

NO. 45826-8-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

AYALNEH M. ANEBO,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Christine Schaller, Judge  
Cause No. 13-1-00443-1

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence in violation of the confrontation clause.
02. The trial court erred in permitting Anebo to be represented by counsel who provided ineffective assistance by failing to properly object to admission of a map displaying a building labeled as a school.
03. The trial court erred in admitting evidence under the business record exception to the hearsay rule.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether admission of State's Exhibit 16, a map displaying a building labeled "Olympic View Elementary School," violated Anebo's right of confrontation?  
[Assignment of Error No. 1].
02. Whether Anebo was prejudiced as a result of his counsel's failure to properly object to admission of a map displaying a building labeled as a school?  
[Assignment of Error No. 2].
03. Whether the trial court erred in admitting State's Exhibit 16, a map displaying a building labeled "Olympic View Elementary School," under the business record exception to the hearsay rule?  
[Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Ayalneh Marcus Anebo was charged by

second amended information filed in Thurston County Superior Court January 10, 2014, with two drug offenses, each with school zone enhancement: unlawful delivery of Oxycodone, count I, unlawful possession of Oxycodone with intent to deliver, count II, and assault in the second degree, count III, contrary to RCWs 69.50.401(2)(a), 69.50.435(1)(d) and 9A.36.021(1)(c), respectively. [CP 11].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced January 14, the Honorable Christine Schaller presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 158, 163].

The jury failed to return a verdict on count III (assault second) but convicted on the remaining counts, including enhancements [CP 23-26, 28; RP 411-12], for which Anebo was sentenced within his standard range, and timely notice of this appeal followed. [CP 73, 84-93].

## 02. Substantive Facts: Trial<sup>1</sup>

### 02.1 Count I: Delivery of Oxycodone

On March 20, 2013, David Ellis Pejranoknutz, working as a confidential informant, conducted a controlled buy<sup>2</sup>

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<sup>1</sup> The facts are limited to counts I-II, for which Anebo was convicted.

<sup>2</sup> In a “controlled buy,” an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant “goes in empty and comes out full,” his or her assertion that drugs were available is proven, and his or her

of approximately 100 pills of Oxycodone for \$3,000 from Veasna Uon at his residence in Thurston County. [RP 50-62, 104-06, 110-113, 169-70, 263-64]. Approximately 30 minutes after Pejrano-Knutz arrived at Uon's, Anebo drove up in a silver-colored Volvo and parked in the driveway, removed a baggie of pills from the trunk and got back into his car where he received the money Pejrano-Knutz had paid Uon, who exited the vehicle and consummated the transaction with Pejrano-Knutz. [RP 56-61, 71, 75, 110-11]. Anebo fled the scene in his vehicle when law enforcement moved in for the arrest. [RP 147].

02.2 Count II: Possession of Oxycodone with Intent To Deliver

Anebo was taken into custody after crashing into an undercover police vehicle that was blocking his escape. [RP 117, 148-49, 294-95, 299]. A search of his person produced over 50 Oxycodone pills, \$2,900<sup>3</sup> of the prerecorded buy money, and over \$2,000 in additional cash. [RP 118, 120, 126, 137, 182, 193, 263-64; State's Exhibit 17]. Twenty-four Oxycodone pills were found on the center console inside his vehicle. [RP 121, 263-64].

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reliability confirmed. *State v. Lane*, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, *Search and Seizure* SS 3.3(b), at 512 (1978)).

<sup>3</sup> The remaining \$100 of the prerecorded buy money was seized during the subsequent booking of Anebo and Uon. [RP 168, 170-71].

### 02.3 School Zone Enhancements

The site of the delivery and the location of Anebo's arrest were within 1,000 feet of the perimeter of a school ground. [RP 236-37; State's Exhibits 15-16].

#### D. ARGUMENT

##### 01. THE ADMISSION OF STATE'S EXHIBIT 16, A MAP DISPLAYING A BUILDING LABELED "OLYMPIC VIEW ELEMENTARY SCHOOL," VIOLATED ANEBO'S RIGHT OF CONFRONTATION.

To support a school zone enhancement under RCW 69.50.435(1)(d), there must be sufficient evidence that a drug offense occurred within 1,000 feet of the perimeter of a school ground, and the State must prove each element of the sentencing enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The Thurston County GeoData Center (GDC) provides mapping and data services for Thurston County, using mapping software to create maps depicting geographic regions within the county. [RP 210-14]. Kelly Alfaro-Haugen, an analyst for GDC, testified that maps are generated by software using aerial photography to see houses or streets or to map roads. [RP 216-17]. GDC maintains over 300 data layers, one of which was mapped by the “911 office for Thurston County” and shows the names and locations for all public schools in the county. [RP 223]. There was no testimony as to the provider of the information designating the school names or locations used in the creation of the data layer. The building in State’s Exhibit 16 was labeled “Olympic View Elementary School.”

Alfaro-Haugen explained:

I was able to find Olympic View Elementary School in relationship to (Uon’s) house, because I was given an address of the school. And I used the various layers to identify that it was a school and

then located and placed the name of the school on top of it.

[RP 226]. Exhibit 16, which was used to depict a 1,000-foot radius encompassing the two offenses for sentencing enhancement purposes [RP 236-37], was admitted at trial over hearsay objection under the business record exception. [RP 233].

Here, to prove the sentencing enhancements, a business record was offered to establish the fact that the two offenses had occurred within 1,000 feet of a school ground, namely "Olympic View Elementary School." To establish this, however, the State was required to provide "a map produced or reproduced by any municipality, school district, (or) county ... for the purpose of depicting the location and boundaries of the area ... within one thousand feet of any property used for a school...." RCW 69.50.435(5). This map "shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas" if the "municipality, school district (or) county ... has adopted a resolution or ordinance approving the map." Id. And while there was no evidence of a complying resolution or ordinance adopted by Thurston County, RCW 69.50.435(5) does not preclude "the use or admissibility of any map or diagram other than one which has been approved by the governing body of a municipality, school district (or)

county ... if the map or diagram is otherwise admissible under court rule." Id. (emphasis added).

To the point: the map is not otherwise admissible, and its introduction into evidence violated Anebo's right of confrontation, as such constituted testimonial statements. The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with witnesses against him." Similarly, article I, section 22 of the Washington State Constitution asserts that "[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10). In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)), our Supreme Court concluded that article I, section 22 is more protective than the Sixth Amendment with regard to a defendant's right of confrontation.

Such a violation is reviewed de novo. Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). The right to confront adverse witnesses is an issue of constitutional magnitude, which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); State v. Price, 158 Wn.2d 630, 639 n.3, 146 P.3d 1183 (2006); State v. Lee, 159 Wn. App. 795, 813-14, 247 P.3d 470 (2011).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On appeal, the State has the burden of establishing that statements are nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

In Crawford, the court did not offer a "comprehensive definition" of what constitutes testimonial statements, though it did say "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial, Crawford, 541 U.S. at 52.

More recent United States Supreme Court cases have also held that documents specifically prepared for use in a criminal proceeding fall within this core class of testimonial statements. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11, 324, 129 S. Ct. 2527, 174 L. Ed 2d 314 (2009) (holding three forensic "certificates of analysis" stating that a substance tested positive as cocaine were testimonial).

State v. Pearson, \_\_\_ Wn. App. \_\_\_, 321 P.3d 1285, 1288 (2014).

In this case, Alfaro-Haugen generated and presented a digital map using a data layer mapped by the “911 office for Thurston County” based on information provided by an unknown source designating the school name and location at issue. There can be no question but that this map was prepared for use in Anebo’s criminal trial to determine whether RCW 69.50.435(1) had been satisfied, and as such, he had a right to confront the source of the information, who was never shown to be unavailable. Since there was also no showing that Anebo had a prior opportunity to cross-examine the declarant witness, the map generated from this source, State’s Exhibit 16, was inadmissible, with the result that there was insufficient evidence to support the jury’s special verdicts, which must be vacated.

02. ANEBO WAS PREJUDICED BY HIS  
COUNSEL’S FAILURE TO PROPERLY  
OBJECT TO THE ADMISSION OF A  
MAP DISPLAYING A BUILDING  
LABELED AS A SCHOOL.<sup>4</sup>

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104

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<sup>4</sup> While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented should this court disagree with this assessment.

S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued in the preceding section by failing to object to the admission of the map displaying a building labeled as a school, State's Exhibit 16, as a violation of the confrontation clause, then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel failed to so object for the reasons argued in the preceding section. And there is a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice is self-evident, for without the map, State's Exhibit 16, sufficient evidence did not exist to support the jury's special verdicts.

Counsel's performance was deficient, which was highly prejudicial to Anebo, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to vacation of his sentencing enhancements.

03. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT 16, A MAP DISPLAYING A BUILDING LABELED "OLYMPIC VIEW ELEMENTARY SCHOOL," UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.

As previously noted, the trial court overruled Anebo's hearsay objection to admission of State's Exhibit 16 under the business record exception to the hearsay rule. [RP 233].

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement can be either “an oral or written assertion.” ER 801(a). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply in this case. ER 802.

Records of a regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). The business record exception is codified in RCW 5.45.020:

A record of an act, condition or event, shall in s far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and mode of preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the source of information, method and time of preparation were such as to justify its admission.

It is not necessary that the person who actually made the record provide the foundation for admissibility. State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005). Even where, as here, the witness who relied on information contained in a document did not actually prepare it, he or she may still provide foundation testimony if that person knows its mode of preparation and

routinely relies on another's preparation of that document. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

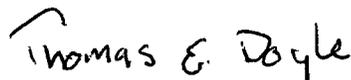
Alfaro-Haugen was not qualified to identify the building in State's Exhibit 16 as a school and to testify about the mode of preparation of the map in this regard. There was no testimony that she knew the mode of preparation as it related to the information designating the school used in the creation of the data layer she used to generate State's Exhibit 16, which included the building labeled "Olympic View Elementary School." [State's Exhibit 16].

As before, the prejudice is self-evident, for without the map, State's Exhibit 16, sufficient evidence did not exist to support the jury's special verdicts.

E. CONCLUSION

Based on the above, Anebo respectfully requests this court to vacate his sentencing enhancements.

DATED this 31<sup>st</sup> day of May 2014.

  
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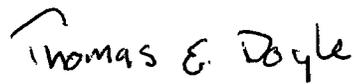
CERTIFICATE

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

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