and that such a conviction is accordingly invalid on its face. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004). The subsequent case of State v. Tarrer, 140 Wn. App. 166, 165 P.3d 35 (2007), is merely one example of Washington decisions requiring pleas of guilty to non-existent crimes to be

permitted to be withdrawn, and convictions based thereon reversed, because such crime is non-existent, despite the fact that nothing in the statute would seem to preclude this combination of offenses. Mr. Sullivan was found guilty of a non-existent “crime” or sentencing enhancement, and his conviction must be reversed.

**c. The conviction on the enhancement must be reversed because the jury instructions failed to include the essential element of “knowledge,” or define that element.** As noted, the crime of delivery of a controlled substance, which the State assumed the burden of proving based on its jury instruction on the enhancement, includes an essential element of knowledge that the substance delivered was a controlled substance. State v. DeVries, 149 Wn.2d at 849-50; State v. Ong, 88 Wn. App. at 573.

However, in the present case the jury instruction that based the special verdict on delivery of a controlled substance failed to require a finding of knowledge of the controlled substance. CP 54 (Jury instruction 16). In addition, the jury instructions failed to define “knowledge.” CP 33-56; see WPIC 50.06 (requiring use of WPIC 10.02 (Knowledge—Knowingly—Definition), and WPIC 50.07 (Deliver—Definition) in a delivery case).

The absence of an essential element from the "to-convict" instruction is presumed to be reversible error. State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005) (quoting State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002)).<sup>13</sup> Where an element is missing from a "to convict" jury instruction, the error will be deemed harmless only if uncontroverted evidence supports a finding on the element, and the reviewing court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The burden is on the State to show that the error was harmless. In re Pers. Restraint of Smith, 117 Wn. App. 846, 859, 73 P.3d 386 (2003).

The evidence in the present case was not "uncontroverted" on the question of knowledge by Mr. Sullivan that the thing delivered was cocaine. The jury is permitted to find knowledge if there is sufficient circumstantial information which would lead a reasonable person to believe that a fact exists. State v. Johnson,

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<sup>13</sup>Mills and Oster are cases where the definition of the offense charged, or other jury instructions, included every essential element of the crime, but the to-convict instruction did not. Mills, 154 Wn.2d at 8; Oster, 147 Wn.2d at 147. Here, the jury instructions nowhere included the essential element of "knowledge."

119 Wn.2d 167, 174, 829 P.2d 1082 (1992). And knowledge includes possession of information that would lead a reasonable person in the same situation to believe facts exist that constitute a crime. State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166 (1997).

However, the defendant's cross-examination of Officer Johnson elicited substantial evidence that controverted the factual assertion that the defendant was delivering a drug, had arranged for such delivery, or that he knew that the item that was being exchanged was a controlled substance. The officer claimed he was observing three separate instances in which the defendant either directly, or constructively through a compatriot, delivered a controlled substance to three persons on the street in front of the courthouse. 8/38/08RP at 11-12. But it was conceded that the area where the activity occurred was also the site of much completely legal conduct. 8/28/08RP at 33-34. Officer Johnson admitted that he never actually saw narcotics in Mr. Sullivan's hands. 8/28/08RP at 27-28. He could have had candy in his hand, for all the officer knew. 8/28/08RP at 28. He never appeared to receive any money from Ms. Jackson, one of the alleged buyers. 8/28/08RP at 29.

During the “deal” that allegedly occurred with Ms. Jackson, the officer’s view of Mr. Sullivan was “obstructed by the other individuals.” 8/28/08RP at 29. Mr. Sullivan never was involved in handing anything to Ms. Cotter. 8/28/08RP at 34. The only thing that Officer Johnson saw Mr. Sullivan ever hand to any of the male individuals was a cigarette. 8/28/08RP at 35. The officer only “believed” an exchange occurred between Cotter and Mr. Savare. 8/28/08RP at 35. At that point, Mr. Sullivan was “not in the picture.” 8/28/08RP at 36.

The controverted nature of the trial evidence requires reversal based on the failure of the jury instructions to include every essential element of the crime of delivery. Our Supreme Court has stated that the analysis in the absence of instructions on every element of a crime begins with the presumption that the instructional error was prejudicial; this presumption can be rebutted only by an affirmative showing that the omission was harmless. Brown, 147 Wn.2d at 340. The test for determining whether a constitutional error is harmless is “ [w]hether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” ‘ Brown, at 341 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Where the evidence is as controverted as it was here, this standard is not met. State v. Brown, 147 Wn.2d at 341. The presence of this degree of contradictory evidence, and impeachment of the State's evidence, is wholly inadequate to overcome the constitutional error, and reversal is required.

**d. The absence of a unanimity instruction or an election in closing argument requires reversal of the school bus stop enhancement where there were multiple acts of alleged delivery, and the evidence of one or more was controverted, rendering the *Petrich* error reversible.** Criminal defendants have a right to an expressly unanimous jury verdict. Wash. Const. Article 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const. Amend. 6; United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986). In a case where the State presents evidence of multiple incidents of the offense – such as the evidence of multiple deliveries in this case where the State assumed the burden of proving delivery -- but fails to elect which particular incident should be relied on by the jury, and the court fails to give a unanimity instruction, the right to jury unanimity is violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d

105 (1988) (same). Here, the language of the special school bus stop allegation contained an element of delivery of a controlled substance that became the law of the case. Hickman, supra. But the prosecutor in closing argument claimed that the evidence showed three deliveries, and certainly failed to elect one as the basis for the delivery allegation.<sup>14</sup>

This Petrich error is presumed to be prejudicial, and that presumption can be overcome only "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich) (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)). In Petrich error cases, which involve constitutional error, this standard is a specific expression of the general requirement that constitutional errors require reversal unless the State proves they were "harmless beyond a reasonable doubt." Kitchen, at 412 (quoting Chapman, 386 U.S. at 24.

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<sup>14</sup>This failure to elect undoubtedly resulted from the fact that the prosecutor only inadvertently submitted jury instructions making delivery of a controlled substance something he was required to prove. That fact, however, is of no consequence. See Hickman, 135 Wn.2d at 103 (quoting Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) ("whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case")).

This analysis, its logic, and its application in the Washington cases, means that affirmance of the enhancement in the face of the Petrich unanimity error requires this Court to find that no reasonable juror in Mr. Sullivan's case could have done anything other than come to the conclusion that every single incident of alleged delivery presented by the State's evidence was proved beyond a reasonable doubt. For example, in Kitchen, the Court reversed two defendants' convictions, because multiple acts were placed into evidence and "a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred." Kitchen, at 412.

For example, in State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), a prosecution for burglary, no unanimity instruction was given and the State never elected which of two alleged burglaries it was relying on to convict -- the burglary of a storage shed during which a gas pump was removed, or the burglary of a pump house. State v. Brooks, 77 Wn. App. at 520. Reversal was required under the Kitchen standard because the trial evidence as to one of the multiple acts was conflicting -- Brooks testified that one "Dave" burglarized the storage shed. State v. Brooks, 77 Wn. App. at 521. Thus the Court concluded that a rational juror could have a

reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Brooks, 77 Wn. App. at 521 (“Based upon this testimony, it is possible a rational juror could have had a reasonable doubt as to whether Mr. Brooks burglarized the storage shed”); see also State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1994) (unanimity error required reversal where evidence showed multiple acts of cocaine possession but evidence was conflicting as to defendant’s alleged possession of the cocaine in a fanny pack, since King testified he was unaware of it and asserted that police must have planted it) (“We cannot say that no rational trier of fact would entertain a reasonable doubt about King's responsibility for the cocaine in his fanny pack”).<sup>15</sup>

Applying the foregoing law to the present case requires that the absence of a unanimity instruction in Mr. Sullivan’s case be deemed not harmless, if it cannot be said that a reasonable juror could only find that every one of the alleged deliveries presented at

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<sup>15</sup>The King Court also based reversal on the fact that conflicting evidence existed as to whether King possessed a Tylenol bottle containing drugs, which was found in the car in which he was riding. State v. King, 75 Wn. App. at 903-04. Importantly, however, reversal was required for the unanimity error because one incident, from among the multiple acts of possession, was supported by conflicting evidence; although conflicting evidence in fact was the basis of both of the multiple acts, the Court was plainly not holding that this was a requirement for reversal.

trial were proved beyond a reasonable doubt. See Kitchen, 110 Wn.2d at 411. As Justice Utter explained the rule in his concurring opinion in State v. Camarillo:

Because nothing in the record suggests that the credibility of the two principals varied as to any of the incidents and no other direct evidence of the acts was introduced, I agree that given the credibility judgment the jury must have made, no reasonable juror could have concluded that the defendant was innocent of any of the acts alleged. [But] [s]uch a conclusion will never be appropriate if the record reveals any evidence which could justify a reasonable doubt in any juror's mind about any given incident, even if the jury obviously believed the victim and not the defendant.

(Emphasis added.) State v. Camarillo, 115 Wn.2d 60, 73-74, 794 P.2d 850 (1990) (Utter, J., concurring). For example, in State v. Petrich, supra, the defendant's convictions for one count each of rape and indecent liberties (only the former requiring sexual intercourse) were overturned because there was no unanimity instruction or election, and although the child testified with specificity as to certain incidents, others were described "with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place." Petrich, 101 Wn.2d at 573.

The evidence in the present case shows the same sort of evidentiary conflict as in Kitchen and Petrich as to at least one particular incident of alleged delivery. That is, of itself, enough --

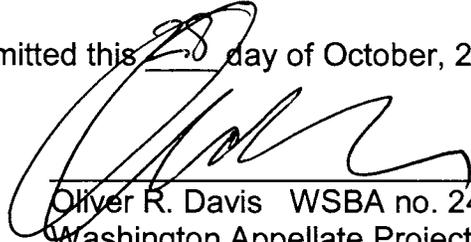
completely enough, not barely enough -- to require reversal. At trial, Officer Johnson openly admitted that the evidence of at least one of the interactions he observed would not even constitute grounds for an arrest for delivery of a controlled substance. He testified that Mr. Sullivan never was involved in handing anything to Ms. Cotter. 8/28/08RP at 34. Johnson could not even see what, if anything, was exchanged between Mr. Savare and Ms. Cotter. 8/28/08RP at 35-36. Based on what he saw with alleged buyer Ms. Cotter, there was no basis for a narcotics arrest. 8/28/08RP at 35 ("Based on just Ms. Cotter I would not place him under arrest").

This one fact alone renders the Petrich error reversible error. It is supplanted by all of the controverting evidence described at Part D.3, supra, demonstrating serious flaws and controverted evidence in the State's case regarding at least one or more of these alleged delivery transactions. The failure to instruct the jury on accomplice liability also renders the proof of one of the alleged deliveries deeply contradicted on that basis, and certainly "controverted." This Court can take its pick from among the alleged deliveries; each one contains flaws of proof that individually are enough to render the Petrich error not harmless. Reversal is required.

**E. CONCLUSION**

Based on the foregoing, Mr. Sullivan respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 28 day of October, 2009.



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Washington Appellate Project - 91052  
Attorneys for Appellant

# APPENDIX A

If you find the defendant guilty of possessing with the intent to deliver a controlled substance, it will then be your duty to determine whether or not the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT: POSSESSION WITH INTENT TO DELIVER, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance, it will be your duty

to answer the special verdict "no".

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62706-6-I
v.	)	
	)	
BRANDON SULLIVAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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<input checked="" type="checkbox"/> BRANDON SULLIVAN 323321 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE FORKS, WA 98331	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF OCTOBER, 2009.

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