IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN KENTRELL ROSS, Appellant.	No. 39036-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Kevin Kentrell Ross appeals his convictions of unlawful delivery of a controlled substance, marijuana, and unlawful possession of a controlled substance, marijuana, with intent to deliver.[1] He claims that the State failed to prove that he lived in the premises searched and thus that he constructively possessed the marijuana supporting count II. He also claims that because RCW 9.94A.533(6) is ambiguous, his school bus route stop enhancements must be imposed concurrently, not consecutively. In a statement of additional grounds, Ross claims ineffective assistance of counsel and numerous trial errors. We affirm the convictions but remand for resentencing.

Facts

On June 4, 2008, Vancouver Police Officers Leonard Gabriel and Dustin Nicholson coordinated a controlled marijuana buy using a confidential informant (CI) and targeting Ross. The CI called Ross to arrange a purchase, went to Apartment 149 at 3214 Southeast 146th Place in Vancouver, and there, exchanged $50 for one-eighth ounce of marijuana. The CI was in the apartment for about 10 minutes and turned over the marijuana to the officers upon leaving.

[1] Violations of RCW 69.50.401(1), (2)(c).

On June 13, 2008, Nicholson and several other officers served a search warrant on the residence. Ross was present as was Amanda Brungardt, Ross's on-again, off-again girl friend. The officers recovered multiple bags of marijuana, one weighing 94.7 grams. They recovered baggies with marijuana residue, smoking paraphernalia, a digital scale, and over $1000 in cash. They also recovered an ID bearing Ross's name.

Ross told Nicholson that he did not know why the police were in his apartment. He denied selling marijuana and claimed that the marijuana was for his personal use. According to Nicholson, Ross admitted twice that he lived in the apartment.

Additional evidence introduced at trial included that Ross was a rapper, that the back bedroom contained rapping equipment, and "Ross" was written on a sheet posted on the wall. Several witnesses testified that Ross did not live at the apartment but lived with his mother on Watson Avenue off Fourth Plain. Additionally, Ross introduced the apartment lease, which showed the apartment leased to Brungardt and Ashley Hughes, not Ross.

Brungardt testified that the she owned the rapping equipment and that while she was not a rapper, she allowed others to use it. She also explained that Ross had just come over with her permission that morning from an all-night party the evening before. Finally, she claimed that the money was hers from an insurance settlement and that she did not know whose marijuana was in her apartment. Ross testified that he did not live at the apartment, that the marijuana and paraphernalia were not his, that his ID was at her house because Amanda was helping him pay his bills, and he denied selling marijuana to the CI.

The jury found Ross guilty of both charged offenses and by special verdict that he committed the offenses within 1,000 feet of a school bus route stop. The sentencing court imposed 7 month concurrent sentences plus two consecutively served 24 month enhancements. Ross appeals.

analysis

I. Sufficiency of the Evidence

Ross first argues that the State failed to prove that he lived in the apartment and thus that he constructively possessed the marijuana seized from it. He argues that because there was no evidence of actual possession, the State had to prove dominion and control as to count II and the evidence was insufficient to do so. Specifically, he points to evidence from multiple witnesses who testified that he did not live at the searched residence, the lease agreement showing that Brungardt and Hughes rented the apartment, and testimony that he called Brungardt and obtained her permission before coming over that early morning.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In a case such as this where Ross did not have the marijuana in his actual possession, the State had to prove that he constructively possessed the marijuana.

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person had actual possession when he or she has physical custody of the item. *Callahan*, 77 Wn.2d at 29. A person has constructive possession when he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29. This dominion and control need not be exclusive. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Courts determine whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). When a person had dominion and control over a premises, it creates a rebuttable presumption that the person had dominion and control over items in the premises. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996); *State v. Shumaker*, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007); *Tadeo-Mares*, 86 Wn. App. at 816; *see also Partin*, 88 Wn.2d at 906-07; *Callahan*, 77 Wn.2d at 30-31.

Whether Ross lived at the apartment was a disputed factual issue at trial that turned on the jury's assessment of the evidence and the witnesses' testimony. Here, there was evidence that Ross lived at the residence. The CI had purchased marijuana from him the previous week at the apartment. The police found Ross asleep in the master bedroom when they searched the apartment. They found rapping equipment even though Brungardt said she was not a rapper and Ross was known as a rapper. They found an ID bearing Ross's name and Ross twice told Nicholson that it was his apartment. While Ross introduced evidence of his intoxication and testimony that the equipment was not his, taken cumulatively, the evidence was disputed and the question was one solely for the jury to resolve. Further, taking this disputed evidence in a light

most favorable to the State, as we must on review, it was sufficient to sustain his conviction for possession of marijuana with intent to deliver.

II. School Bus Route Enhancements

The sentencing court imposed concurrent 7 month sentences for Ross's offenses and imposed two 24 month school bus route stop enhancements consecutive to the underlying sentences and to each other. Ross contends that the statute authorizing these enhancements is ambiguous and, under the rule of lenity, these enhancements should run concurrently. That statute, RCW 9.94A.533(6) provides:

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

In *State v. Jacobs,* the court found the first sentence of this provision ambiguous, applied the rule of lenity, and concluded that it was unclear from the statute whether the legislation required multiple drug zone enhancements to be served concurrently or consecutively to each other. 154 Wn.2d 596, 602-04, 115 P.3d 281 (2005). The court directed the trial court to add the 24 month enhancements to the base sentences.

The 2006 legislature added the second sentence to RCW 9.94A.533(6) in direct response to the *Jacobs* decision. *See* Laws of 2006, ch. 339, §301. Division Three considered this amendment in *Post-Sentencing Review of Gutierrez*, 146 Wn. App. 151, 156, 188 P.3d 546 (2008):

> The addition of the stacking provision in the 2006 legislation to change the *Jacobs* result did not change the command of the first sentence of subsection 533(6) that enhancements are to be added to the base range. The amendment permitted multiple enhancements and directed that they run consecutively. It did not change

the way that enhanced sentence ranges are calculated.

While in a different context than that in *Gutierrez*, we agree with Ross that the *Gutierrez* decision properly harmonizes the two sentences of the statute before us. Further, the language in former subsection 533(6) is different from that used in the firearm and deadly weapon enhancement statutes. "'[W]here the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" *In re Det. of Swanson,* 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting *United Parcel Serv., Inc. v. Dep't of Revenue,* 102 Wn.2d 355, 362, 687 P.2d 186 (1984)).

Former RCW 9.94A.533(3)(e) provides:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, *and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter. . . .

(Emphasis added.)

Former RCW 9.94A.533(4)(e) provides:

> Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement *and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter. . . .

(Emphasis added.)

While the legislature tried to remedy the ambiguity the *Jacobs* court identified, it did not. The first sentence in the statute extends the standard range for each conviction by the length of the applicable enhancement. Ross has convictions on two counts and this first sentence would therefore extend the standard range on each of those two convictions by 24 months. These two standard range current offenses would normally be served concurrently. RCW 9.94A.589(1)(a).

Yet, the second sentence suggests that all enhancements be served consecutively; but this can only occur if the enhancements are not part of standard range sentences, a proposition that the court in *Guiterrez* rejected. This does not make the second sentence in RCW 9.94A.533(6) meaningless because it still requires that when multiple enhancements apply to a single criminal act, the court must impose those enhancements consecutively to each other. The State's position here simply cannot be reconciled with the statute and thus we remand for resentencing, directing the trial court to sentence Ross with the more lenient interpretation of the statute, i.e., two concurrent 31 month sentences should it again elect to impose the low end of the standard range.

Our holding is also consistent with the rule that a sentencing court may not fashion hybrid sentences. As Division One of this court noted, "Nothing in [RCW 9.94A.589(3)] suggests that the court pronouncing 'the sentence' can divide it into two parts, one part to run concurrently with the other sentences and the other consecutively." *State v. Grayson*, 130 Wn. App. 782, 786, 125 P.3d 169 (2005). Quoting *In re Personal Restraint of Long,* 117 Wn.2d 292, 302, 305, 815 P.2d 257 (1991), the *Grayson* court noted that "the statute allows the sentencing judge 'flexibility to be lenient *or* stern in sentencing.' It does not, however, allow the flexibility to impose a sentence in between lenient and stern. The hybrid sentence was unauthorized by the statute and must be reversed." *Grayson* 130 Wn. App. at 786.

III. Statement of Additional Grounds

Ross raises multiple issues in his SAG, none of which has merit. Primarily, he claims that he was denied his right to effective assistance of counsel and thereby his Sixth Amendment right to a fair trial. His 30-page litany of errors fails to establish that his counsel denied him effective representation.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*, that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We begin with the presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). This presumption continues until the defendant shows in the record the absence of legitimate or tactical reasons supporting his counsel's conduct. *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995).

Ross's ineffective assistance claim falls into several categories, none of which establishes actual prejudice: (1) counsel's tactical decisions, which if legitimate cannot amount to ineffective assistance *McFarland*, 127 Wn.2d at 335; (2) matters outside the record, which this court cannot consider on direct appeal, *McFarland*, 127 Wn.2d at 335; (3) credibility issues, which are the sole province of the jury, *Camarillo*, 115 Wn.2d at 71; (4) matters based on speculation, such as the absence of evidence to corroborate evidence that he was not living with Brungardt, *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972); (5) counsel's failure to adduce good character evidence of defense witnesses, ER 608(a) (impermissible absent evidence attacking reputation); and (6) unspecified sentencing errors.

Ross also presents a list of issues that he neither discusses nor explains: (1) whether there was probable cause for the warrant; (2) testing would have shown that the marijuana in the bedroom closet was "unsmokeable"; and (3) he was tried by 12 white jurors. These issues pertain

to matters outside the record and even if Ross made coherent arguments to support them, we cannot consider them. *McFarland*, 127 Wn.2d at 335.

We affirm the convictions but remand for resentencing.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Worswick, J.

Dwyer, J.P.T.