Filed
Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE LEE KOLB, Appellant.	No. 46497-7-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — Eugene Lee Kolb appeals his conviction for delivery of a controlled substance, special verdicts for delivering within 1,000 feet of a school grounds and school bus stop, and his subsequent sentence.

After considering Kolb's arguments, we hold that (1) there was sufficient evidence to support the school grounds enhancement, but not the school bus stop enhancement, (2) the trial court did not abuse its discretion in admitting exhibit 2, the baggie of methamphetamine, because Centralia police detective Robin Holt's and crime lab technician John Dunn's testimony established chain of custody, (3) Kolb's counsel did not perform deficiently by failing to move to strike evidence after a successful objection, and, therefore, Kolb did not receive ineffective assistance of counsel, (4) the sentencing court abused its discretion by failing to consider an exceptional downward sentence because it believed it would always be reversed by an appellate court, and (5) the sentencing court also abused its discretion when it imposed community

custody conditions requiring a substance abuse evaluation and prohibiting use of nonprescribed drugs, because no evidence or findings of fact supported the conclusions of law that these conditions were related to his offense.

Accordingly, we affirm Kolb's conviction, but vacate his sentence and remand for resentencing (1) to consider whether an exceptional downward sentence is appropriate, (2) to strike the school bus stop enhancement, and (3) to strike the improper community custody conditions.

FACTS

A confidential informant (C.I.) for the police arranged to meet Kolb at a Safeway parking lot on December 13, 2013 to purchase a quarter ounce of methamphetamine from him for $250. Holt and other police officers set up surveillance of the Safeway parking lot. Each officer was shown a Department of Licensing photo of Kolb and was given a description of the C.I.'s vehicle. Before meeting Kolb, police officers searched the C.I.'s vehicle and person to ensure he was carrying no drugs. While police officers observed, the C.I. parked his vehicle in the Safeway parking lot. Kolb, who was with his girlfriend Lisa Balkwill, then pulled up in his vehicle and contacted the C.I. Kolb gave the C.I. what appeared to be a bag of methamphetamine, and the C.I. gave Kolb $250.

Shortly afterwards, the C.I. drove back to the pre-arranged location to give Holt the substance he had received from Kolb. The police searched the C.I.'s person and vehicle again. After leaving the location, Holt placed the bag with the crystalline substance into an evidence locker at the Chehalis Police Department. He "filled out the packaging[,] . . . sealed it" and made a request that the substance be tested at the state patrol crime lab. Report of Proceedings (RP) at 123.

Dunn "received this [evidence] from [the state patrol's] property and evidence custodian." RP at 124. The bag he received included a lab request from Chehalis police, listed a case number, and contained a case name identifying Kolb. Dunn's testing of the evidence found it to be methamphetamine.

Subsequently, the State charged Kolb by a second amended information with delivery of a controlled substance, methamphetamine. The State also sought enhancements to the charge and alleged that Kolb had delivered the drugs within 1,000 feet of the perimeter of a school grounds and a school bus stop. After trial, the jury found Kolb guilty of delivery of a controlled substance. The jury also entered separate findings that Kolb had delivered the methamphetamine within 1,000 feet of school grounds and a school bus stop.

At sentencing, Kolb requested an exceptional sentence downward because his mental condition prevented him from appreciating the wrongfulness of his conduct and because his girlfriend, Balkwill, was the primary person dealing the methamphetamine. The sentencing court sentenced Kolb to 12 months, the low end of the standard range, plus a mandatory 24-month addition for the school grounds and school bus stop enhancements. He also received 12 months of community custody. Among the conditions of community custody was a requirement to undergo an evaluation for substance abuse treatment and a prohibition from consuming "non-prescribed drugs." Clerk's Papers (CP) at 10-11. Kolb appeals.

ANALYSIS

I. SUFFICIENCY OF EVIDENCE

Kolb argues that there is insufficient evidence to support the school bus stop and the school grounds sentence enhancements because there was no evidence demonstrating that the school bus stop and the school grounds existed on December 13, 2013, the date of the drug

delivery. The State concedes that there is insufficient evidence regarding the bus stop, but urges that there is enough for the school grounds enhancement. We agree with the State that there is sufficient evidence to uphold the school grounds enhancement, and we accept the State's concession that there was insufficient evidence to support the school bus stop enhancement.

Evidence is sufficient to support a sentencing enhancement if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Jones*, 140 Wn. App. 431, 436, 166 P.3d 782 (2007). All reasonable inferences from the evidence must be drawn in favor of the State. *State v. Eckenrode*, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007). Circumstantial evidence is no less reliable than direct evidence. *State v. Peterson*, 138 Wn. App. 477, 481, 157 P.3d 446 (2007). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

RCW 9.94A.533(6)[1] governs the category of sentencing enhancements at issue here. It provides that "[a]n additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of . . . RCW 69.50.435." RCW 69.50.435[2] provides, in part, that

> [a]ny person who violates RCW 69.50.401 by . . . delivering . . . a controlled substance listed under RCW 69.50.401 . . . [w]ithin one thousand feet of a school

[1] RCW 9.94A.533 was amended in 2013 and 2015. These amendments do not affect the issues in this matter.

[2] RCW 69.50.435 was amended in 2015. This amendment does not affect the issues in this matter.

> bus route stop designated by the school district [or] [w]ithin one thousand feet of the perimeter of the school grounds . . . may be punished by a fine . . . or by imprisonment.

At trial the State presented two witnesses to support its theory that Kolb had delivered methamphetamine within 1,000 feet of school grounds. Matthew Hyatt, geographic information system manager for the county public works department, testified about creating exhibit 1, a map depicting Centralia Middle School's location within 1,000 feet of the Safeway. He testified that the map was an accurate representation of the area surrounding the Safeway and that it properly depicted the drug transaction as 615 feet from Centralia Middle School. Dale Dunham, assistant director of transportation for the Centralia School District, testified that Centralia Middle School is within 1,000 feet of the Safeway where Kolb delivered drugs. When the prosecutor asked whether the "location of the middle school . . . appear[s] to be correct on that map," referring to exhibit 1, Dunham replied in the affirmative. RP at 132.

Significantly, neither Hyatt nor Dunham were asked whether the school existed on December 13, 2013, the day of Kolb's drug delivery. The only evidence on this point on the map is a date noted at the top right of exhibit 1: "Aerial Photo taken 2008 (courtesy of WA Dept of Natural Resources)." The issue is whether this date stamp, coupled with any inferences that can be taken from Hyatt's and Dunham's testimony, is sufficient evidence for a rational juror to find that the school grounds existed on December 13, 2013.

In looking at the evidence in the light most favorable to the State, the jury could infer two premises: (1) the school existed on the date of trial, as established by Dunham's testimony, and (2) the school existed in 2008, as shown by the map and its date stamp. These two premises could rationally lead to a jury conclusion that the school existed in 2013 when Kolb delivered the drugs, since there was no evidence the school had been demolished and rebuilt in that

period. Accordingly, we find the evidence sufficient to support the school grounds sentencing enhancement.

Turning to the other sentencing enhancement, we accept the State's concession that the evidence is insufficient to establish the presence of the school bus stop on December 13, 2013. By its nature, the location of a bus stop may be changed much more readily than that of a school. Although Dunham testified that the map at exhibit 1 properly depicted the school bus stop's location, this testimony does not establish *when* the bus stop existed prior to the time of trial. Even with the 2008 date stamp on the map, Dunham specifically testified that it was the "location" that was accurate on the map. Hyatt testified that the map was an accurate representation of the area surrounding Safeway, but did not say as to what date. For these reasons, the evidence is insufficient to establish the location of the bus stop on December 13, 2013.

II. CHAIN OF CUSTODY

Kolb argues that the trial court abused its discretion when it ruled that there was sufficient evidence to establish chain of custody for exhibit 2, the baggie of methamphetamine. We disagree, because Holt's and Dunn's testimony is sufficient to demonstrate that the item Kolb gave to the C.I. is the same item Dunn tested in the crime lab.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* The trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Before a trial court admits evidence, the proponent must authenticate or identify it "to support a finding that the matter in question is what its proponent claims." ER 901(a). Evidence that is not readily identifiable and is susceptible to alteration by tampering or contamination requires the proponent to establish a chain of custody "'with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.'" *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002) (emphasis omitted) (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989)). "The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution." *Id.* at 436. "'[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility.'" *Id.* (alteration in original) (quoting *Campbell*, 103 Wn.2d at 21).

The trial court here did not err in finding that there was enough evidence to establish chain of custody. Holt testified that the C.I. gave him a clear bag with a crystalline substance in it after receiving it from Kolb. Holt testified that he filled out an evidence sheet with Kolb's name, the State as the victim, the date, and the cause number. He sealed it and put it into an evidence locker to be sent to the state patrol crime lab. He identified the evidence in court and testified that it appeared to be in the same general condition as when he placed it in evidence, except for the blue tape placed on the baggie by the crime lab. Dunn testified that Chehalis police requested a laboratory examination of the substance in the baggie, which had Kolb's case number on it. He testified that the baggie was in the same condition it was in when he received it. He said he received it from the crime lab's "property and evidence custodian." RP at 124.

Kolb argues that there was a break in the chain of custody because there was no evidence demonstrating how the baggie got from the evidence locker at the Chehalis Police Department to

the crime lab's property and evidence custodian. However, Holt and Dunn both identified Kolb and his case number as associated with the baggie, and testified that the baggie was in the same condition as they had left or received it. This evidence was sufficient to show that the same baggie Holt had put into the evidence locker went to Dunn for testing, even without direct evidence of how it got to crime lab's evidence custodian.[3] In addition, there was no evidence that this particular chain of custody involved any circumstances that would make the baggie of methamphetamine susceptible to alteration beyond the fact that it is a generic looking drug. *Cf. Roche*, 114 Wn. App. at 437 (chain of custody not established when crime lab technician stole heroin from lab, admitted to regularly ingesting heroin on the job, and repeatedly lied about his activities).

Kolb also argues that "[n]o one testified to how [the baggie] was maintained in evidence [and] under what controls." Br. of Appellant at 19. However, there is no authority requiring testimony as to how the evidence in question was controlled at every stage in the chain of custody in order to admit the evidence. *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) ("A sufficient foundation for the admission of evidence may be established even without proof of an unbroken chain of custody."). Kolb was entitled to challenge the evidence at trial by cross-examining the officers and asking if they properly secured the evidence and what controls or safeguards were present. In any event, there is record support that the baggie was secure, since Holt testified that he "sealed it up" and put it in the evidence locker. RP at 123. The

[3] In the context of the confrontation clause, our Supreme Court stated: "Although the prosecution is indeed obliged to establish the chain of custody, '*this does not mean that everyone who laid hands on the evidence must be called*.'" *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014) (emphasis added) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)). "Rather, gaps in the chain of custody go to the weight of the evidence and not the admissibility." *Id.*

evidence was sufficiently complete to render it improbable that the original item had either been contaminated or tampered with or exchanged with another. We hold that the trial court did not abuse its discretion.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Kolb's ineffective assistance of counsel claim comes from one moment in the trial when defense counsel failed to move to strike testimony:

[Prosecutor]:	I want to ask you about events that took place January 15: Were you working on that day?
[Holt]:	I was.
[Prosecutor]:	Do you recall receiving information about the defendant in this case on that date?
[Holt]:	Yes.
[Prosecutor]:	What was that information?
[Holt]:	That he was coming down to the Lewis County area to deliver some more methamphetamine.
[Defense counsel]:	Objection, your Honor.
THE COURT:	That objection is sustained.

RP at 96. Because defense counsel failed to move to strike the testimony that Kolb was coming down to the Lewis County area to deliver methamphetamine, Kolb argues that this was both deficient and prejudicial. We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). If a defendant fails to establish either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Representation is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33.

We begin with a strong presumption that counsel's representation was effective. *Id.* The defendant may demonstrate deficient performance by showing that, based on the record, there were no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001).

The State argues that it was a legitimate tactic to object to Holt's hearsay, but not strike the testimony, because it would further emphasize the C.I.'s earlier testimony that Kolb would be coming back to the area with more methamphetamine. We agree. Even though defense counsel's objection was sustained and prevented Holt from continuing that line of testimony, Kolb contends that defense counsel had already chosen to draw attention to the testimony by his objection. We find this argument unpersuasive, because, as the State argues, it was reasonable for defense counsel to not ask the trial court to strike the testimony as it could bring more attention to what Holt said.[4] Kolb fails to meet his burden in showing deficient performance. Accordingly, his ineffective assistance of counsel claim fails.

IV. EXCEPTIONAL SENTENCE DOWNWARD

Immediately before imposing Kolb's standard range sentence, the sentencing court took the position that it essentially had no discretion to give Kolb an exceptional downward sentence because an appellate court would invariably reverse it. In this, we hold that the sentencing court abused its discretion.

[4] Kolb provides no authority that a sustained objection to evidence must be followed by a motion to strike to prevent the evidence from reaching the jury. Instead, he cites to *State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) and *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007), which involved, respectively, defense counsel failing to argue that a warrant lacked probable cause and failing to raise a defense to a second degree rape charge, where the evidence clearly supported these arguments.

At sentencing, in the context of discussing the historical roots and various aspects of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the court stated:

> But the problem in the State of Washington is that from day one the Supreme Court and the Court of Appeals following their lead and have never been willing to give the trial judges discretion to go below the standard range and sustain it.
>
> *Almost without exception every case that's come out, where a trial judge has gone below the standard range for whatever reason, the Supreme Court and the Court of Appeals have reversed the trial judge finding there was no basis whatsoever in the record for the Court to do that, and even if there is a basis in the record, they still haven't sustained it.*
>
> I have never understood the basis for that distinction. A lot of commentators have also commented on it and pointed out that the intent of the legislature initially passing the SRA, which I think has been discredited over the years, *because it took away all the discretion from the trial judges, such as myself* and gave it basically to the prosecutor in what they charge, but nobody has ever been able to explain at least to the satisfaction of most of the trial judges how it is that if we go above the standard range, they say that's fine provided there's a reason for it, *but if we go below, it doesn't matter what the reason what it is. Whether it is in the record or not, they don't sustain it. I've never understood it.*
>
> In this incident, I think it's a tragedy that Mr. Kolb is facing this situation with the enhancement. . . . I think at the very least that Mr. Kolb deserves nothing more than the bottom of the standard range.

RP at 205-06 (emphasis added).

"A sentence within the standard sentence range . . . for an offense shall not be appealed." RCW 9.94A.585(1). However, "[a] defendant may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). Although "no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (footnote omitted) ("When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling"). A trial court abuses its discretion

when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "The failure to consider an exceptional sentence is reversible error." *Grayson*, 154 Wn.2d at 342.

Here, the trial court's comments, which immediately preceded Kolb's sentence, demonstrated that the sentencing court categorically refused to consider or impose exceptional downward sentences because it believed an appellate court would invariably reverse them. Particularly pertinent are the sentencing court's comments that "[a]lmost without exception every case that's come out, where a trial judge has gone below the standard range for whatever reason, [the appellate courts] have reversed the trial judge," that the SRA "took away all the discretion from the trial judges, such as myself," and that "if we go below, it doesn't matter what the reason what it is. Whether it is in the record or not, [the appellate courts] don't sustain it." RP at 205. The aggregate of these comments shows that the court believed that it had discretion *in theory* to give an exceptional downward, but that *in actuality*, it did not have discretion. This statement indicates that in all situations where the sentencing court may believe an exceptional downward sentence is appropriate, and even if there is evidence in the record to support it, it will not impose the downward sentence because an appellate court will reverse it.

The State argues that the sentencing court did consider the materials submitted in support of the exceptional downward sentence because the court stated that it had read them. Although this is true, the record reflects that the sentencing court's primary reason for not giving Kolb an exceptional downward was that it believed such a sentence would be reversed on appeal. This case is similar to *Grayson*, where our Supreme Court found reversible error because the sentencing court categorically refused to give a drug offender sentencing alternative (DOSA) for

the reason that the program did not have funding. 154 Wn.2d at 342. In its analysis, in part, the *Grayson* court stated that this was a categorical refusal because (1) the sentencing court did not articulate any reasons for denying the DOSA, such as why the defendant was not a good candidate for DOSA, and (2) the court's belief that the DOSA program was underfunded was its primary reason for denying the DOSA sentence. *Id.* at 342-43.

Similar to *Grayson*, the sentencing court's primary reason for denying an exceptional sentence is that it believed it would be reversed on appeal, a reason not based on the merits of Kolb's argument for an exceptional downward sentence. There is no evidence at the time it imposed its sentence that the sentencing court denied the exceptional downward sentence based on any of the materials submitted to the court or based on the facts of his case. In fact, the sentencing court called his situation a "tragedy" and stated that at "the very least that Mr. Kolb deserves nothing more than the bottom of the standard range." RP at 206. This suggests that the sentencing judge was considering the exceptional downward sentence, but categorically denied it because he believed appellate courts would invariably reverse him if he gave Kolb one. Accordingly, we hold that the sentencing court abused its discretion.

V. SENTENCING CONDITIONS

Kolb was sentenced to 12 months of community custody pursuant to RCW 9.94A.701(3)(c). As part of the conditions of that community custody, the court also (1) ordered a substance abuse evaluation and (2) prohibited consumption of nonprescribed drugs. The State concedes that the sentencing court abused its discretion in imposing these conditions. We accept the State's concessions.

"We review de novo whether the trial court had statutory authorization to impose a community custody condition." *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

"If the trial court had statutory authorization, we review its decision to do so for an abuse of discretion." *Id.* at 326. An abuse of discretion occurs when a trial court's imposition of conditions is manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

The SRA authorizes the trial court to impose "crime-related prohibitions and affirmative conditions" as part of a sentence. Former RCW 9.94A.505(8) (2009). Any condition imposed in excess of this statutory grant of power is void. *Johnson*, 180 Wn. App. at 325. When a court sentences a person to a term of community custody, the court has the power to impose mandatory, waivable, and discretionary conditions. RCW 9.94A.703.[5] Some of those discretionary conditions empower the court to order an offender to

> (c) Participate in *crime-related* treatment or counseling services;
> (d) Participate in rehabilitative programs or otherwise perform affirmative conduct *reasonably related to the circumstances of the offense*, the offender's risk of reoffending, or the safety of the community;
> . . . .
> (f) Comply with any *crime-related* prohibitions.

RCW 9.94A.703 (emphasis added). Specifically, a trial court can only order a chemical dependency evaluation if it makes a finding that the chemical dependency contributed to the crime. Former RCW 9.94A.607(1) (1999); *State v. Kinzle*, 181 Wn. App. 774, 786, 326 P.3d 870, *review denied*, 181 Wn.2d 1019 (2014); *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). Similarly, if the court orders a discretionary crime-related prohibition, it must

[5] RCW 9.94A.703 was amended in 2015. The amendment does not affect the issues in this matter.

"directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).[6]

Kolb argues, and the State concedes, the absence of evidence or findings that Kolb suffered from drug dependence or abuse or that any such condition was related to his crime. We accept the State's concession. The record has no evidence from either the court or the parties that Kolb had substance abuse problems or that substance abuse contributed to the crime. On the judgment and sentence, the sentencing court also did not make a finding that "[t]he defendant has a chemical dependency that has contributed to the offense(s)." CP at 7. The trial court failed to comply with the requirements of the SRA and, as such, abused its discretion.

Next, Kolb argues, and the State concedes, that the prohibition on nonprescribed drugs is invalid because it does not relate to the circumstances of Kolb's offense. We again accept the State's concession. Similar to the substance abuse condition, there are no findings or evidence that Kolb's offense related to nonprescription drugs.

Despite its concession, the State contends that "the trial court was required . . . to impose a condition that Kolb not consume or possess 'controlled substances' without a lawful prescription." Br. of Resp't at 26. As part of any term of community custody, unless waived by the court, a court shall order an offender to"[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). Because we remand for resentencing, the sentencing court may decide whether it will impose or waive this community custody condition as permitted by the statute. Despite the State's insistence otherwise, we do not find that it is now "mandatory" for this court to impose this condition.

[6] RCW 9.94A.030 was amended in 2015. The amendment does not affect the issues in this matter.

CONCLUSION

We affirm Kolb's conviction for delivery of a controlled substance and his school grounds sentencing enhancement. However, we vacate his sentence and remand for resentencing (1) to consider on the record whether an exceptional downward sentence is appropriate in his case, (2) to strike the school bus stop enhancement, and (3) to strike the improper community custody conditions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, A.C.J.

We concur:

MAXA, J.

MELNICK, J.