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COA NO. 68906-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH WINCHESTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

1. THE COURT ERRED IN DENYING WINCHESTER'S REQUEST FOR NEW COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY 1

2. THE COURT COMMITTED CONSTITUTIONAL ERROR IN ADMITTING WINCHESTER'S STATEMENTS TO POLICE BECAUSE THEY WERE NOT VOLUNTARILY MADE 5

   a. Winchester's Statements Were Involuntary Under The Due Process Standard 5

   b. Winchester's Statements Were Inadmissible Under The Fifth Amendment Miranda Test. 8

   c. In The Alternative, Defense Counsel Was Ineffective In Failing To Create An Adequate Record Of The Totality Of The Circumstances For Purposes Of The CrR 3.5 Determination 10

3. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT III EXCEEDS THE STATUTORY MAXIMUM. 15

4. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE A FIREARM ENHANCEMENT ON WINCHESTER'S CONVICTION FOR AN UNRANKED FELONY.. 17

B. CONCLUSION 20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Detention of Ritter,
177 Wn. App. 519, 312 P.3d 723 (2013) 5

In re Pers. Restraint of Acron,
122 Wn. App. 886, 95 P.3d 1272 (2004) 17

In re Post-Sentence Review of Charles,
135 Wn.2d 239, 955 P.2d 798 (1998) 17

State v. Aten,
130 Wn.2d 640, 927 P.2d 210 (1996) 5, 7

In re Pers. Restraint of Hopkins,
137 Wn.2d 897, 976 P.2d 616 (1999) 19

State ex rel. McDonald v. Whatcom County Dist. Court,
92 Wn.2d 35, 593 P.2d 546 (1979) 19

State v. Boyd,
174 Wn.2d 470, 275 P.3d 321 (2012) 15

State v. Breaux,
167 Wn. App. 166, 273 P.3d 447 (2012) 18

State v. Butler,
165 Wn. App. 820, 269 P.3d 315 (2012). 6-9

State v. Cross,
156 Wn.2d 580, 132 P.3d 80 (2006) 3

State v. Gregory,
79 Wn.2d 637, 488 P.2d 757 (1971),
overruled on other grounds by
State v. Rogers, 83 Wn.2d 553, 520 P.2d 159 (1974) 13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Hudnall,
116 Wn. App. 190, 64 P.3d 687 (2003) 18

State v. Jones,
172 Wn.2d 236, 257 P.3d 616 (2011) 16

State v. Madsen,
168 Wn.2d 496, 229 P.3d 714 (2010) 2

State v. Mendoza,
63 Wn. App. 373, 819 P.2d 387 (1991),
review denied, 841 P.2d 1232 (1992) 17, 18

State v. Moeurn,
170 Wn.2d 169, 240 P.3d 1158 (2010) 17

State v. Morley,
134 Wn.2d 588, 952 P.2d 167 (1998) 18

State v. Rosas-Miranda,
176 Wn. App. 773, 309 P.3d 728 (2013) 8

State v. Sargent,
111 Wn.2d 641, 762 P.2d 1127 (1988) 14

State v. Soto,
__Wn. App.__, 309 P.3d 596 (2013) 17, 19

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997),
cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998) ... 3

State v. Thomas,
113 Wn. App. 755, 54 P.3d 719 (2002),
aff'd, 150 Wn.2d 666, 80 P.3d 168 (2003) 18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Walker,
153 Wn. App. 701, 224 P.3d 814 (2009) 5

State v. Wojtyna,
70 Wn. App. 689, 855 P.2d 315 (1993),
review denied, 123 Wn.2d 1007, 869 P.2d 1084 (1994) 17

FEDERAL CASES

Brubaker v. Dickson,
310 F.2d 30 (9th Cir. 1962) 4

Frye v. United States,
293 F. 1013 (D.C. Cir. 1923) 5

Mincey v. Arizona,
437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) 8

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 6

Rhode Island v. Innis,
446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) 13, 14

Thompson v. Keohane,
516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995) 9

United States v. Cristobal,
293 F.3d 134 (4th Cir. 2002) 6, 10, 12, 13

United States v. D'Amore,
56 F.3d 1202, 1205 (9th Cir. 1995) 2

United States v. George,
987 F.2d 1428 (9th Cir. 1993) 6, 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Martin,
781 F.2d 671 (9th Cir. 1985) 6, 9

OTHER STATE CASES

People v. Marsden,
2 Cal.3d 118, 465 P.2d 44 (Cal. 1970) 4

RULES, STATUTES AND OTHER AUTHORITIES

Chapter 9A.28 RCW 18, 19

Chapter 62.50 RCW 18, 19

CrR 3.5 ..... 7, 9-13

RAP 12.2 4

RCW 9.94A.510 ..... 18, 19

RCW 9.94A.517 ..... 17, 19

RCW 9.94A.518 19

RCW 9.94A.595 ..... 18, 19

RCW 9.94A.701(9) 15

Sentencing Reform Act 17, 18

A. ARGUMENT IN REPLY

1. THE COURT ERRED IN DENYING WINCHESTER'S REQUEST FOR NEW COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY.

The State contends Winchester was really only concerned about the State's handling of the case and manipulation of witnesses. Brief of Respondent (BOR) at 35-37. From this, the State claims the trial court had no duty to inquire further into defense counsel's handling of prospective witnesses, including the failure to talk to certain witnesses. BOR at 35-36.

The record shows Winchester was indeed concerned about how the State was treating witnesses, including delaying charges against witnesses it intended to call against Winchester. 3RP 74, 76-77, 78. The record also shows Winchester's concern that his attorney did not interview certain witnesses. 3RP 75-76.

In arguing Winchester did not have the latter concern, the State seizes upon Winchester's statement "I didn't say that these were people that I wanted to call. These are people that the prosecution is going to put up on the stand . . . there's witnesses that have charges hanging over their head." 3RP 78. But the State pays inadequate attention to the context in which Winchester made that statement.

The prosecutor had told the court that he and defense counsel had interviewed the "major" witnesses in this case and that defense counsel had been diligent in doing that. 3RP 77-78. The court set forth its understanding of Winchester's claim to be that defense counsel had not investigated witnesses, which it described as a matter between counsel and Winchester. 3RP 78. It was at this point that Winchester said "I didn't say that *these were people* that I wanted to call." 3RP 78 (emphasis added). Winchester is referring to the people that were in fact interviewed by defense counsel, the "major witnesses" as described by the prosecutor. His concern over those witnesses was that the State left charges hanging over their head. 3RP 78-79. Winchester was not referring to the witnesses that defense counsel had not investigated. Winchester had not abandoned his concern that defense counsel had not interviewed other prospective witnesses. The court correctly understood that to be his concern based on Winchester's earlier articulation of it. 3RP 78.

The State asserts substitution of counsel was not required because there was no irreconcilable conflict or complete breakdown in communication. BOR at 36. But whether a conflict exists that calls for new counsel to be appointed presupposes the trial court has fully informed itself of the conflict at issue. United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995); see also State v. Madsen, 168 Wn.2d 496, 505, 229

P.3d 714 (2010) (in context of request to proceed pro se, "the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met" and then deny the request to proceed pro se).

A general loss of confidence or trust alone is insufficient to substitute new counsel, but attorney-client conflicts do justify the grant of a substitution motion "when counsel and defendant are so at odds as to prevent presentation of an adequate defense." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Trial strategy is generally left to the attorney and client to work out, but only if there is no actual ineffective assistance of counsel. State v. Cross, 156 Wn.2d 580, 608-09, 132 P.3d 80 (2006).

Here, the trial court's inadequate inquiry renders that determination problematic because the court did not put itself into the position to make an informed decision on whether counsel's failure to interview prospective witnesses demonstrated ineffective assistance. When inadequate representation is alleged, such issues upon which inquiry must focus include "whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and

strategy." People v. Marsden, 2 Cal.3d 118, 123-24, 465 P.2d 44 (Cal. 1970) (quoting Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962)).

The trial court did not conduct the requisite inquiry. The court said it could not make any sense out of Winchester's complaint about his attorney's investigation "[w]ithout a list of who it is you told him you wanted him to talk to, and whether they had any validity or not, and whether they can provide any information[.]" 3RP 76. That is the kind of information that needs to be set forth in a private hearing where the prosecutor cannot eavesdrop on it. But the trial court did not give Winchester that option.

The State notes defense counsel filed a supplemental witness list a few days later. BOR at 36; CP 123-25. But because of the trial court's inadequate inquiry, it cannot be determined whether those witnesses were among those that Winchester believed defense counsel should have investigated.

The State further argues there is no remedy for Winchester even if the trial court's inquiry was insufficient. BOR at 37, 41. It resists remand for an evidentiary hearing on the matter because the present appeal is not a collateral attack. BOR at 41. But under RAP 12.2, appellate courts "may reverse, affirm, or modify the decision being reviewed and *take any other action as the merits of the case and the interest of justice may require*."

(emphasis added). Appellate courts remand for further development of the record in a variety of circumstances so that a claim can ultimately be fully reviewed on appeal. See, e.g., In re Detention of Ritter, 177 Wn. App. 519, 312 P.3d 723, 723 (2013) (remanding for Frye[1] hearing, retaining jurisdiction of case); State v. Walker, 153 Wn. App. 701, 708-09, 224 P.3d 814 (2009) (remanding for fact hearing on whether statute of limitations on criminal charges had expired). If this Court declines to reverse based on the present record, then remand for further factual development is an appropriate step to fairly resolve Winchester's claim.

2. THE COURT COMMITTED CONSTITUTIONAL ERROR IN ADMITTING WINCHESTER'S STATEMENTS TO POLICE BECAUSE THEY WERE NOT VOLUNTARILY MADE.

a. Winchester's Statements Were Involuntary Under The Due Process Standard.

The State cites several cases in arguing there is no due process violation because Winchester was coherent and rational during the interviews. BOR at 48, 49. The cases cited by the State do not control the outcome here because they are distinguishable. "To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made." State v. Aten, 130

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Wn.2d 640, 663-64, 927 P.2d 210 (1996). The totality of circumstances in Winchester's case is different from those cited by the State.

Winchester's injuries resulted in him being placed in a medically induced coma, from which he was awakened a short time before the interrogations began. 3RP 7, 11; cf. United States v. George, 987 F.2d 1428, 1431 (9th Cir. 1993) (in determining hospital statement was voluntary, placing weight on fact that suspect's injuries "did not render him unconscious or comatose") (quoting United States v. Martin, 781 F.2d 671, 674 (9th Cir. 1985)). Winchester was only "a little more awake" during the November 24 nighttime encounter. CP 127 (FF 2); 3RP 11-12. Detective Beld needed to go over things a number of times in an effort to make sure Winchester understood. 3RP 12. If Winchester were coherent at all times, then there would be no need for Beld to go over things a number of times. Cf. United States v. Cristobal, 293 F.3d 134, 142 (4th Cir. 2002) ("the uncontroverted medical testimony before us indicates that Cristobal was alert and coherent at the time of the interview.").

State v. Butler is not on point because the issue in that case was whether the defendant voluntarily waived his rights after being given

Miranda[2] warnings. State v. Butler, 165 Wn. App. 820, 828, 269 P.3d 315 (2012). Winchester was never read his Miranda rights.

Further, there was no showing in Butler "that the detective took advantage of his weakened condition." Butler, 165 Wn. App. at 828; see also George, 987 F.2d at 1431 (same). The record in Winchester's case shows otherwise. Detective Beld knew Winchester was immobilized because he had just come out of a coma after having his face shot off. The detective came back again and again to question Winchester in his weakened and grief-stricken state until he extracted the information he wanted. Cf. Aten, 130 Wn.2d at 665 ("although Respondent was diagnosed as suffering from grief and depression, there is no evidence that officers deliberately exploited her mental condition to obtain her statement or acted in a way that would overcome her will to resist giving a statement.").

The State maintains Detective Beld, in questioning Winchester, was merely attempting to find out who shot Winchester and his son, and did not take advantage of Winchester's medical condition to obtain incriminating statements from him. BOR at 49. Detective Beld testified at the CrR 3.5 hearing "We were trying to find out who the suspects were,

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

who shot him and his son, and some of the details of what happened up in that, up in that bedroom." 3RP 7. Those "details" included whether Winchester illegally possessed a firearm and the circumstances under which Winchester found himself confronting the people who ended up shooting him and his son, all of which formed the basis for the criminal charges against him.

All in all, Winchester's case is more like Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), where a due process violation was found, than those cases where one was not found. The opening brief sets forth a comparison with Mincey and need not be repeated here. Brief of Appellant at 44-48.

b. Winchester's Statements Were Inadmissible Under The Fifth Amendment Miranda Test.

The State relies on Butler to argue Winchester was not in custody. BOR at 51-52. Whether a person is in custody is based on the totality of circumstances of each particular case. State v. Rosas-Miranda, 176 Wn. App. 773, 309 P.3d 728, 731 (2013). The totality of circumstances in Winchester's case does not match those in Butler.

In Butler, "[n]o police were stationed inside or outside Mr. Butler's room." Butler, 165 Wn. App. at 828. Police were stationed outside of Winchester's room. CP 127 (FF 2); 3RP 24-25. And although the trial

court found Winchester was told the police were there for his protection, the fact remains that Winchester was made aware of their presence and that police were investigating the crime in which he was involved. Also, in Butler, "it was Mr. Butler's nurse, Mr. Henry, who ultimately controlled access to Mr. Butler." Butler, 165 Wn. App. at 828. In Winchester's case, there is no finding and nothing in the CrR 3.5 record showing hospital personnel controlled police access to Winchester.

An individual can be in custody when held for medical treatment in a hospital. Martin, 781 F.2d at 673. "If the police took a criminal suspect to the hospital from the scene of a crime, monitored the patient's stay, stationed themselves outside the door, arranged an extended treatment schedule with the doctors, or some combination of these, law enforcement restraint amounting to custody could result." Id. Winchester was taken to the hospital from the scene of the crime, and police stationed themselves outside the door and monitored his stay while Winchester was questioned about his involvement in the crimes that were being investigated. Those circumstances amount to a custodial environment.

The dispositive legal inquiry is whether, given the factual circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Under the

circumstances recited above, Winchester could not leave because he was physically incapacitated. No state officer created Winchester's injury, but Detective Beld exploited Winchester's fragile state. Detective Beld used Winchester's incapacitation and grief as the occasion to elicit incriminating information from Winchester. Winchester was in custody and he was interrogated but he was not read his Miranda rights. The statements used against him at trial were unconstitutionally obtained.

c. In The Alternative, Defense Counsel Was Ineffective In Failing To Create A Complete Record Of The Totality Of The Circumstances For Purposes Of The CrR 3.5 Determination.

As the State notes, the totality of circumstances for determining voluntariness includes "the details of the interrogation." BOR at 44 (quoting Cristobal, 293 F.3d at 140). Yet defense counsel failed to put important details of the interrogation before the trial judge as part of the CrR 3.5 hearing.

The State claims defense counsel may have known the trial testimony overall would not have borne out an involuntariness argument. BOR at 59. The State's chides appellate counsel for leaving out additional trial evidence that could be used to argue the statements were voluntary. BOR at 54-56. But whether the State could have put on additional evidence at the CrR 3.5 hearing is not the issue on appeal. The State put

on its case at the CrR 3.5 stage in a manner that it thought suitable and it was successful in convincing the trial judge that the statements were voluntary.

The issue, rather, is whether defense counsel was ineffective in failing to create a factual record that would support counsel's theory that the statements were involuntary. The problem is that the trial court heard a one-sided rendition of events that left out key circumstances supporting the involuntariness argument as a result of counsel's failure to present that evidence. At the CrR 3.5 hearing, Detective Beld testified to essentially the same thing he testified to at trial. Winchester's argument is not that defense counsel was deficient in failing to elicit what the State acknowledges is redundant testimony from Beld. BOR at 54 ("Det. Beld reiterated at trial . . . "). Nor is the argument that counsel was deficient in failing to present evidence that arguably supported voluntariness. The argument is that counsel was deficient in failing to put additional circumstances left out by Beld into evidence at the CrR 3.5 hearing that supported the argument that the statements were involuntary.

For example, trial testimony showed (1) Winchester was still in the intensive care unit when the November 24 nighttime interrogation took place (5RP 524); (2) he was still under heavy medication (5RP 525, 527); (3) Winchester fell asleep several times during the interrogation and

Detective Beld needed to rouse him (5RP 530); (4) no family member was present during the nighttime interrogation on November 24 (5RP 595); and (5) no family member was present during the November 26 hospital interrogation. 5RP 582-83. These facts, which all support the argument that the statements were not voluntary, were not elicited by defense counsel at the CrR 3.5 hearing. That was not a legitimate tactic because defense counsel's argument was that the statements were involuntary. 3RP 81-82. Counsel's failing undermined his own goal to exclude the statements from trial.

Again, "the details of the interrogation" are among the circumstances to be taken into account in determining voluntariness. Cristobal, 293 F.3d at 140. Those details were contained in the recordings of the interrogations, but defense counsel did not put those recordings into evidence and the trial judge never heard them before ruling on the CrR 3.5 matter.

At the CrR 3.5 hearing, the trial court heard some of the circumstances from Detective Beld, expressed in an exceedingly dry and antiseptic manner. What the trial court did not hear, through the recordings, are a host of additional circumstances that demonstrate Winchester was not in full possession of his faculties. For example, the recording for the November 24 nighttime interrogation shows Winchester

lapsed in and out of consciousness, that Detective Beld had to rouse and refocus him to answer questions, and that the detective urged Winchester towards the end to "[s]tay with me just a little bit longer" because he was "almost done" with questioning him. Ex. 159 (lines 72-73, 185-89, 211-14, 224-25, 361). The recording of the November 26 interrogation shows similar circumstances. Ex. 160 (lines 543, 553, 606, 608, 610); cf. State v. Gregory, 79 Wn.2d 637, 642, 488 P.2d 757 (1971) (summarizing evidence that suspect "was in full possession of his mental facilities during the questioning "in concluding statements were voluntary), overruled on other grounds by State v. Rogers, 83 Wn.2d 553, 520 P.2d 159 (1974); Cristobal, 293 F.3d at 143 (in concluding statements were voluntary: "Though it was obvious to the officers that Cristobal was in pain, he did not slur his words during the interview, he never lapsed into unconsciousness, nodded off or went to sleep."). Contrary to the State's contention (BOR at 58), Detective Beld did not offer testimony on these circumstances at the CrR 3.5 hearing.

The State also asserts Detective Beld did not interrogate or manipulate in order to extract incriminating statements. BOR at 58. The State is wrong. Winchester was interrogated and manipulated. The recordings that counsel failed to put into evidence show this to be the case.

Interrogation includes express questioning as well as any words or actions that the police should know are reasonably likely to elicit an

"incriminating response" from the suspect. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). An "incriminating response" encompasses "any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial." Innis, 446 U.S. at 301 n.5. The interrogation standard, meanwhile, "is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue." State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). Whatever the subjective expressions of intent offered by Detective Beld, an objective officer in his position would know he was exploiting Winchester's weakened physical and mental state to obtain incriminating information.

Detective Beld manipulated Winchester into talking about his involvement with the crime by playing upon Winchester's grief in losing his son and his desire for justice in seeing his son's murderers brought to justice. Beld was well aware at the time of interrogation that Winchester had a felony history and could not legally possess a firearm. 3RP 13-14. By preying upon Winchester's compromised mental and physical state, Detective Beld extracted incriminating information from Winchester during the course of the hospital interviews that was used by the

prosecution at trial. Defense counsel was ineffective in failing to give evidence in support of the involuntariness claim.

3. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT III EXCEEDS THE STATUTORY MAXIMUM.

The State concedes the combined sentence of confinement and community custody for the attempted robbery conviction exceeds the 120 month statutory maximum and therefore must be fixed. BOR at 67. There is disagreement over what the trial court may do to fix the problem. The State maintains remand for resentencing is inappropriate and that this Court should simply direct the trial court to reduce the community custody term to zero. BOR at 67-68.

The correct remedy is resentencing because it allows the trial court an opportunity to exercise its discretion to reduce the confinement term, reduce the community custody term, or reduce both in a manner that does not exceed the statutory maximum. The Supreme Court in Boyd "remand[ed] to the trial court to either amend the community custody term or resentence Boyd on the protection order violation conviction consistent with RCW 9.94A.701(9)." State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Winchester is entitled to the same remedy. No more and no less.

The State asserts the trial court clearly wished to impose the maximum term of confinement available at the original sentencing, but it is not at all clear if the trial court would do the same at the expense of getting rid of the community custody term altogether. The trial court could view community custody as a valuable tool for safely reintegrating Winchester into the community and monitoring him following his release.

Requiring offenders to serve a sentence of community custody in the community serves several purposes, including protecting the public, offering the offender an opportunity to improve himself and reducing the risk of reoffense. State v. Jones, 172 Wn.2d 236, 246, 257 P.3d 616 (2011). Community custody provides both the time and resources necessary to assist with reintegration into society, while protecting the public by maintaining some control over the offender through the community custody requirements imposed by the Department of Corrections. Jones, 172 Wn.2d at 246.

Taking these valuable purposes of community custody into account, the trial court has the discretion on remand to fashion an appropriate sentence. The State's attempt to artificially tie the court's hands on the matter is not well taken.

4. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE A FIREARM ENHANCEMENT ON WINCHESTER'S CONVICTION FOR AN UNRANKED FELONY.

Firearm enhancements apply only to ranked felony offenses. State v. Soto, __Wn. App.__, 309 P.3d 596, 596 (2013). The State claims attempted possession of a controlled substance is a ranked offense under RCW 9.94A.517 and therefore the firearm enhancement imposed on Winchester is proper. BOR at 70.

The State is mistaken. This Court has held attempted possession of a controlled substance is an unranked felony offense. CP 7, 22; State v. Wojtyna, 70 Wn. App. 689, 697, 855 P.2d 315 (1993) (citing State v. Mendoza, 63 Wn. App. 373, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992)), review denied, 123 Wn.2d 1007, 869 P.2d 1084 (1994).

The Washington State Adult Sentencing Guidelines Manual continues to treat attempted possession of a controlled substance as an unranked felony offense. See 2011 Washington State Adult Sentencing Guidelines Manual at 27-28 (attached as app. A). Appellate courts often look to the sentencing manual when interpreting the Sentencing Reform Act. In re Post-Sentence Review of Charles, 135 Wn.2d 239, 250, 955 P.2d 798 (1998); see, e.g., State v. Moeurn, 170 Wn.2d 169, 175-76, 240 P.3d 1158 (2010); In re Pers. Restraint of Acron, 122 Wn. App. 886, 890,

95 P.3d 1272 (2004); State v. Hudnall, 116 Wn. App. 190, 195-96, 64 P.3d 687 (2003) (where State pressed argument based on sentencing manual); State v. Thomas, 113 Wn. App. 755, 759 n.6, 54 P.3d 719 (2002), aff'd, 150 Wn.2d 666, 80 P.3d 168 (2003). Indeed, the sentencing manual has been as described as one of the "leading authorities" of the SRA. State v. Morley, 134 Wn.2d 588, 597, 952 P.2d 167 (1998).

Also instructive is this Court's decision in State v. Breaux, 167 Wn. App. 166, 273 P.3d 447 (2012). In Breaux, the Court rejected the State's argument that anticipatory offenses had no seriousness level under RCW 9.94A.510 because that interpretation ignored RCW 9.94A.595, which governs the procedure to calculate the standard range for those convicted of anticipatory offense under chapter 9A.28 RCW.[3] Breaux, 167 Wn. App. at 176. Breaux relied on Mendoza, which recognized the predecessor to RCW 9.94A.595 only applied to convictions for anticipatory offenses under chapter 9A.28 RCW, not to drug convictions for anticipatory offenses under chapter 69.50 RCW. Breaux, 167 Wn. App. at 177 (citing Mendoza, 63 Wn. App. at 376-77).

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[3] RCW 9.94A.595 provides "For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent."

Of significance to Winchester's case, there is no provision comparable to RCW 9.94A.595 that applies to drug offenses under chapter 69.50 RCW. The statutory basis for determining anticipatory crimes have a seriousness level like completed crimes is present for convictions under chapter 9A.28 RCW but lacking for drug convictions under chapter 69.50 RCW. Anticipatory offenses are not specifically ranked in the seriousness level table in RCW 9.94A.517 (with reference to RCW 9.94A.518) and there is no provision comparable to RCW 9.94A.595 that incorporates attempted offenses into RCW 9.94A.517. If the legislature had intended to included anticipatory drug offenses as ranked offenses in RCW 9.94A.517, then it would have created a provision analogous to RCW 9.94A.595 applicable to crimes under chapter 60.52 RCW.

Attempted possession of a controlled substance is not ranked in RCW 9.94A.515 or RCW 9.94A.517. The firearm enhancement is therefore unauthorized. Soto, 309 P.3d at 596. To the extent there is any reasonable ambiguity on the matter, the rule of lenity requires the statute be interpreted in Winchester's favor. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999); State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979).

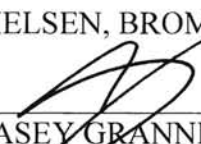
B. CONCLUSION

For the reasons set forth above and in the opening brief, Winchester respectfully requests that this Court (1) reverse the convictions and remand for a new trial; (2) remand for resentencing on count III; (3) strike the challenged condition of community custody from the judgment and sentence; and (4) vacate the firearm enhancement under count I.

DATED this 20th day of February 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
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APPENDIX A

(c) Class C felony when the crime attempted is a Class B felony;
(d) Gross misdemeanor when the crime attempted is a Class C felony;
(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

Criminal Solicitation (RCW 9A.28.030)

(1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

(2) Criminal solicitation shall be punished in the same manner as criminal attempt under RCW 9A.28.020.

Criminal Conspiracy (RCW 9A.28.040)

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

(2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:
(a) Has not been prosecuted or convicted; or
(b) Has been convicted of a different offense; or
(c) Is not amenable to justice; or
(d) Has been acquitted; or
(e) Lacked the capacity to commit an offense; or
(f) Is a law enforcement officer or other government agent who did not intend that a crime be committed.

(3) Criminal conspiracy is a:
(a) Class A felony when an object of the conspiratorial agreement is Murder in the First Degree;
(b) Class B felony when an object of the conspiratorial agreement is a Class A felony other than Murder in the First Degree;
(c) Class C felony when an object of the conspiratorial agreement is a Class B felony;
(d) Gross misdemeanor when an object of the conspiratorial agreement is a Class C felony;
(e) Misdemeanor when an object of the conspiratorial agreement is a gross misdemeanor or misdemeanor.

Anticipatory Offenses (RCW 9.94A.595)

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under Chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.

In calculating an offender score, count each prior conviction as if the present conviction were for the completed offense. When these convictions are used as criminal history, score them the same as a completed offense.

ANTICIPATORY OFFENSES (VUCSA Attempts, Conspiracies and Solicitations)

The calculation of sentences stemming from anticipatory VUCSA offenses (Chapter 69.50 RCW) presents different challenges than calculating sentences for anticipatory offenses arising under the criminal code.

An attempt or conspiracy to commit a VUCSA offense is specifically addressed in RCW 69.50.407, which provides that such offenses are punishable by "...imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense..." The appellate courts have consistently held that for VUCSA offenses, RCW 69.50.407 takes precedence over Chapter 9A.28 RCW. Although current statute and case law should be reviewed for definitive guidance in this area, the following summarizes current sentencing practices.

An attempt or conspiracy to commit a VUCSA offense is typically sentenced as an "unranked" offense (0-12 months). In State v. Mendoza, the Court of Appeals held that since "a conspiracy conviction under RCW 69.50.407 has no sentencing

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directions from the Legislature, it is punished under the unspecified crimes provisions of RCW 9.94A.505(2)(b)." 63 Wn. App. 373 (1991).

A *solicitation* to commit a VUCSA offense is not specifically addressed in Chapter 69.50 RCW. It is usually charged under Chapter 9A.28 RCW and sentenced under RCW 9.94A.510 at 75 percent of the standard range. Solicitations to commit VUCSA offenses are not considered "drug offenses", but do score as such and are subject to the multiple "scoring" requirement. See RCW 9.94A.525(4), (6) and *State v. Howell*, 102 Wn. App. 288, 6 P. 3d 1201 (2000).

Table 1 presents the current status of statute and case law on appropriate sentence ranges for anticipatory VUCSA offenses.

Table 1. Sentence Ranges for Anticipatory VUCSA Offenses

Offense Type	Sentence Range	Statute
Attempt**	Unranked (0 to 12)	RCW 69.50.407
Conspiracy**	Unranked (0 to 12)	RCW 69.50.407
Solicitation*	75% of Standard Range	RCW 9A.28.030

RELEVANT STATUTES FOR VUCSA OFFENSES

Delivery Definition (RCW 69.50.101(f))

"Deliver" or "delivery" means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.

Criminal Conspiracy (RCW 69.50.407)

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[1971 ex.s. c 308 § 69.50.407.]

****Sentences (RCW 9.94A.505(2)(b))**

If a standard sentence range has not been established for the offender's crime, the Court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The Court may impose a sentence which provides more than one year of confinement and a community custody term under 9.94A.701 if the Court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

Criminal Solicitation (RCW 9A.28.030)

(1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

(2) Criminal solicitation shall be punished in the same manner as criminal attempt under RCW 9A.28.020.

*Solicitations drop one class from the underlying offense (e.g., a solicitation to commit a Class B felony is a Class C felony). Solicitations to commit Class C felonies are gross misdemeanors.

The Washington State Court of Appeals ruled that although solicitations to commit violations of Chapter 69.50 RCW are not considered drug offenses as defined in 9.94A.030, they do score as a drug offense. See State v. Howell, 102 Wn. App. 288, 6 P.3d 1201 (2000).

The Supreme Court clarified that solicitations to commit violations of the Uniform Controlled Substances Act (Chapter 69.50 RCW) are not "drug offenses" and are not subject to the community custody requirement for drug offenses, under RCW 9.94A.701 and 9.94A.702. See In re Hopkins, 137 Wn.2d 897 (1999).

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68906-1-I
	)	
JEREMIAH WINCHESTER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPY BRIEF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] JEREMIAH WINCHESTER
DOC NO. 716971
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF FEBRUARY 2014.

x Patrick Mayovsky